

GENESIS AND EVOLUTION OF PUBLIC INTEREST LITIGATION IN THE SUPREME COURT OF PAKISTAN: TOWARD A DYNAMIC THEORY OF JUDICIALIZATION

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I. INTRODUCTION

Judicial activism in South Asia, as well as the unique form of pro-poor litigation known as “public interest litigation” (PIL) on which much of it rests, has received considerable attention in recent years from both South Asian and foreign scholars.¹ The concept of public interest law or PIL is not novel and is often instinctively traced back to the PIL phenomenon of the 1960s in the United States.² In recent decades, the American practice has been a notional counterpart of public interest in courts in other constitutional systems.

However, the South Asian incarnation of PIL is, in many ways, distinguishable from the Anglo-American experience. Upendra Baxi’s early critique of the Indian Supreme Court’s activism in the mid-1980s is the classic statement of the distinctiveness of the Indian genre of PIL.³ Baxi uses the term “social action litigation” (SAL) to emphasize the very different historical triggers, institutional settings, and conceptual groundings of PIL in the Indian context.⁴ The

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1. See, e.g., Shyami Fernando Puvimanasinghe, *Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest*, 10 SUSTAINABLE DEV. L. & POL’Y 41, 41 (2009) (explaining how impoverished and lower class citizens are able to gain access to the judicial system through PIL).

2. See MANSOOR HASSAN KHAN, PUBLIC INTEREST LITIGATION: GROWTH OF THE CONCEPT AND ITS MEANING IN PAKISTAN 3 (1993) [hereinafter KHAN, GROWTH OF THE CONCEPT].

3. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 108 (1985).

4. See *id.* at 108–09 (describing the distinction between SAL in India and PIL in the United States).

focus of SAL, for instance, is on issues of socio-economic justice, state repression, and governmental lawlessness.⁵ On the other hand, Baxi argues, PIL activism in the United States is centralized in the “civic participation in governmental decision-making” to “secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society.”⁶

While SAL has undergone multiple phases of evolution, critical appraisal, and judicial self-correction in India,⁷ constitutional migration has encouraged indigenized variations of SAL to germinate and expand in the broader South Asian region.⁸ Pakistan, in particular, has witnessed a burgeoning of PIL⁹ since the appointment of Iftikhar Chaudhry as the chief justice of the Supreme Court in 2005 by General Pervez Musharraf.¹⁰ Chaudhry’s appointment led to constitutional crises arising from the court’s challenges to the political legitimacy and survival of Musharraf’s military regime, as well as the democratic governments succeeding it.¹¹

Far from being chastened by the limitations of SAL—as well as of judicial populism generally—in driving structural socio-economic change in India, PIL appears at the center stage of judicial activism in Pakistan and provides a formidable instance of what comparative scholars refer to as the “judicialization of politics.”¹² Simply put, judicialization is a rising trend in constitutional systems

5. *Id.* at 109–10.

6. *Id.* at 108–10; *see also*, Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. OF THE INDIAN L. INST. 494, 496 (1987) (describing Indian PIL as “a phoenix: a whole new creature arising out of the ashes of an older order”).

7. *See* Surya Deva, *Public Interest Litigation in India: A Critical Review*, 28 CIV. JUST. Q. 19, 27–29 (2009) (explaining how PIL discourse in India can be divided into three broad phases that differ from each other in terms of who initiated PIL cases, what the subject matter or focus of PIL was, against whom the relief was sought, and how the judiciary responded to PIL cases).

8. *See, e.g.*, Maryam Khan, *Selective Borrowings*, WE THE PEOPLE: A SYMP. ON THE CONST. OF INDIA AFTER 60 YEARS, 1950-2010, SEMINAR NO. 615 (Nov. 2010), *available at* http://www.india-seminar.com/2010/615/615_maryam_khan.htm#top [hereinafter Khan, *Selective Borrowings*].

9. The label SAL refers mostly to India’s variant of PIL. In the context of Pakistan and South Asia more generally, the more traditional appellation of PIL is used in recognition of its common usage in the courts and constitutional judgments.

10. *See* Maryam S. Khan, *Ambiguous Ambitions*, DEVELOPMENT AND COOPERATION (Nov. 18, 2013), *available at* <http://www.dandc.eu/en/article/pakistans-supreme-court-must-protect-fundamental-rights-without-overstepping-its> [hereinafter Khan, *Ambiguous Ambitions*] (asserting Chaudhry resuscitated PIL and, in effect, enabled the Supreme Court to grant itself the power to select and prioritize issues for judicial intervention).

11. *See id.*

12. *See* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002); Torbjörn Vallinder, *The Judicialization of Politics—A Worldwide Phenomenon: Introduction*, 15 INT’L POL. SCI. REV. 91, 91 (1994); *see also* Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 723 (2006) [hereinafter Hirschl, *Judicialization of Pure Politics*] (distinguishing between ordinary judicial review and rights adjudication on the one hand, and the judicialization of pure politics on the other); Russell A. Miller, *Lords of Democracy: The Judicialization of “Pure*

around the world toward a relocation of lawmaking powers from representative institutions to judiciaries.¹³ It is characterized by a growing inclination on the part of judiciaries to frame political controversies that implicate broader nation building processes as constitutional issues.¹⁴ Thus, the political significance of the court is enhanced in unprecedented ways.¹⁵

The Pakistani Supreme Court's meddling in pure politics under Chief Justice Chaudhry's headship is part of this global expansion of judicial power. From the time of Musharraf's first coup in October 1999 to Chaudhry's retirement in December 2013, the Supreme Court took cognizance of a broad swath of political questions.¹⁶ These political questions included matters such as regime legitimacy, law reform, economic policy and deregulation, regulation of electoral processes, eligibility of elected representatives to hold office, validity of constitutional amendment processes, intervention in executive appointments, conflict management, and even some issues bearing on foreign policy.¹⁷ Indeed, Chaudhry himself became a symbol of judicial overreach, especially after his second reinstatement in 2009.¹⁸ Most, if not all, of these political questions, along with a litany of other issues, were litigated and adjudicated under the ever-expanding

Politics” in the United States and Germany, 61 WASH. & LEE L. REV. 587, 598 (2004). “Pure politics” encompasses questions of high political salience such as regime legitimacy, validity of electoral process outcomes, legality of executive prerogatives in the spheres of macroeconomic policy and planning and national security, and legal recognition of group identities for autonomous self-governance or greater participatory access in political processes. See Hirschl, *Judicialization of Pure Politics*, *supra*, at 598–99. Hirschl accepts that the classification of issues as purely political is contingent on the politico-legal context, but nevertheless considers this definition to be an expedient way of highlighting the political salience of certain constitutional questions. See *id.* at 723. Other scholars, including Miller, have attempted to articulate a more concrete definition of pure politics within narrow contexts. See Miller, *supra*, at 598.

13. See Vallinder, *supra* note 12, at 91 (defining judicialization of politics).

14. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 237 (2002) (distinguishing between the framing of certain issues as constitutional and the concomitant assumption that courts—not the political process or the demos—are the proper forums for settling these issues).

15. *Id.*

16. See Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 N.C.J. INT'L L. & COM. REG. 485, 518–28 (2010) [hereinafter Qureshi, *State of Emergency*] (discussing several political cases heard by the Supreme Court of Pakistan); see also Khan, *Ambiguous Ambitions*, *supra* note 10, at 2 for a discussion about Chaudhry's reinstatement to the Supreme Court of Pakistan in 2009 and the resulting increase in the court's consideration of questions of a political nature.

17. See Osama Siddique, *Judicialization of Politics: Pakistan Supreme Court's Jurisprudence after the Lawyers' Movement*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA (Marc Tushnet & Madhav Khosla eds., forthcoming 2015) [hereinafter Siddique, *Judicialization of Politics*]; see also Khan, *Ambiguous Ambitions*, *supra* note 10 for a discussion of Chaudhry's judicial activism.

18. See Siddique, *Judicialization of Politics*, *supra* note 17; see also Khan, *Ambiguous Ambitions*, *supra* note 10 for a discussion of Chaudhry's judicial activism.

umbrella of PIL.¹⁹

The Pakistani Supreme Court's hyper-activism has provided scholars working at the intersection of law and political science with a unique opportunity to reexamine positive theories on the expansion of judicial power. Research on judicialization has snowballed in the past few years and is no longer limited to democracies.²⁰ The conventional notion that "it seems very unlikely that one will encounter the judicialization of politics outside democratic polities"²¹ has been effectively challenged by groundbreaking work on judicial activism in both transitional and authoritarian contexts.²² Pakistan is also increasingly the subject of commentary and theorizing on judicialization.²³

Yet, a decade after the Supreme Court's activism emerged, the literature on judicial activism in Pakistan remains sparse and informed by limited analytics.²⁴ On the one hand are the global theories of judicial power, which seek to situate Pakistan's case within an existing comparative paradigm.²⁵ However, they tend to gloss over its much more complex political history by selectively illuminating a single grand instance of regime legitimation or judicial defection.²⁶ On the other hand is the literature focused on Pakistan.²⁷ This literature is almost entirely

19. See Khan, *Ambiguous Ambitions*, *supra* note 10.

20. See, e.g., *infra* note 22 and accompanying text for examples of research of judicialization in non-democracies.

21. C. Neal Tate, *Why the Expansion of Judicial Power?*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 27, 28 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

22. See generally TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 106 (2003); Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 *LAW & SOC. INQUIRY* 883 (2003); Tamir Moustafa & Tom Ginsburg, *Introduction to RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 21–22 (Tom Ginsburg & Tamir Moustafa eds., 2008); see also *THE JUDICIALIZATION OF POLITICS IN ASIA* 77–233 (Björn Dressel ed., 2012).

23. See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *ANN. REV. POL. SCI.* 93, 101–02, 111–12 (2008) [hereinafter Hirschl, *Rise of Political Courts*] (discussing the Pakistani Supreme Court's role in the country's changing political atmosphere); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEO. L.J.* 723, 790–91 (2009) (discussing the political tension between Musharraf and Chief Justice Chaudhry); Katie Cella, *The World's Most Meddlesome Supreme Courts*, *FOREIGN POLICY* (June 25, 2012), available at http://www.foreignpolicy.com/articles/2012/06/25/the_world_s_most_meddlesome_supreme_courts (discussing examples of judicial activism in Pakistan).

24. See *infra* notes 25–26 and accompanying text for examples of literature that, while related to judicialization, only sparsely address judicial activism in Pakistan.

25. See, e.g., Hirschl, *Rise of Political Courts*, *supra* note 23, at 95–97; Law, *supra* note 23, at 754–57.

26. See Hirschl, *Rise of Political Courts*, *supra* note 23, at 111–12 (arguing that courts are invariably confronted with harsh political reactions where judicial power is not actively supported by political stakeholders, citing Musharraf's judicial purge of November 2007 as an important case in point); Law, *supra* note 23, at 790–91 (arguing that the function of the Supreme Court of Pakistan as a whistleblower against the excesses of the Musharraf regime through judicial review is an illustration of the monitoring and coordinating roles of courts that enable them to mobilize popular opinion in favor of judicial independence).

27. See *infra* notes 28–29 and accompanying text for examples of the uniformity of literature on judicial activism in Pakistan.

absorbed with two topics: (1) the “Lawyers’ Movement” and the role of the media in sustaining it,²⁸ and (2) the Supreme Court’s judicialization jurisprudence under Chief Justice Chaudhry and concerns over judicial independence and accountability.²⁹

A crucial part of the judicialization story, which appears to be of marginal importance in this literature, is the gradual and cyclical expansion of the Supreme

28. See, e.g., HUMAN RIGHTS WATCH, DESTROYING LEGALITY: PAKISTAN’S CRACKDOWN ON LAWYERS AND JUDGES (2007); MUNEER A. MALIK, THE PAKISTAN LAWYERS’ MOVEMENT: AN UNFINISHED AGENDA (2008); Zahid Shahab Ahmed, *The Role of the Pakistani Mass Media in the Lawyers’ Resistance Against the Musharraf Dictatorship, 2007–2009*, 4 PAKISTANIAAT 61 (2012); Zahid Shahab Ahmed & Maria J. Stephan, *Fighting for the Rule of Law: Civil Resistance and the Lawyers’ Movement in Pakistan*, 17 DEMOCRATIZATION 492 (2010); Aitzaz Ahsan, *The Preservation of the Rule of Law in Times of Strife*, 43 INT’L LAW. 73 (2009); Sadaf Aziz, *Liberal Protagonists? The Lawyers’ Movement in Pakistan*, in FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 305 (Terence C. Halliday, Lucien Karpik, & Malcolm M. Feeley eds., 2012); Ali Khan, *The Lawyers’ Movement in Pakistan: Law Beyond Politics*, SOC. SCI. RES. NETWORK (Dec. 26, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078727; Daud Munir, *From Judicial Autonomy to Regime Transformation: The Role of the Lawyers’ Movement in Pakistan*, in FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY, *supra*, at 378 [hereinafter Munir, *Role of the Lawyers’ Movement in Pakistan*]; Daud Munir, *Struggling for the Rule of Law: The Pakistani Lawyers’ Movement*, 251 MIDDLE E. REPO. 37 (2009), available at <http://www.merip.org/mer/mer251/struggling-rule-law/>; S. Akbar Zaidi, *A Political Movement in the Making*, 42 ECON. & POL. WKLY. 2036 (2007); Toby Berkman, Note, *The Pakistani Lawyers’ Movement and the Popular Currency of Judicial Power*, 123 HARV. L. REV. 1705 (2010); *Pakistan: Lawyer’s movement is the ‘vanguard of democracy,’* ASIAN HUMAN RIGHTS COMM’N, (Mar. 3, 2008), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-053-2008>; Huma Yusuf, *Old and New Media: Converging During the Pakistan Emergency (Mar. 2007–Feb. 2008)*, MIT CTR. FOR FUTURE CIVIC MEDIA (Jan. 12, 2009 12:53 PM), <https://civic.mit.edu/blog/humayusuf/old-and-new-media-converging-during-the-pakistan-emergency-march-2007-february-2008>.

29. See, e.g., Maureen Byrnes et al., *Pakistan’s Courts and Constitution Under Attack: Reversing the Damage*, HUMAN RIGHTS FIRST (2008), available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/pakistan-courts-reports.pdf>; INT’L BAR ASS’N, A LONG MARCH TO JUSTICE: A REPORT ON JUDICIAL INDEPENDENCE AND INTEGRITY IN PAKISTAN (2009), available at http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Pakistan.aspx; INT’L COMM’N OF JURISTS, AUTHORITY WITHOUT ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN PAKISTAN (2013), available at <http://www.icj.org/pakistan-retiring-chief-justice-chaudhry-leaves-legacy-of-robust-yet-inconsistent-action-on-human-rights>; Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 LAW & SOC. INQUIRY 985 (2010); Tassaduq Hussain Jilani, *Defending the Constitution Under the Rule of Law*, 43 INT’L LAW. 67 (2009); Tasneem Kausar, *Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court*, in PAKISTAN’S STABILITY PARADOX 28 (Ashutosh Misra & Michael E. Clarke eds., 2011); Charles H. Kennedy, *Judicialization of Politics in Pakistan*, in THE JUDICIALIZATION OF POLITICS IN ASIA 139 (Björn Dressel ed., 2012) [hereinafter Kennedy, *Judicialization of Politics*]; Qureshi, *State of Emergency*, *supra* note 16, at 518–28; Mohammad Waseem, *Judging Democracy in Pakistan: Conflict between the executive and judiciary*, 20 CONTEMPORARY SOUTH ASIA 19 (2012); Aitzaz Ahsan, Op-Ed., *Pakistan’s Tyranny Continues*, N.Y. TIMES, Dec. 23, 2007, http://www.nytimes.com/2007/12/23/opinion/23ahsan.html?_r=2&ex=1199077200&en=c560e42dac0c2828&ei=5070&emc=eta1&oref=slogin.

Court's power through the production and use of PIL since its genesis in the early 1990s. This marginalization creates the impression that the Supreme Court of Pakistan has scarcely engaged in activism in the past and that the use of PIL as a political and strategic tool has no noteworthy precedents in the court's history.³⁰ In effect, explanations for the judicialization of politics under the Chaudhry court are deeply de-historicized and disconnected from the political and institutional evolution of judicial power.

To understand the contemporary judicialization phenomenon—whether in Pakistan or on a broader scale—it is necessary to contextualize it within its historical antecedents. This article presents two reasons for advancing this argument. The first has to do with the method of theorizing. Virtually all the research that exists on judicialization of politics in Pakistan—and indeed a large majority of work on judicialization in general—takes a static view of judicial power that presents a highly dichotomized before and after picture of judicial politics.³¹ This “static method” captures and magnifies a small, defined, and often transient space on a much longer temporal axis. But it does so in a way that deceptively constructs a sense of profound rupture from the past. A collective reading of the accounts of judicialization jurisprudence under the Chaudhry court creates a general impression that the Supreme Court's activism is unprecedented and that the court's assertion of independence breaks away from a past characterized by judicial submission and subordination to other state institutions.³²

By historicizing the court's activism through a study of the evolution of PIL, a temporalized view of judicialization emerges. The temporalized view uncovers an iterative process building up to the hyper-activism of the Chaudhry court over a span of a quarter-century. This alternative “dynamic method” also reveals an episodic waxing and waning of judicial activism. It shows that judicial activism is a process along a continuum, not a culminating event. Just as there are periods of activism, there are periods of judicial retreat.

This leads into the second reason for retelling the story of the Supreme Court's contemporary judicialization through the medium of the evolutionary cycle of PIL—the question of theory itself. Based on a static method, the “static theory” dismisses periods of relative judicial lull and inactivity or even active retreat as inconsequential for positive theorizing.³³ Not surprisingly, scholars and commentators tend to attribute the recent episode of judicialization to, among other

30. See *supra* notes 23, 26, 28–29 and accompanying text for literature on judicial power in general, the lawyers' movement in Pakistan, and judicialization jurisprudence under Chaudhry. This literature does not discuss in detail the historical evolution of judicial activism in Pakistan, creating the impression that judicial activism under the Chaudhry court was a novelty.

31. *But see* Anil Kalhan, “Gray Zone” *Constitutionalism and the Dilemma of Judicial Independence in Pakistan*, 46 VAND. J. TRANSNAT'L L. 1, 33–42 (2013) (examining the role of the judiciary and judicial independence in Pakistan in light of the historical institutional imbalance in civil-military relations).

32. See *supra* notes 28–29 and accompanying text for accounts of judicialization jurisprudence under Chaudhry.

33. See *supra* notes 26–29 and accompanying text for literature on judicialization in Pakistan that presents a static view of judicial power.

things, the personal courage and leadership of Chief Justice Chaudhry.³⁴ Various other explanations attribute the judicialization phenomenon to institutional support from lawyers associations,³⁵ civil society organizations,³⁶ and the media.³⁷ In some way, all these factors were drivers of judicialization and converged in a propitious environment to transform a largely conformist Supreme Court into a dramatically activist one. But all of these explanations zero in on a brief window of about four years, from 2005–2009. They overlook the highly relevant trends in the use of and support for PIL—both within and without the judiciary—preceding this period.

This article uses the case of Pakistan as a hypothesis-generating exercise for a preliminary exploration into the idea of a dynamic theory of judicialization in transitional systems. The article does not attempt the ambitious goal of constructing a holistic theory, but instead aspires to the more humble objective of taking the initial steps toward reconceptualizing judicialization. Broadly, it emphasizes three things through a dynamic theory: (1) it provides a more nuanced historical perspective on judicial power that reveals interesting continuities between past and present; (2) it underscores the deeper, structural factors behind both judicialization and judicial rollback in contrast to the momentary and ephemeral “determinants of judicial power”;³⁸ and (3) it highlights the strategic role of constitutional courts as political actors in their own right in periods of both judicial activism and judicial retreat from political questions. In the case of Pakistan, the emergence and development of PIL in the Supreme Court in the 1990s provide the building blocks for a dynamic theory of judicialization.³⁹

Part II of this article introduces a historical dimension to the phenomenon of judicialization in Pakistan. It begins with a general background of PIL, including its original vision and novel features, and a brief textual analysis of PIL-related constitutional provisions. It draws parallels between Pakistan and India on the genesis of PIL and argues that PIL in Pakistan is deeply rooted in the judiciary’s crisis of legitimacy arising from the Supreme Court’s historical support for dictatorships. Similar to the post-emergency rise of SAL in India a decade earlier,

34. See, e.g., Ghias, *supra* note 29, at 996 (arguing that one of the primary drivers of judicial activism was the strategic leadership of Chief Justice Chaudhry); Kennedy, *Judicialization of Politics*, *supra* note 29, at 147–48 (discussing Chaudhry’s groundbreaking work upon his appointment as chief justice in 2005); Zia Mian & A. H. Nayyar, *Rule of Force Vs. Rule of Law in Pakistan*, SOC. SCI. RES. COUNCIL 1, 1, available at <http://essays.ssrc.org/pakistancrisis/2008/01/02/rule-of-force-vs-rule-of-law-in-pakistan/> (last visited Oct. 18, 2014) (discussing Chaudhry’s confronting the seemingly arbitrary power of the Pakistani government in his role as chief justice).

35. See Munir, *Role of the Lawyers’ Movement in Pakistan*, *supra* note 28 for a discussion of the role of lawyers’ organizations in judicialization.

36. See Ahmed & Stephan, *supra* note 28, for a discussion of the role of civil associations in judicialization.

37. See Yusuf, *supra* note 28, for a discussion of the role of the media in judicialization.

38. See Ghias, *supra* note 29, at 996.

39. See Maryam Khan, *The Politics of Public Interest Litigation in Pakistan in the 1990s*, 2 SOC. SCI. & POL’Y BULL. 2 (2011) [hereinafter Khan, *Politics of Public Interest Litigation*] (describing the use of PIL as a political tool by the Supreme Court of Pakistan in the 1990s).

the revived political process in Pakistan in the late 1980s created the space for the judiciary to reimagine, reinvent, and propagate its role from an exponent of authoritarian rule to the custodian of a new, democratic political order through PIL. Finally, Part II situates the early development of PIL within the larger historical and political context of the 1980s and 1990s. The objective of this overview is to emphasize the judiciary's strategy as a political actor and the judge-led instrumentalization of PIL for the accumulation of judicial power.

Part III introduces innovative analytical and quantitative elements to the study of PIL as well as of the interdependence of PIL and judicialization. It moves beyond the genesis and early development of PIL to explore its evolution over the past twenty-five years, from 1988–2013 and presents the first such systematic empirical analysis of PIL in both the Supreme Court of Pakistan and South Asia generally.⁴⁰ The analysis in Part III is based on a combination of quantitative and qualitative data collated from a study of all 218 reported PIL judgments of the Supreme Court during this period. This article uses a methodology of periodization that divides PIL into chronological periods or phases of judicialization according to changes in political conditions. The objective of periodization is to foreground the political choices of the Supreme Court in relation to both larger power struggles and the shifting positions of other political institutions, actors, and interest group mobilizations. The periodized study clearly shows that there are alternating periods of judicial activism on the one hand and judicial retreat from political questions on the other.

Building upon the case data and the periodized study in Part III, Part IV focuses on periods of judicial activism to map important transmutations in PIL jurisprudence over time. The rationale for dwelling on periods of activism is not to exclude the phenomenon of judicial retreat from the judicialization discourse, but to explain the qualitative changes, as well as continuities and patterns, that accompany judicialization over time. A theory of judicialization that endeavors only to explain the general temporal cycle—the alternating rise and fall—of judicial activism is a partial theory. A more comprehensive theory must additionally explain the evolving nature and shifting goal posts of judicial activism in successive cycles, as well as the deep interconnectedness of the past and the present in judicial discourse. The mapping of PIL jurisprudence in Part IV attempts to lay the groundwork for this purpose.

A key observation of Part IV is that even though the Supreme Court's judicialization jurisprudence has evidently proliferated both in terms of the quantity of unconstitutional rulings and the extent of jurisprudential innovation and judicial overreach, there is a remarkable continuity in the kinds of issues adjudicated by the court under the garb of PIL during the initial (1988–1997) and subsequent waves of judicial activism (2005–2007 and 2009–2013). The

40. The most comprehensive empirical examination that exists on the subject is a study of all the cases on SAL in the Indian Supreme Court over a ten-year period between 1997 and 2007 with a much narrower objective of testing judicial attitudes toward the claims of poor and marginalized litigants. See Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?*, World Bank Policy Research Working Paper No. 5109 (Nov. 2009).

conjunction of PIL with salient and recurrent political questions for virtually the entire two and a half decades of its use demonstrates that, in transitional societies like Pakistan, the determinants of judicial power are embedded in structural factors. Such factors provide an enabling environment for legitimacy-starved judicial actors and the professional and lay denizens of the law courts—including bona fide litigants—to cyclically assert ascendancy, even hegemony, over the political process.

Part IV ends with critical reflections on the evolution of PIL jurisprudence. It argues that the Supreme Court's repeated use of PIL for self-legitimation at the expense of democratic processes has, among other things, contributed significantly to institutionalizing an anti-democracy jurisprudence. Part V concludes with the important findings and preliminary thoughts on how insights from Pakistan may be harnessed to develop a dynamic theory on judicialization.

II. HISTORICAL BACKGROUND TO PUBLIC INTEREST LITIGATION IN PAKISTAN

A. *Original Vision & Parallels with India*

Commentators on PIL in Pakistan all tend to agree that *Benazir Bhutto v. Federation of Pakistan*⁴¹ and *Darshan Masih v. State*⁴² were the pioneering Supreme Court PIL cases.⁴³ Although these cases were decided only a few months apart, they could not have been more distant in terms of the subject matter and the socio-economic status of the parties. The petitioner in *Benazir Bhutto* was the daughter and political heir of Zulfikar Ali Bhutto, the prominent politician and the first popularly elected prime minister of Pakistan.⁴⁴ Benazir challenged the constitutional validity of certain electoral laws introduced by the military dictator General Zia-ul-Haq on the basis that they violated her political party's freedom of

41. (1988) 40 PLD (SC) 416.

42. (1990) 42 PLD (SC) 513.

43. For examples of earlier works on PIL that point to these pioneering cases, see KHAN, GROWTH OF THE CONCEPT, *supra* note 2, at 43–48, 60–70; Faqir Hussain, *Access to Justice*, PLD Journal 10, 19 (1994) [hereinafter Hussain, *Access to Justice*]; Syed Mushtaq Hussain, *Public Interest Litigation*, PLD Journal 5, 7–8 (1994) [hereinafter Hussain, *Public Interest Litigation*]; Rashid Akhtar Qureshi, *Public Interest Litigation—Prospects and Problems*, PLD Journal 95, 96 (1994) [hereinafter Qureshi, *Prospects and Problems*]; Nasim Hasan Shah, *Public Interest Litigation as a Means of Social Justice*, PLD Journal 31, 35 (1993); and Faqir Hussain, *Public Interest Litigation in Pakistan 7* (Sustainable Dev. Policy Inst., Working Paper No. 5, 1993) [hereinafter Hussain, *PIL in Pakistan*]. For more recent works, see WERNER MENSKI, AHMAD RAFAY ALAM & MEHREEN KASURI RAZA, PUBLIC INTEREST LITIGATION IN PAKISTAN (2000); Maryam Khan & Osama Siddique, *The 2005 South Asian Earthquake: Natural Calamity or Failure of State? State Liability and Remedies for Victims of Defective Construction in Pakistan*, 9 ASIAN L. 187, 217–19 (2007); Muhammad Amir Munir, *Public Interest Litigation in the Supreme Court of Pakistan* 12–13 (Soc. Sci. Research Network, Working Paper Aug. 4, 2007) [hereinafter Munir, *Public Interest Litigation*]; and Abdus Sattar Asghar, Judge, Lahore High Court, Address at the National Judicial Conference Islamabad 2011, *Public Interest Litigation: A Tool to Protect Fundamental Rights* (Apr. 23, 2011).

44. Farhan Bokhari, *Benazir Bhutto*, FIN. TIMES, Dec. 27, 2007.

association.⁴⁵ The *Darshan Masih* case, on the other hand, was a representative class action on behalf of bonded laborers in the brick kiln industry.⁴⁶ It set a precedent for what was to become the *suo motu* jurisdiction of the constitutional courts,⁴⁷ through which the courts empowered themselves to take cognizance of matters addressed to them through letters and informal complaints, as well as on their own motion.⁴⁸

Notwithstanding the contrast between these two cases, early observers of PIL agreed that collectively they constituted the essential vision and characteristics of PIL.⁴⁹ The primary objective of PIL, according to these cases, was to facilitate social justice for poor and underprivileged individuals and groups, as well as for classes of people who suffered from state oppression or were generally unable to pursue their claims through the formal justice system because of various physical, economic, and social constraints.⁵⁰ The defining element of PIL was the right to seek “access to justice”⁵¹ directly through the constitutional courts by mitigating traditional rules of standing in adversarial litigation in favor of bona fide representation.⁵² Other ancillary, but nonetheless important, aspects of PIL include waiver of court fees, provision of legal aid, expansive and purposive interpretation of constitutional rights in view of broader principles of policy, flexible inquisitorial procedures often involving fact-finding through multiple stakeholders and expert committees, rolling reviews, and a diverse range of both dispositive and open-ended remedies.⁵³ In the words of a Supreme Court justice in the early 1990s, PIL was intended for “alleviating the sufferings of the masses” through the recognition

45. See *Benazir Bhutto*, (1988) 40 PLD (SC) at 445–47.

46. See *Darshan Masih*, (1990) 42 PLD (SC) at 519–21.

47. The Supreme Court, the apex court of the country, together with the high courts of the four provinces of Punjab, Sindh, Balochistan, and Khyber Pakhtunkhwa comprise the constitutional courts of Pakistan. PAKISTAN CONST. art. 175. These courts have multiple jurisdictions: appellate, advisory, and original. Later amendments to the constitution also provided for a Federal Shariat Court to decide whether or not any law was repugnant to the injunctions of Islam. PAKISTAN CONST. art. 203C. Unless otherwise stated, this article uses the term “constitutional courts” to refer only to the Supreme Court and the provincial high courts.

48. See *Darshan Masih*, (1990) 42 PLD (SC) at 513 (acknowledging that the chief justice of Pakistan received a telegram alleging bonded labor practices and the Supreme Court chose to preside over the case).

49. See KHAN, GROWTH OF THE CONCEPT, *supra* note 2, at 43–48, 60–70; Hussain, *Public Interest Litigation*, *supra* note 43, at 7–8; Qureshi, *Prospects and Problems*, *supra* note 43, at 96; Shah, *supra* note 43, at 35; Hussain, *Access to Justice*, *supra* note 43, at 19; Hussain, *PIL in Pakistan*, *supra* note 43, at 7.

50. *Darshan Masih*, (1990) 42 PLD (SC) at 514–16; *Benazir Bhutto*, (1988) 40 PLD (SC) at 446–47.

51. See Hussain, *PIL in Pakistan*, *supra* note 43, at 1, (explaining how PIL emerged as a judicial response to redress the problems of the underprivileged, by giving them a right to access the courts to seek justice). See generally Hussain, *Access to Justice*, *supra* note 43, at 18–20.

52. See Hussain, *Access to Justice*, *supra* note 43, at 19 (describing the simple procedure for bringing a complaint before the constitutional courts); Hussain, *Public Interest Litigation*, *supra* note 43, at 7 (noting that the traditional standing rules have relaxed as PIL has evolved).

53. See generally MENSKI, ALAM & RAZA, *supra* note 43.

of “social rights.”⁵⁴ These included “freedom from indigence, freedom from ignorance and discrimination, a right to healthy environment, protection from massive corporate frauds and governmental oppression.”⁵⁵ Others described it as a mechanism for “liberalising” the adversarial system “on behalf of poor and down-trodden sections of society.”⁵⁶

Early stocktaking scholarship on PIL suggests that it was adapted in many ways from across the border in India.⁵⁷ In the mid-1970s, India was witness to unprecedented judicial populism that ostensibly sought social and economic justice for the poor.⁵⁸ The Indian Supreme Court’s procedural and jurisprudential innovations revolved around the violation of constitutional rights, leading to a formidable rights discourse in favor of direct judicial access to “little Indians in large numbers.”⁵⁹ These innovations included: the relaxation of the standing rule and other procedural niceties;⁶⁰ expansion of the substantive meaning of right to life to encompass broader matters of social and economic empowerment and human dignity;⁶¹ establishment of a novel, epistolary jurisdiction that enabled the court to take cognizance of rights violations on the basis of letters and newspaper reports;⁶² and reinterpretation of the otherwise unenforceable Directive Principles of Policy⁶³ to support and enhance the procedural and substantive innovations of this new breed of litigation.⁶⁴ The kind of issues that this judicial populism targeted included “freedom from indigency, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection from massive

54. See Shah, *supra* note 43, at 31, which advances the belief that social evils are eradicated through PIL.

55. *Id.* at 34.

56. Hussain, *Access to Justice*, *supra* note 43, at 14–15.

57. See MENSKI, ALAM & RAZA, *supra* note 43, at 87 (discussing the influence of Indian case law on Pakistani judgments).

58. See Arun K. Thiruvengadam, *Revisiting the Role of the Judiciary in Plural Societies (1987): A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South*, in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* 341 (Sunil Khilnani, Vikram Raghavan & Arun K. Thiruvengadam, eds., 2013) (providing a masterly synthetic analysis of the literature on PIL in India).

59. A.B.S.K. Sangh (Ry.) v. Union of India, A.I.R. 1981, S.C. 298, 317 (India).

60. See S. P. Gupta v. President of India, A.I.R. 1982 S.C. 149, 150–52 (India) (discussing the evolution of the standing rule).

61. See Francis Coralie Mullin v. Adm’r, Union Territory of Delhi, (1981) 2 S.C.R. 516, 518–19 (India) (holding that the right to life gives humans the right to human dignity, the right to nutrition, clothing, and shelter, as well as the right to learn and to express oneself).

62. See *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1974 S.C. 802, 840–41 (India) (holding that, in some circumstances, one can invoke the jurisdiction of the court with a letter or telegram).

63. See INDIA CONST. pt. IV.

64. See Sanjay Ruparelia, *A Progressive Juristocracy?, The Unexpected Social Activism of the Indian Supreme Court* 11 (KELLOGG INST., Working Paper No. 391, 2013) (stating that between 1950 and 1967 the Supreme Court, inspired by the Directive Principles, struck down 128 pieces of parliamentary legislation).

financial, commercial and corporate oppression.”⁶⁵

Almost all the jurisprudential and procedural innovations of SAL in India found resonance in the PIL movement in Pakistan through creative judicial interpretations. The manner in which judges likened their ideas, and at times explicitly referred to Indian judicial pronouncements, gave PIL a much-borrowed flavor. Simultaneously, however, they took pains to define PIL in indigenous terms as an ideological rights-based device to “achieve democracy, tolerance, equality and social justice according to Islam.”⁶⁶ Examples of this include Chief Justice Muhammad Haleem’s express reliance on a string of Indian precedents in the pioneering case of *Benazir Bhutto*,⁶⁷ and the formulaic adaptation of the “little Indians in large numbers” language to “little Pakistanis in large numbers” in the seminal *Darshan Masih* case.⁶⁸ The emphasis of early PIL cases on the issue of bonded labor was also heavily inspired by influential Indian judgments,⁶⁹ as was the creation of the *suo motu* doctrine.⁷⁰

Leading Indian legal scholars like Upendra Baxi and S. P. Sathe explain that the judge-induced SAL was an attempt by the Indian Supreme Court to marshal a “new, historical basis of legitimation of judicial power” in response to the “post-Emergency euphoria at the return of liberal democracy,”⁷¹ and “to increase its political power vis-a-vis other organs of government.”⁷² From a vantage point almost three decades after the emergence of SAL, Nick Robinson asserts that this “new interventionism was born at a time when Parliament and the country’s other representative institutions were increasingly politically fractured and viewed as abdicating their governance responsibilities.”⁷³ This governance vacuum enabled the Indian Supreme Court to step into the political sphere and expand its jurisdictional and remedial reach to a plethora of governance functions.

Similarly, the growth of PIL as a methodical feature in Pakistani

65. P.N. Bhagwati, *Social Action Litigation: The Indian Experience*, in THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 20, 21 (Tiruchelvam & Coomaraswamy, eds., 1987).

66. See *Benazir Bhutto v. Federation of Pak.* (1988) 40 PLD (SC) 416, 419; see also MARTIN LAU, THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN 95–120 (2006) (detailing the important contribution of Islamic arguments to the advent of PIL in Pakistan).

67. See *Benazir Bhutto*, (1988) 40 PLD (SC) at 521–37.

68. *Darshan Masih v. State* (1990) 42 PLD (SC) 513, 513; see also Khan, *Selective Borrowings*, *supra* note 8 (commenting on the potential, in an effort to quickly fix socio-political issues, to forget that the problems of the “little Indians” and “little Pakistanis” are far removed from constitutional niceties).

69. See MENSKI, ALAM & RAZA, *supra* note 43, at 87.

70. See *id.* at 80–82 (discussing the initiation of *suo motu* in Pakistan).

71. Baxi, *supra* note 3, at 113. See also UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 122–23 (1980) (asserting that the Indian Supreme Court’s judicial activism in the post-Emergency period was an attempt to “bury its emergency past”).

72. S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL’Y 29, 51 (2001).

73. Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 43 (2009) (arguing that the shortcomings of India’s representative institutions and a constitutional mandate for a “controlled revolution” led the Indian Supreme Court to enlarge its role).

constitutional jurisprudence coincided with the departure of the military government of General Zia-ul-Haq and the reinstallation of civilian government in the late 1980s.⁷⁴ The timing of PIL's creation suggests parallels with India in terms of the triggers for the development of social and economic rights-based constitutionalization. Like SAL in India, Pakistani PIL reflected a complex mix of post-dictatorship judicial catharsis and a crisis of governance in Pakistan's political institutions.⁷⁵ Deep political fractures existed not only between the military junta and political elite, but also among the different elements of the new civilian government. This provided the constitutional courts sufficient space to articulate an alternative narrative on governance and socioeconomic justice.⁷⁶

But, surprisingly, despite the many similarities between India and Pakistan in the political and institutional conditions driving the creation of this new form of litigation, the interconnections between the judiciary's crisis of legitimacy and the emergence of PIL remain unexplored and unarticulated in the context of Pakistan. Historically, the Pakistani judiciary has supported military dictators by legitimating coups and aiding in the consolidation of extra-constitutional regimes, while sabotaging democratic forces and constitutional processes as well as its own autonomy.⁷⁷ The decline and fall of General Zia-ul-Haq's military government, installed by a coup in 1977, and the comeback of political parties in the late 1980s brought the taint and infamy of judicial collaboration with the dictator to the forefront of judicial politics.⁷⁸ The judiciary had to construct some kind of

74. Barring some early but isolated examples of the Pakistani Supreme Court's attentive eye on developments in India, there was a decade-long hiatus between India and Pakistan in the emergence of PIL. As a result, the "development cycle" of PIL was accelerated in Pakistan. See MENSKI, ALAM & RAZA, *supra* note 43, at 124. Describing four distinct phases of judicial activism in India, Menski argues that:

[i]f we observe that Pakistan started at once in all four phases of public interest litigation, we must also note that this has been possible only because Pakistani judges—and some litigants and their legal advisers—knew of the earlier developments in Indian public litigation and were able to copy those concepts selectively.

Id.

75. See, e.g., *State v. M.D., Wasa*, (2000) 22 CLC (Lahore) 471, 475 (Pak.) ("The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficiency and corruption at various levels. In such a socio-economic and political milieu, the non-intervention by Courts in complaints of matters of public concern will amount to abdication of judicial authority.").

76. See Khan, *Politics of Public Interest Litigation*, *supra* note 43, at 5.

77. See, e.g., OMAR NOMAN, *THE POLITICAL ECONOMY OF PAKISTAN 1947–85* 140–50 (1988) (recounting the Supreme Court's support of one such dictator, General Zia-ul-Haq, who eventually abrogated the constitution and limited the power of the court); Kausar, *supra* note 29, at 30 ("In short, Pakistan's Supreme Court has followed the path of least resistance and least fidelity to constitutional principles...the courts have been the military's handmaidens in extra-constitutional assaults on the democratic order.").

78. See, e.g., Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under the Pakistani Constitution and Its Discontents*, 23 ARIZ. J. INT'L & COMP. L. 615, 646 (2006) [hereinafter Siddique, *Jurisprudence of Dissolutions*] ("The judges

symbolic break with the past in order to stake a claim to independence and create a pro-democracy façade. PIL provided the means for the judiciary to both resolve its internal contradictions and make reparations for its past delegitimation of democratic politics. The nexus between the judiciary's ongoing crisis of legitimacy and the use and proliferation of PIL has become more apparent in successive phases of judicial activism.

B. “Original Jurisdiction” of the Constitutional Courts: The Textual Site of PIL’s Creation

With the benefit of hindsight, it is perhaps an obvious truth that PIL is textually grounded in the provisions relating to the jurisdiction and judicial review powers of the constitutional courts in the Pakistani Constitution of 1973 (1973 Constitution).⁷⁹ The 1973 Constitution was the first indigenous constitutional framework to be promulgated by a democratically elected government through the consensus of major political parties, including Zulfikar Ali Bhutto's majority party, the Pakistan People's Party (PPP).⁸⁰ Though past constitutions provided for constitutional rights in some form,⁸¹ the 1973 Constitution empowered the constitutional courts in fundamentally different ways through an elaborate set of “Fundamental Rights” directly enforceable by the courts.⁸² In addition to the general appellate and advisory jurisdictions, it endowed both the apex Supreme Court and the provincial high courts with a special “original jurisdiction” with specific jurisdictional, procedural, and remedial powers devoted to the enforcement of the Fundamental Rights.⁸³ Additionally, the 1973 Constitution

were frustrated, disillusioned, and at times scathingly critical about the anti-democratic forces that they blamed for the state of affairs.”).

79. PAKISTAN CONST. (1973), reprinted in M. MAHMOOD, *THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN: A COMPREHENSIVE AND DETAILED COMMENTARY WITH A COMPARATIVE STUDY OF THE CONSTITUTIONS OF PAKISTAN, 1956 AND 1962* (1973) (containing the 1973 Constitution and commentary regarding the development of the law as seen in the 1973 Constitution).

80. See Maryam S. Khan, *Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity and Group Conflict*, 30 HARV. J. ON RACIAL & ETHNIC JUST. 77, 103–14 (2014) (providing a summary of the constitution-making process and how the 1973 Constitution was different from past constitutions); see also PHILIP E. JONES, *THE PAKISTAN PEOPLE'S PARTY: RISE TO POWER* 99–255 (2003) (discussing the PPP and its rise to power).

81. See PAKISTAN CONST. (1956) arts. 5–21; PAKISTAN CONST. (1962) art. 6.

82. See PAKISTAN CONST. (1973) arts. 9–28 (outlining protection of Fundamental Rights); see also Khan & Siddique, *supra* note 43, at 215–16 (discussing whether the growing trend of PIL can provide a legal remedy to Pakistani victims of the 2005 South Asian earthquake). The Fundamental Rights provided by the 1973 Constitution include, but are not limited to: right to life and liberty (Article 9); safeguards as to arrest and detention (Article 10); prohibition against slavery and forced labor (Article 11); protection against retrospective punishment (Article 12); protection against double punishment and self-incrimination (Article 13); inviolability of dignity (Article 14); freedom of movement (Article 15); freedom of assembly (Article 16); freedom of association (Article 17); freedom of trade, business, or profession (Article 18); freedom of speech (Article 19); freedom of religion (Article 20); protection of property (Article 24); and equality of citizens (Article 25). See PAKISTAN CONST. (1973). Recently added to this list are the right to information (Article 19A) and the right to education (Article 25A). *Id.*

83. See FAQIR HUSSAIN, *THE JUDICIAL SYSTEM OF PAKISTAN*, 2011, at 14–18, available at

strengthened the judiciary's power to enforce these rights by providing that laws that were inconsistent with or made in derogation of the Fundamental Rights were void.⁸⁴

The respective original jurisdictions of the high courts and Supreme Court for enforcing Fundamental Rights became the site of the genesis and development of PIL.⁸⁵ The two jurisdictions overlap somewhat, but mostly rest on different threshold requirements.⁸⁶ The following textual analysis of the constitutional foundations of PIL aims to generate a nuanced understanding of PIL jurisprudence and how it has evolved over time.

Article 199(1)(c) of the 1973 Constitution deals with the original jurisdiction of the high courts and provides:

[A] High Court may, if it is satisfied that *no other adequate remedy* is provided by law . . . , on the application of any *aggrieved person*, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the *enforcement of any of the Fundamental Rights*⁸⁷

Therefore, at least prima facie Fundamental Rights adjudication in the high courts necessitates *locus standi* in the form of an “aggrieved person.”⁸⁸ The aggrieved party has to additionally show that “no other adequate remedy” is obtainable, either because the ordinary remedies have been exhausted or because those that exist are inadequate in the given circumstances.⁸⁹

In addition to this specific provision pertaining to the enforcement of Fundamental Rights, the high courts have conventional powers to issue prerogative writs, including mandamus, *prohibito*, certiorari, habeas corpus, and *quo warranto*.⁹⁰ While generally the writ jurisdiction of the high courts requires *locus standi* in the form of “an aggrieved party,” habeas corpus and *quo warranto* may be put into operation “on the application of any person.”⁹¹ Even so, there is no express authority enabling the high courts to issue writs *suo motu*.

http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf; Hina Jilani, *Human Rights and Democratic Development in Pakistan*, INT'L CENTER FOR HUM. RTS. & DEMOCRATIC DEV. 1, 22 (1998) available at <http://hria.equalit.ie/pdf/es/16/Pakistan.pdf> (discussing the history and the development of the Supreme Court of Pakistan).

84. PAKISTAN CONST. (1973) art. 8.

85. See, e.g., MENSKI, ALAM & RAZA, *supra* note 43, at 32; Munir, *Public Interest Litigation*, *supra* note 43, at 78 (discussing the advent of PIL in the Supreme Court under Article 184(3) of the constitution).

86. See PAKISTAN CONST. (1973) art. 199 (detailing jurisdiction of the high courts).

87. *Id.* art. 199(1)(c) (emphasis added).

88. *Id.*

89. *Id.*

90. *Id.* arts. 199(1)(a)–(b). These writs are not enumerated in the constitutional provisions by their Latin maxims, but their definitions essentially correspond to well-established categories of English common law writs.

91. *Id.* art. 199(1)(c).

The original jurisdiction of the Supreme Court under Article 184(3) of the 1973 Constitution is exercisable independently of the high courts. Article 184(3) states:

Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a *question of public importance* with reference to the enforcement of *any of the Fundamental Rights* conferred by Chapter I of Part II is involved have the power to make *an order of the nature mentioned in the said Article*.⁹²

Prima facie, the Supreme Court's jurisdiction is not circumscribed by any specific *locus standi* requirement. The dilution of legal standing is the core component of PIL, an interpretive outcome that was initially viewed as novel but now seems fairly intuitive. Regardless, the court's jurisdiction is restricted by the threshold requirements of "a question of public importance" with respect to the enforcement of Fundamental Rights.⁹³ This means that any person, whether or not an "aggrieved party," can invoke the Supreme Court's jurisdiction as long as the Fundamental Rights issue is one of "public importance."⁹⁴ It also appears that there is no express bar against the otherwise distinct jurisdictions of the Supreme Court and the high courts operating concurrently in circumstances where an aggrieved party who has no other adequate remedy raises an issue of public importance in relation to the enforcement of Fundamental Rights. Presumably, in such cases, the petitioner could choose one of the two jurisdictions.

Article 184(3) states that the Supreme Court shall "have the power to make an order of the nature mentioned in [Article 199]."⁹⁵ The plain wording of this provision suggests that the Supreme Court can only make orders that the high courts are empowered to make in their Fundamental Rights jurisdiction. However, this apparent constraint on the Supreme Court seems to be of little consequence, given that the ambit of the high courts' orders extends to "*any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights*."⁹⁶ Thus, even if the Supreme Court's remedial powers are coextensive with those of the high courts, the range of possible remedies and directions for the enforcement of Fundamental Rights seems to be rather wide and open-ended in both forums.

Quite apart from the respective original jurisdictions of the constitutional courts, the Supreme Court's overall authority is bolstered by other general provisions. These include the "power to issue such directions, orders or decrees as may be *necessary for doing complete justice* in any case or matter pending before it"⁹⁷ and the provision that "[a]ll executive and judicial authorities throughout

92. PAKISTAN CONST. (1973) art. 184(3) (emphasis added).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* art. 199(1)(c) (emphasis added).

97. *Id.* art. 187(1) (emphasis added).

Pakistan shall act in aid of the Supreme Court.”⁹⁸ These are referred to as the apex court’s “inherent powers.”⁹⁹ But note that, facially, they apply only in the context of a “case or matter pending” before the Supreme Court.¹⁰⁰

Finally, in light of recent developments, it is important to mention that the Supreme Court, unlike the high courts, does not have express authority to directly hear prerogative writs.¹⁰¹ The Supreme Court may surely issue an order that is effectively equivalent to a writ-based remedy, but only when adjudicating a Fundamental Rights-related case of public importance. However, the Supreme Court’s original jurisdiction is an extraordinary one and is not envisioned as a routine forum for dealing with traditional, non-Fundamental Rights-based writs. This is the exclusive domain of the high courts, which, in most cases, requires legal standing. For the Supreme Court to assume this ordinary writ jurisdiction in the absence of a concrete Fundamental Rights issue would be tantamount to usurping the province of the high courts.

C. Pre-PIL Politics of the Zia Years & the Judiciary’s Crisis of Legitimacy

The rise of PIL in Pakistan is deeply embedded in the political history of the country, the institutional and structural centers of political power, and the judiciary’s encounter with this evolving landscape. Like various other post-colonial states experimenting with the messy, non-linear, and inchoate business of democratic transition, Pakistan has experienced multiple oscillations between democratic and authoritarian governments since its first general election in 1970.¹⁰² In the first half of the 1970s, the Supreme Court could not have been immune to the general euphoria of ushering in the populist government of Zulfikar Ali Bhutto, embracing the country’s first democratic constitution, and celebrating the recognition and protection of the people’s Fundamental Rights through an independent judiciary unshackled from the rigors and oppression of past authoritarian regimes.¹⁰³ Indeed, one of the first major post-election judgments to emanate from the Court underscored the unconstitutionality of regime change through military coups. The iconic words of then Chief Justice Hamoodur Rahman in the historic judgment of *Asma Jilani v. Government of Punjab* are resurrected time and again by democracy supporters:

May be, that on account of their holding the coercive apparatus of the state, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal

98. PAKISTAN CONST. (1973) art. 190.

99. MENSKI, ALAM & RAZA, *supra* note 43, at 32.

100. PAKISTAN CONST. (1973) art. 187(1).

101. *See id.* arts. 184–86 (listing the powers of the Supreme Court, none of which expressly give the court the authority to directly hear prerogative writs).

102. *See generally* Hasan-Askari Rizvi, *Civil Military Relations in Contemporary Pakistan*, 40 SURVIVAL: GLOBAL POL. & STRATEGY 96 (1998) (discussing the historical civil-military imbalance in Pakistan and the periodic attempts at transition to civilian rule).

103. *See* JONES, *supra* note 80, at 99–105 (describing Bhutto’s rise to power in domestic politics).

and the Courts will not recognize its rule As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would-be adventurers.¹⁰⁴

The judgment was more a note of optimism for the new civilian government than a serious warning to “usurpers” and “would-be adventurers” as it came only after a military government had handed over the “coercive power of the state” to an elected president.¹⁰⁵

But even so, the Supreme Court had made the first categorical declaration of its own power—that it alone could legitimize regime change. This self-proclaimed power was highly strategic. In openly expressing its power, the court both supported and was supported by the electoral incumbent, mutually reinforcing the institutional interests of the judiciary and the new democratic government. This construction of judicial power was thus a complex process of court-driven strategic responses to advantageous political circumstances. As future events showed, the court’s declamation on its own did not and could not bring about a larger structural shift in the relationship between the judiciary and de facto rulers.

The Supreme Court’s resolve was put to the test only a few years into its first encounter with democratic transition. In 1977, General Zia-ul-Haq deposed Bhutto’s government and imposed martial law throughout the country on the pretext of preventing a “civil war.”¹⁰⁶ Initially, Zia declared that his sole purpose was to hold free and fair elections within ninety days of the coup and promised to transfer power to elected representatives.¹⁰⁷ But shortly thereafter, he used political accountability as an excuse to delay elections.¹⁰⁸ Zia’s most urgent need was to legitimize his coup, for which he primed the Supreme Court.¹⁰⁹ The constitutional courts found themselves at the center of the conflict between a de facto military ruler and civilian politicians with mass public support. Anticipating the courts’ involvement in questions concerning the legitimacy of the new regime, Zia purged the more dissident and pro-democracy judges.¹¹⁰

104. Asma Jilani v. Government of Punjab, (1972) 24 PLD (SC) 139, 243.

105. *Id.*

106. NOMAN, *supra* note 77, at 122; *see also* Shahid Javed Burki, *Pakistan Under Zia, 1977-1988*, 28 ASIAN SURV., 1082, 1096–97 (1988) (discussing Zia’s illegal seizure of power and his relationship with the United States after the Soviet Union attempted to invade Afghanistan). General Zia-ul-Haq was the infamous coup-maker who thrust Pakistan into the forefront of the US-led fight against communism in Afghanistan with over \$3 billion of military and economic assistance trickling in from the Reagan administration. Burki, *supra*, at 1096.

107. NOMAN, *supra* note 77, at 128.

108. *Id.*

109. Official accounts of the coup suggest that Zia’s Proclamation of Martial Law was issued after consultations with then Chief Justice Muhammad Yaqub Ali. *See* Mahmood Khan Achakzai v. Fed’n of Pak., (1997) 49 PLD (SC) 426, 471 (“Record shows that Martial Law was imposed on 5th July, 1977 and on the same day in the morning C.M.L.A. called on the then Chief Justice of Pakistan Mr. Justice Muhammad Yaqub Ali and remained with him for some time. Proclamation of Martial Law was issued on the same day...Presumption is that Proclamation was published after meeting with the Chief Justice.”).

110. *See* Siddique, *Jurisprudence of Dissolutions*, *supra* note 78, at 627 (discussing Zia’s

The challenge to Zia's coup arose almost immediately in the form of a constitutional petition directly before the Supreme Court in *Begum Nusrat Bhutto v. Chief of Army Staff*.¹¹¹ That petition disputed the constitutionality of the martial law and claimed that the constitutional rights of the detained members of Bhutto's political party, the PPP, had been violated.¹¹² This was the first time that the court sought to adjudicate a question of regime change—arguably a first-order political question—under its new and largely untested Fundamental Rights jurisdiction under the 1973 Constitution.¹¹³

The freshly purged Supreme Court unanimously dismissed *Begum Nusrat Bhutto* on the basis of the “doctrine of necessity.”¹¹⁴ It declared that the imposition of martial law “appears to be an extra-constitutional step necessitated by the complete breakdown and erosion of the constitutional and moral authority of the Government of Mr. Zulfikar Ali Bhutto.”¹¹⁵ The court came to this conclusion on the basis of an “objective narration of facts” as contained in official reports and newspapers that showed that a “situation had . . . arisen for which the Constitution provided no solution.”¹¹⁶ In particular, the “constitutional and moral authority” of the PPP had been shown to be “continuously and forcefully repudiated” by prolonged countrywide disturbances.¹¹⁷

The court opined that, under the circumstances, Zia's military intervention “acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions.”¹¹⁸ The fact that the general election had been postponed as a result of the necessity of completing the process of accountability of public office holders did not negate Zia's “sincere and unambiguous declaration” that he would hold fresh elections in the future.¹¹⁹ The presiding justices justified their new oath under martial law on the same premise.¹²⁰ But, most shockingly, the court

amendment of the constitution to require judges of the superior courts to take a loyalty oath).

111. (1977) 29 PLD (SC) 657. The petitioner was Begum Nusrat Bhutto—Zulfikar Ali Bhutto's wife and then acting chairperson of the PPP.

112. *Id.*

113. *See id.* at 671 (indicating that the unique facts of this case rendered past jurisprudence inapplicable).

114. *Id.* at 762–63.

115. *Id.* at 721.

116. *Id.* at 661. These “objective facts” included allegations of electoral rigging against the PPP that were “confirmed” by the chief election commissioner, continuing and widespread agitation beyond the control of civilian authorities and local martial law, heavy loss of life and property, the inability of law enforcement officials to maintain law and order, the sanctioning of the distribution of firearm licenses on a vast scale by the PPP government in the Punjab to its party members as a way of threatening the opposition, and the unlikelihood of a peaceful resolution of the political deadlock leading to “incalculable damage to the nation and the country.” *Id.* at 701–02.

117. *Begum Nusrat Bhutto*, (1977) 29 PLD (SC) at 704.

118. *Id.*

119. *Id.* at 723.

120. *See id.* at 719 (indicating that the President's Order No. 9 of 1977 required justices of the Supreme Court to take a new oath that omitted the words “to defend the Constitution”).

empowered Zia to amend the 1973 Constitution during the temporary period of what it euphemistically termed “constitutional deviation.”¹²¹ At the same time, the court stressed that the constitutional courts would continue to have the power of judicial review to judge the validity of any act of the martial law authorities, even though, paradoxically, the enforcement of Fundamental Rights was to remain suspended owing to the prevalent disorder in the country.¹²²

From the perspective of democratic transition, what was most interesting and unprecedented about the *Begum Nusrat Bhutto* judgment was the court’s paternalistic posture toward political parties and its repeated insinuation that its validation of the coup was in favor of democracy.¹²³ Unlike any time in the past, the judgment actively validated the coup on a moral high ground of restoration of democracy, implying that the Supreme Court was entitled to stand in judgment over the larger political process while also declaring openly a judicial partnership with the de facto ruler.¹²⁴ The self-contradictions of the figurative “judge as paternalist” in *Begum Nusrat Bhutto* were extremely insidious, as the judiciary actively and subjectively assented to taking political decisions out of the hands of the political representatives while giving normative credence to “would-be adventurers.”¹²⁵ The judiciary would increasingly resort to condescension toward democratic processes and institutions, making presumptuous claims to overseeing future transitions to democracy through various constitutional and extra-constitutional means in order to justify arbitrary dissolutions of government as well as Musharraf’s military coup in 1999 and again in 2007.¹²⁶

In this manner, the Supreme Court’s original jurisdiction was co-opted within just a few years of its inception for the historical judicial role of regime legitimation. The notion of a Fundamental Rights jurisdiction was thus turned on its head.¹²⁷ But the court’s alignment with the dictator, however temporary, did not ensure its continued existence or credibility. To the contrary, as time went on, it became clear that Zia intended to control the reins of power and to use the courts only as a rubber stamp for his extra-constitutional political agenda.

With constitutional legitimacy on his side, Zia turned next to the issue of

121. *Id.* at 722.

122. *See id.* at 721–22 (holding that the 1973 Constitution is still in effect and that the superior courts and the president must still abide by it).

123. *See Begum Nusrat Bhutto*, (1977) 29 PLD (SC) at 721–23 (reasoning that the institution of martial law was legitimized by the turbulent circumstances in the country).

124. *See id.* at 704 (holding that institution of martial law and postponement of elections were effected to protect democracy).

125. *Asma Jilani*, (1972) 24 PLD (SC) at 243.

126. *See, e.g., Gen Musharraf’s second coup: Charge-sheet against judiciary; ‘Media promoting negativism’; Country’s ‘integrity at stake’; Legislatures intact*, DAWN, Nov. 4, 2007, <http://www.dawn.com/news/274263/gen-musharraf-s-second-coup-charge-sheet-against-judiciary-media-promoting-negativism-country-s-integrity-at-stake-legislatures-intact> (describing Musharraf’s second coup and the Supreme Court’s previous attempts to re-legitimize and move back toward democracy shut down by Musharraf.)

127. *Begum Nusrat Bhutto*, (1977) 29 PLD (SC) at 721 (holding that, pursuant to General Zia’s martial law, the right to enforce Fundamental Rights as well as the Fundamental Rights themselves “stand validly suspended.”).

eliminating Bhutto. In April 1979, the Supreme Court convicted Bhutto of conspiracy to commit murder in an extremely politicized trial with a split verdict of four to three.¹²⁸ Despite several international appeals of clemency and commutation of sentence, Bhutto was hanged in the dead of night.¹²⁹ This dark episode—labeled “judicial murder” by Bhutto’s supporters and others—led to the popular perception that the judiciary was the puppet of the military.¹³⁰ Shortly after Bhutto’s execution, elections were cancelled and political parties banned.¹³¹ In 1981, Zia subjected the constitutional courts to another major purge and essentially barred them from exercising their powers of judicial review.¹³²

In 1988, after almost a decade-long clampdown on the judiciary, the Supreme Court found the opportunity to reassert its autonomy through its Fundamental Rights jurisdiction to support the political candidacy of Bhutto’s daughter, Benazir Bhutto.¹³³

Just months before the scheduled general election in 1988, Benazir challenged Zia’s amendments to laws regulating political parties.¹³⁴ She argued they fell afoul of the Fundamental Rights of freedom of association (Article 17) and the right to equality (Article 25) and were thus *ultra vires* of the 1973 Constitution.¹³⁵ The court agreed, holding for the first time that the constitutional courts’ judicial review powers extended to voiding legislation (or parts of it) that conflicted with

128. See *Zulfikar Ali Bhutto v. State*, (1979) 31 PLD (SC) 741 (containing a rejection of Bhutto’s final appeal, which ultimately led to his execution); *Zulfikar Ali Bhutto v. State*, (1979) PLD 31 (SC) 53 (containing Bhutto’s appeal of his guilty verdict); *Zulfikar Ali Bhutto v. State*, (1979) 31 PLD (SC) 38 (containing Bhutto’s initial trial in which he was found guilty); see also VICTORIA SCHOFIELD, *BHUTTO, TRIAL AND EXECUTION* 208 (1979) (recounting the events of the trials and the reaction of the news and journalists).

129. See Peter Niesewand, *Bhutto is Hanged in Pakistan*, WASH. POST, Apr. 4, 1979, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/27/AR2007122701067.html> (recounting the circumstances of Bhutto’s execution).

130. In April 2009, on the thirtieth anniversary of Bhutto’s death, a number of prominent legal figures, including retired judges, spoke openly about the various irregularities in the Bhutto trial, suggesting that Bhutto’s hanging was politically motivated. See, e.g., Rana Tanveer, *Experts Term Z. A. Bhutto’s Execution a Judicial Murder*, DAILY TIMES (Apr. 4, 2009), http://www.dailytimes.com.pk/default.asp?page=2009%5C04%5C04%5Cstory_4-4-2009_pg7_23.

131. See NOMAN, *supra* note 77, at 120 (recounting the execution of Bhutto and the subsequent election ban).

132. See Provisional Constitution Order, No. 1 of 1981, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Mar. 24, 1981, reprinted in 33 PLD (Central Statutes) 183, 183–91 (stating that no court could override the ruling of a Martial Court during a period of martial law).

133. See *Benazir Bhutto v. Federation of Pak.* (1988) 40 PLD (SC) 416.

134. *Id.* at 464–65 (explaining the constitutional grounds of *Benazir Bhutto*). The holding struck down laws introduced by General Zia that attempted to expand the grounds on which political parties could be banned, required parties to “register” with the Election Commission upon fulfilling certain conditions within a short limitation period, and provided the Election Commission untrammelled powers to allow or disallow a political party to function. *Id.* at 540.

135. *Id.*

Fundamental Rights on the basis of both *ex facie* and actual discrimination.¹³⁶ That the first exercise by the Supreme Court of its powers to strike down legislation arose in the context of a serving dictator's tenure is highly significant, as it enabled the court to create a constitutional moment around the pivotal theme of the synthesis of principles of state policy and Fundamental Rights.¹³⁷ This signaled a strategic reversal in the court's political priorities and the revival of its authority and legitimacy as a custodian of the much-anticipated democratic-constitutional order.¹³⁸ One only has to skim the *Benazir Bhutto* judgment to appreciate the heightened self-awareness of the court as a guardian of democracy. The judgment is speckled with references such as "the democratic way of life as ensured by Fundamental Rights,"¹³⁹ "the onward progress of democracy,"¹⁴⁰ "the democratic method,"¹⁴¹ and Fundamental Rights as "the pillars of democracy."¹⁴² By identifying with, and taking a calculated risk in supporting, the cause of political parties, the court attempted, among other things, to soft-pedal its anti-democracy posture in *Begum Nusrat Bhutto*.¹⁴³

136. *Id.* at 483. The court relied on Article 8 of the 1973 Constitution, which states that: Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the [Fundamental Rights], shall, to the extent of such inconsistency, be void. The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void.

PAKISTAN CONST. (1973) art. 8 §§ 1–2.

137. *See Benazir Bhutto*, (1988) 40 PLD (SC) at 489 (stating that the "intention of the framers of the Constitution...is to implement the principles of social and economic justice enshrined in the Principles of Policy within the framework of Fundamental Rights" and that a "rational synthesis" of these two components of the constitution "would lead to the establishment of an egalitarian society under the rule of law."). *See Khan & Siddique, supra* note 43, at 222–24, for an explanation of the principles of state policy, how they differ from the Fundamental Rights, and how the constitutional courts have synthesized them to achieve certain objectives under their PIL jurisdiction.

138. *See, e.g., id.* at 489 (stating that the ideal of an egalitarian society "can only be achieved under the rule of law by adopting the democratic way of life as ensured by Fundamental Rights and Principles of Policy").

139. *Id.*

140. *Id.* at 490.

141. *Id.* at 516.

142. *Id.* at 519.

143. *See, e.g., Benazir Bhutto*, (1988) 40 PLD (SC) at 580 (stating that the "inconsistency, the contradictions, the departures and the repudiation of the law laid down in the judgment of Begum Nusrat Bhutto's case and the provisions made in the Provisional Constitutional Order are too obvious and too numerous."). It is an interesting fact that the only two judges of the Supreme Court to sit on both apex court benches that decided *Begum Nusrat Bhutto* and *Benazir Bhutto*—namely, former Chief Justices Mohammad Haleem (1981–1989) and Nasim Hasan Shah (1993–1994)—were also the two pioneering and leading proponents of PIL in the late 1980s and early 1990s. *See Ahmed Rafay Alam, Public Interest Litigation and the Role of the Judiciary*, at 2, unpublished manuscript, available at <http://www.supremecourt.gov.pk/ijc/Articles/17/2.pdf> ("The seeds of PIL were planted in Pakistan in the mid to late 1980s by such luminaries of the legal fraternity as, *inter alia*, Chief Justice Muhammad Haleem and Nasim Hasan Shah"). Further, for the presence of the two justices on the Supreme Court benches in question, see *Begum Nusrat Bhutto*, (1977) 29 PLD (SC) at 657 and *Benazir Bhutto*, (1988) 40 PLD (SC) at 416. For a profile of Justice Haleem, see *Justice Haleem passes away*, DAWN, Aug. 12, 2006, <http://www.dawn>.

In many ways, the adoption of PIL was an epiphenomenon of the court's shift away from de facto regime legitimation to self-legitimation, and not simply a new form, to use Baxi's words, of "social legitimation."¹⁴⁴ An important point that is often overlooked in the existing PIL literature is the fact that the use of PIL was not directly relevant to the decision in *Benazir Bhutto*. It was only part of the dicta, but helped to buttress the democratic credentials of the Supreme Court by reinventing its interpretive approach toward its Fundamental Rights jurisdiction.¹⁴⁵ The court took its cue from the contestation over whether Benazir was an "aggrieved party" for the purpose of *locus standi*.¹⁴⁶ Early in the judgment, the court held that "it cannot be doubted that the petitioner is an 'aggrieved party.'"¹⁴⁷

The court then belabored "another important question mooted for consideration," namely whether the status of an "aggrieved party" was even a requirement under its original jurisdiction.¹⁴⁸ The court reasoned that "while construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation," and that "access to justice to all . . . is pivotal in advancing the national hopes and aspirations of the people"¹⁴⁹ The court further reasoned that only "if the procedure is flexible" will the court be in a position "to extend the benefits of socio-economic change . . . to all sections of the citizens."¹⁵⁰ As if to justify the break from past practice, the court consciously added that:

This approach is in tune with the era of progress and is meant to establish that the Constitution is not merely an imprisonment of the past, but is also alive to the unfolding of the future. It would thus, be futile to insist on ceremonious interpretative approach to constitutional interpretations as hitherto undertaken which only served to limit the controversies between the State and the individual without extending the benefits of the liberties and the Principles of Policy to all the segments of the population.¹⁵¹

PIL was thus born in the throes of a political judgment, and the irony of adverting to the notion of access to justice in such a context appears to have been entirely lost on the apex court's admiring observers.¹⁵² Put another way, the Supreme Court

com/news/205765/justice-haleem-passes-away. For a profile of Justice Shah, see *Former CJ Nasim Shah passes away*, DAWN, Feb. 4, 2015, <http://www.dawn.com/news/1161394>.

144. Baxi, *supra* note 3, at 127.

145. See *Benazir Bhutto*, (1988) 40 PLD (SC) at 420–520 (stating the importance of Fundamental Rights and analyzing the fundamental right to form a political party in depth).

146. *Id.* at 417–18.

147. *Id.* at 418.

148. *Id.*

149. *Id.* at 419–20.

150. *Id.*

151. *Benazir Bhutto*, (1988) 40 PLD (SC) at 421.

152. One exception appears to be Mehreen Kasuri Raza, who expressly points to the political nature of PIL's beginnings in *Benazir Bhutto*. See MENSKI, ALAM & RAZA, *supra* note 43, at 98–99 (discussing cases that are predominantly political in nature, rather than true public interest cases).

created PIL primarily as a political prop for its own institutional legitimation at a crucial political moment. That the notions of social upliftment and access to justice were part of the PIL narrative in *Benazir Bhutto* does not detract from—and in many ways even reinforces—the fundamentally political essence of PIL at the time of its birth, whereby the Supreme Court buried its undemocratic past and paved the way for systematically intervening in major political controversies in the future.

D. Early Development of PIL: Democratic Transition & Article 58(2)(b) Jurisprudence

The year 1988 was a watershed in Pakistan's political history. It was the year when General Zia-ul-Haq died in a mysterious plane crash,¹⁵³ resulting in a military retreat to the barracks and ushering in a new epoch of democratic transition. The early development of PIL took place within the larger context of this second cycle of democratic transition, which was, like the first attempt of the 1970s, riddled with serious challenges and contradictions as well as embedded in structural power relations hegemonized by the armed forces.¹⁵⁴ To begin with, even though the military command withdrew from Zia's strategy of government takeover for various reasons, there were several avenues available for exercising its political influence indirectly.¹⁵⁵ The most immediate method of control was the military's grip on the electoral process through a manufactured political bloc in the form of the Islami Jamhoori Ittehad (IJI or the Islamic Democratic Alliance).¹⁵⁶ The IJI brought together nine right-of-center political parties, united by their common agenda of propagating Zia's "Islamization program"—prominent amongst which was the Pakistan Muslim League (PML).¹⁵⁷ The primary purpose of the IJI was to undercut the resurgence of PPP under the leadership of Benazir Bhutto.¹⁵⁸ At the

153. Zia was killed along with several of his top army generals, as well as then U.S. Ambassador to Pakistan Arnold Lewis Raphel and the U.S. Chief Military Attaché Brigadier-General Herbert Wassom. The reasons for, and the circumstances surrounding, the plane crash remain shrouded in mystery. See Michael Serrill et al., *Pakistan Death in the Skies*, TIME, Aug. 29, 1988, <http://www.time.com/time/magazine/article/0,9171,968293,00.html> (recounting the death of Zia in a plane crash in the desert of Bahawalpur).

154. See Rasul B. Rais, *Pakistan in 1988: From Command to Conciliation Politics*, 29 ASIAN SURV. 199, 202–04 (1989) (discussing the role of the armed forces in elections after Zia's death).

155. *Id.*

156. *Id.* at 202 (recounting the elections that took place after Zia's death and the creation of the IJI party, which was composed of the PPP's opposition).

157. *Id.*; see also Seyyed Vali Reza Nasr, *Democracy and the Crisis of Governability in Pakistan*, 32 ASIAN SURV. 521, 523 (1992) (showing that the IJI was created to prevent PPP from sweeping the polls in the elections of 1988).

158. The IJI was the brainchild of Lieutenant General Hamid Gul, the head of Pakistan's Inter-Services Intelligence (ISI) at the time. See *Hamid Gul admits he had role in IJI formation*, THE DAILY TIMES, Jan. 5, 2010, http://www.dailytimes.com.pk/default.asp?page=2010%5C01%5C05%5Cstory_5-1-2010_pg_7_21 (showing that he admitted he was accountable for the creation of the IJI). Gul's recent public acknowledgment of his instrumental role in creating the IJI to undermine the PPP has attracted much scorn, both within and without the military. *Id.*; Editorial, *What the Generals must apologize for*, THE DAILY TIMES, Feb. 1, 2008, http://www.dailytimes.com.pk/default.asp?page=2008\02\01\story_1-2-2008_pg3_1 (showing

forefront of the IJI was Mian Nawaz Sharif, a PML politician from an industrial background who had been the chief minister of the most powerful province of Punjab under Zia's military government.¹⁵⁹ Though on the surface the elections centered on the political contest between Benazir Bhutto and Nawaz Sharif, the civilian political elite as an aggregate continued to maintain complex, opportunistic, and labyrinthine relations with various sections of the military establishment for their political survival and patronage.¹⁶⁰

The military also had available to it more long-term means of political control. It could expect to manipulate both the judiciary—as it was wont to do—and the presidential office to keep the civilian government in check through the constant threat of dissolution under the infamous Article 58(2)(b) of the 1973 Constitution. Article 58(2)(b) was inserted through a constitutional amendment, commonly known as the “Eighth Amendment,” by Zia in 1985.¹⁶¹ It enabled Zia, as president, to unilaterally dissolve an elected government “in his discretion where, in his opinion . . . a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”¹⁶²

By enabling the president to dissolve elected assemblies “on a largely subjective evaluation of their performance,” Article 58(2)(b) represented an “unprecedented empowerment” of the president.¹⁶³ There is nothing to suggest that

that retired Pakistani military officers drafted a letter to apologize for imposing martial law in the past and abrogating the constitution several times). It is also alleged that General Mirza Aslam Baig, then chief of Army staff, and other ISI and military personnel misused public money to bankroll the IJI's election campaign to ensure PPP's defeat in the general election of 1990. *See* Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig, Former Chief of Army Staff, (2013) 65 PLD (SC) 1. This “Mehran Bank scandal” first became public knowledge when it was unveiled in 1996 by then minister of interior Nasirullah Babar, a retired general, on the floor of the National Assembly. *Id.* Subsequently, Air Marshal (R) M. Asghar Khan filed a human rights petition in the Supreme Court (HRC 19/96), implicating several high-ranking officials and politicians, including Nawaz Sharif, in the financial scandal. *Id.* The case was finally disposed of by the Supreme Court in 2012. *Id.*

159. *See generally* BBC News Asia, *Profile: Nawaz Sharif*, BBC (Sept. 24, 2013 12:51 ET), <http://www.bbc.com/news/world-asia-22167511> (detailing Nawaz Sharif's political involvement).

160. *See generally* Rizvi, *supra* note 102, at 96 (noting that governance in Pakistan is a balancing act between the military and elected civilian government and that the military is capable of influencing political change).

161. The Constitution (Eighth Amendment) Act, 1985, § 5(b)(2)(b), THE GAZETTE OF PAKISTAN EXTRAORDINARY, Nov. 11, 1985, *available at* <http://www.pakistani.org/pakistan/constitution/amendments/8amendment.html>.

162. *Id.* § 5(b).

163. Siddique, *Jurisprudence of Dissolutions*, *supra* note 78, at 629; *see also* Charles H. Kennedy, *Presidential-Prime Ministerial Relations: The Role of the Superior Courts*, in PAKISTAN: 1995, 17, 18 (Charles H. Kennedy & Rasul Bakhsh Rais eds., 1995) [hereinafter Kennedy, *Prime Ministerial Relations*] (indicating that the language of the 1985 constitution designed a presidential-dominant system); Mohammad Waseem, *Constitutionalism in Pakistan: The Changing Patterns of Dyarchy*, 53 *DIAGENES* 102, 111 (2006) (describing the dissolution power as a setback to parliamentary sovereignty).

Zia intended the exercise of presidential power in Article 58(2)(b) to be justiciable.¹⁶⁴ Indeed, no one immediately called upon the courts to intervene when Zia dissolved the government of his own handpicked prime minister in early 1988.¹⁶⁵ But shortly after Zia's death, some members of the dissolved National Assembly approached the high courts to rule on the constitutional validity of the dissolution.¹⁶⁶ The matter was eventually appealed to the Supreme Court, paving the way for a new kind of judicialization that turned the court into a constitutional arbiter of presidential powers under Article 58(2)(b) and the ultimate judge of the fate of elected governments.¹⁶⁷

In the context of the military's political agenda and the nascent two-party system, this "jurisprudence of dissolutions"¹⁶⁸ emerging from Article 58(2)(b) is directly relevant to the story of PIL. It was, in many ways, constitutive of the politically-centric development of PIL in the 1990s. While the Supreme Court adjudicated the first two dissolution cases under its appellate jurisdiction in 1988 and 1990, the third such case made its way directly to the court under its original jurisdiction.¹⁶⁹ The fusion of the jurisprudence of dissolutions and PIL has had profound consequences for judicialization in Pakistan. The Supreme Court has resorted, time and again, to the strategy of merging different filaments of its jurisprudence with PIL to protect and ensure its institutional survival, enhance its institutional legitimacy, and continually enlarge its capacity to directly intervene in political questions. Since the merger of PIL with the jurisprudence of dissolutions, the social justice dimension of PIL has become increasingly ancillary to, if not eclipsed by, the Supreme Court's larger objective of asserting its autonomy from civilian democratic processes and actors.

III. PERIODIZED STUDY OF PIL: TRENDS IN JUDICIAL ACTIVISM

The periodized study of PIL presented derives from an extensive qualitative and quantitative review of all 218 reported judgments¹⁷⁰ of the Supreme Court in its

164. See Kennedy, *Prime Ministerial Relations*, *supra* note 163, at 17–18 (describing the president's confidence that his dissolution was unassailable).

165. See Siddique, *Jurisprudence of Dissolutions*, *supra* note 78, at 650 (discussing that a two and a half month delay in challenging the dissolution damaged the petitioner's case); see also *id.* at 648, n.152 (noting the lack of action by the prime minister himself).

166. See *Muhammad Sharif v. Fed'n of Pak.*, (1988) 40 PLD (Lahore High Ct.) 725, 761 (highlighting delays in bringing the challenge before the Lahore High Court with elections pending); *M. P. Bhandara v. Fed'n of Islamic Republic of Pak.*, (1988) 6 MLD (Sindh High Ct.) 2869, 2869 (challenging the dissolution in the Sindh High Court).

167. See *Fed'n of Pak. v. Muhammad Saifullah Khan*, (1989) 41 PLD (SC) 166, 190 (holding dissolution is subject to judicial review).

168. This term is borrowed from Siddique, *Jurisprudence of Dissolutions*, *supra* note 78.

169. See *Muhammad Nawaz Sharif v. President of Pak.*, (1993) 45 PLD (SC) 473, 555 (affirming that the matter could be brought directly before the Supreme Court).

170. "Reported" judgments refers to case law reported in both official law digests and on the Pakistan Supreme Court website, <http://www.supremecourt.gov.pk>. In recent years, the court has resorted to publishing interim judgments in important cases in addition to the final judgments and orders. The study, however, does not enumerate the interim judgments separately, but collapses them into a single case to avoid over-reporting. In cases where a dispositive judgment

original jurisdiction since the introduction of the 1973 Constitution. The qualitative analysis aims to provide a wide range of metrics for gauging shifts in PIL jurisprudence, the nexus of these shifts with judicial strategy, and the overall trends in judicial activism—and retreat—over time. The quantitative analysis is juxtaposed with the qualitative analysis to: (1) chart changes in the frequency and proportion of “unconstitutional” rulings, which are broadly defined as rulings that declare executive action or legislation unconstitutional; (2) observe the differential make up of litigants; and (3) examine the evolution of types of issues adjudicated in each phase. On the basis of a combined evaluation of the qualitative and quantitative data, the study identifies and divides PIL into three “waves” of judicial activism punctuated by two “troughs” signifying judicial retreat. These waves and troughs are further sub-divided into distinct phases that merit independent attention because of the important milestones that they represent within each wave or trough.

The periodized study also introduces into the PIL discourse new analytical categories for identifying and enumerating different types of PIL cases as well as for gauging the relative importance and currency of each type of PIL over time. These categories include: Typical PIL, Political PIL, Class Action PIL, and High Court Writ PIL.

A. First Wave of PIL Activism

1. Phase One, 1988–1993

Except for the distinction attached to the two seminal cases of *Benazir Bhutto v. Federation of Pakistan*—regarding the freedom of association of a leading political figure—and *Darshan Masih v. State*—regarding the life and liberty of bonded laborers¹⁷¹—PIL had gradual and modest beginnings. The few PIL cases reported in the first five years were not politically charged. Neither were they particularly pro-poor in the sense of the abject poverty and the immediate loss of dignity and liberty that marked the *Darshan Masih* case. Successive cases in Phase One dealt with issues as diffuse as rights of pensioners in the civil services, appointment of civil judges, recruitment policies in state enterprises, student malpractices in universities, and environmental issues. However, despite the lack of focus and the contradictions, there was a note of excitement and optimism in the general reception of PIL as is evident from the early literature and commentary on the subject.¹⁷²

has not been issued at the date of the conclusion of the study—namely, the date of retirement of Chief Justice Iftikhar Chaudhry, December 11, 2013—the study includes in its tally the last reported judgment for the case.

171. See *supra* Part II, Section A for discussion about *Benazir Bhutto v. Federation of Pakistan* (1988) 40 PLD (SC) 416 and *Darshan Masih v. State* (1990) 42 PLD (SC) 513.

172. See Hussain, *PIL in Pakistan*, *supra* note 43, at 1 (characterizing PIL as a novel strategy to promote social justice free from undue influence); Shah, *supra* note 43, at 31 (“Public Interest Litigation, in a sense, is an effort to eradicate social evils through the agency of ‘Law.’”). There were a total of thirteen reported cases in Phase One.

2. Phase Two, 1993–1997

Phase Two was a turning point for PIL. In many ways, this phase represents the apotheosis of PIL's jurisprudential development and innovation. It was also the phase during which PIL acquired a determinedly political character. The Supreme Court adjudicated a string of mega-political cases, justifying them, however tenuously, as Fundamental Rights-related issues of public importance.¹⁷³ Two of these cases challenged the constitutionality of the president's decision to dissolve, respectively, the incumbent governments of Nawaz Sharif in 1993 in *Muhammad Nawaz Sharif v. President of Pakistan*¹⁷⁴ (*Third Dissolution*) and Benazir Bhutto in 1996 in *Benazir Bhutto v. President of Pakistan*¹⁷⁵ (*Fourth Dissolution*) pursuant to Article 58(2)(b). The Supreme Court justified the use of its original jurisdiction for adjudicating these political issues on the basis that Article 184(3) was "an edifice of democratic way of life and manifestation of responsibility casts [sic] on this Court as a protector and guardian of the Constitution."¹⁷⁶

In addition to deciding the fate of two prime ministers in a short span of three years, the court seized a significant opportunity to redefine the process for appointment of judges of the constitutional courts under the garb of PIL.¹⁷⁷ Judicial appointments became an important issue for the courts after the repeal of Article 58(2)(b) under Nawaz Sharif's second government.¹⁷⁸ The departure of Article 58(2)(b) was a setback for the judiciary in terms of its direct power over the democratic political process. On the other hand, for Sharif it meant a majoritarian government that was subservient neither to the president nor to the Supreme Court.

It was in this context that institutional control over judicial appointments turned into an outright institutional battle, as this was the only effective leverage that the chief justice had for preserving his authority. In *Al-Jehad Trust v. Federation of Pakistan*¹⁷⁹ (*Judges' Case*), the Supreme Court essentially armed the chief justice with the authority to trump presidential nominees for judicial appointment in the event of a deadlock.¹⁸⁰ Soon after, when the Federation failed to appoint five judges nominated by then Chief Justice Sajjad Ali Shah, the court,

173. See, e.g., *Benazir Bhutto v. President of Pak.*, (1998) 50 PLD (SC) 388; *Muhammad Nawaz Sharif v. President of Pak.*, (1993) 45 PLD (SC) 473.

174. (1993) 45 PLD (SC) 554.

175. (1998) 50 PLD (SC) 432.

176. *Muhammad Nawaz Sharif*, (1993) 45 PLD (SC) at 735.

177. See *Babar Awan v. Fed'n of Pak.*, (1998) 50 PLD (SC) 45 (mandating that the president formalize appointments in accordance with earlier judgments); *Al-Jehad Trust v. Fed'n of Pak.*, (1996) 48 PLD (SC) 324 (arming the chief justice with the authority to trump presidential nominees for judicial appointment in the event of a deadlock).

178. See *Al-Jehad Trust v. Fed'n of Pak.*, (1996) 48 PLD (SC) at 329 (explaining that consultations of the judiciary in appointments is important in that it provides a means to secure independence of the judiciary and prevent political appointments).

179. (1996) 48 PLD (SC) 324.

180. See *id.* at 405 (emphasizing superior expertise of the judiciary in the constitutionally required "consultation" of appointments). The court also held that if the government declined to accept the chief justice's recommendations for judicial appointments, it would have to specify its reasons in writing, which would in turn be open to judicial review. See *id.* (requiring that reasons for ignoring the chief justice be weighed against the public interest).

once again relying on its PIL jurisdiction, mandated that the president formalize the appointments in accordance with its earlier judgment.¹⁸¹

Amidst the institutional competition between the government and the apex court, signs of internal opposition began to appear against the chief justice. While transferring dissident judges from the Islamabad headquarters to provincial registries of the Supreme Court in an attempt to marginalize them, the chief justice also initiated contempt proceedings against Prime Minister Sharif and other members of Parliament as pushback on their harsh and open criticism of the judiciary.¹⁸² The contempt proceedings were deliberately disrupted by an angry mob of Sharif's party workers, who openly threatened to assault members of the judicial staff and to take the chief justice into custody.¹⁸³ Shocked by the storming of the Supreme Court, the justices adjourned the contempt proceedings and sought the safety of their chambers.¹⁸⁴ Finally, when intra-court fissures appeared within the Supreme Court over the eligibility of the chief justice himself to hold office, the dispute was settled through PIL.¹⁸⁵ It culminated in the forced retirement of Chief Justice Sajjad Ali Shah on the ground that his appointment had violated the well-established convention of seniority.¹⁸⁶

Thus, the twin issues of judicial review of presidential dissolution of government and judicial appointments dominated the original jurisdiction of the Supreme Court in the mid-1990s. While the court asserted jurisdiction over the former on the basis of enforcement of the freedom of association,¹⁸⁷ it rationalized its intervention in the latter through a general, unenumerated, and supposedly universal notion of access to justice.¹⁸⁸

181. See *Babar Awan*, (1998) 50 PLD (SC) at 47–50 (referencing the *Judges' Case* in support of directing the president to finalize appointments).

182. See Raja Riaz, *How contempt notice to PM was dealt in past*, DAILY TIMES, Jan. 17, 2012, <http://archives.dailytimes.com.pk/national/17-Jan-2012/how-contempt-notice-to-pm-was-dealt-in-past>. At issue was the judicial suspension of the Fourteenth Constitutional Amendment, which gave the head of a political party the power to unseat any member of the party from the National and Provincial Assemblies for violating party discipline. The provision additionally barred the judiciary from entertaining any legal proceedings in respect of the new law. See Constitution (Fourteenth Amendment) Act, 1997, available at <http://www.pakistani.org/pakistan/constitution/amendments/14amendment.html>.

183. See Raymond Bonner, *Protest Disrupts Contempt Case Against Pakistan Premier*, N.Y. TIMES, Nov. 29, 1997, <http://www.nytimes.com/1997/11/29/world/protest-disrupts-contempt-case-against-pakistan-premier.html> (discussing how the Supreme Court was forced to suspend proceedings because supporters of the prime minister had stormed the building).

184. For the court's version of events, see *Muhammad Ikram Choudhry v. Muhammad Nawaz Sharif*, (1998) 31 SCMR (SC) 176, 178, indicating the court had no alternative other than to adjourn. See also Ardeshir Cowasjee, *Storming of the Supreme Court*, DAWN, Nov. 28, 1999, <http://www.dawn.com/news/1074391> (describing events leading up to the storming of the court).

185. See *Malik Asad Ali v. Fed'n of Pak.*, (1998) 50 PLD (SC) 161, 192 (invalidating chief justice's appointment on grounds he was not the most senior judge at the time).

186. *Id.*

187. See *Muhammad Nawaz Sharif v. President of Pak.* (1993) 45 PLD (SC) 554, 557–58 (establishing that rights to associate extend to the operation of a political party).

188. See *Malik Asad Ali*, (1998) 50 PLD (SC) at 191 (defining access to justice through an

Other innovations in PIL jurisprudence during this phase included the much-celebrated judicial intervention in *Shehla Zia v. WAPDA*, a case involving the construction of a grid station that posed a potential environmental and health hazard.¹⁸⁹ The seminal aspect of *Shehla Zia* was less the court's indulgence of environmental issues and environmental rights activists—such issues fell within the purview of PIL from the very outset—than the extension of the “right to life” to encompass a life of dignity and well-being.¹⁹⁰ In times to come, the *Shehla Zia* precedent would be used and abused by both litigants and the Supreme Court to limitless proportions.¹⁹¹

The foregoing categories of Political PIL and Class Action PIL—the latter involving a determinate class of aggrieved persons—held major precedential value for judicial activism in the future. But the more Typical PIL cases—involving entitlements of government employees and the right to unionize, student malpractice in universities, recruitment policies in relation to government and public authorities, criminal cases of unlawful detention and illegal sentencing, and rights of prisoners—continued to form the mass of PIL in the first wave of judicial activism. Within a decade of its judge-led creation, PIL had thus evolved into a farrago of purely political issues, environmental issues, and criminal law cases that were human rights related, and middle class interests, typically those of government employees. Barring very few exceptions, the initial romanticism with social justice for the poor and the vulnerable seemed to have been prematurely effaced. This is strikingly similar to the early evolution of SAL in India, where scholars like Baxi recognized as early as the mid-1980s that the movement was “at best an ‘establishment revolution.’”¹⁹²

Figure One presents a pie chart showing the share of the total PIL cases litigated of different types of PIL litigants in Phases One and Two collectively. The total number of PIL cases reported is forty-five—thirteen in Phase One and thirty-two in Phase Two.

independent judiciary as a constitutionally-protected fundamental right).

189. (1994) 46 PLD (SC) 693, 693.

190. *See id.* at 713 (confirming constitutional protections to life expanded to rights beyond biological existence).

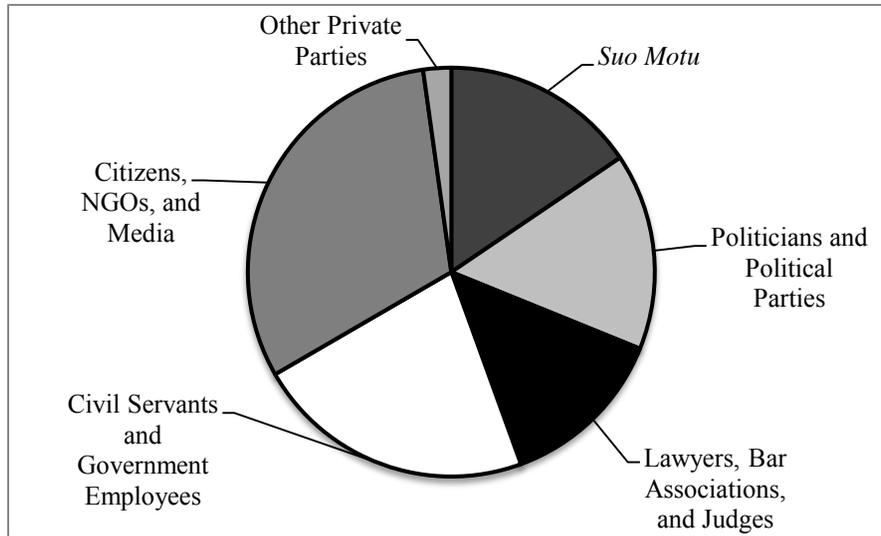
191. Maryam Khan, *Legal Solution to a Political Question*, THE NEWS ON SUNDAY, Jan. 8, 2012, <http://jang.com.pk/thenews/jan2012-weekly/nos-08-01-2012/enc.htm#1> [hereinafter Khan, *Legal Solution*] (asserting that the right to life has been “a regular feature of the highly thoughtless Article 184(3) jurisprudence emanating from Chief Justice Iftikhar Chaudhry’s Court since 2005 under the garb of ‘judicial activism’. Any number of activities and policies, ranging from wedding meals and kite flying to development projects and oil pricing mechanisms, have fallen prey to the Court’s intervention through the ‘right to life’”).

192. Baxi, *supra* note 3, at 132.

FIGURE 1

Types of PIL Litigants During Phases One & Two

Represented by each type's share of PIL cases litigated during Phases One & Two

**B. Judicial Retreat****1. Phase Three, 1998–2000**

With the expulsion of Chief Justice Sajjad Ali Shah in late 1997, the Supreme Court showed visible signs of retreat in its PIL activism. The court was not chastened merely by the debacle over the chief justice's status. Its cautious and restrained approach toward judging the constitutionality of executive action was fundamentally a result of the cohesiveness within the government as well as broad support for the government in the judiciary. Most challenges to government action during Phase Three were dismissed and there was not a single reported *suo motu* case.

However, it is important to make note of an undertow of rulings through which the court sought to consolidate its jurisdictional space even as it evaded direct confrontation with the government and its political agenda. In cases involving the government's attempts at shrinking the Supreme Court's turf by either cementing new parallel court systems or increasing the substantive ambit of existing parallel courts, the court responded decisively in favor of protecting its jurisdiction.¹⁹³ These cases included the momentous *Liaquat Hussain v. Federation of Pakistan* judgment, in which the court struck down the establishment of military

193. See, e.g., *Liaquat Hussain v. Fed'n of Pak.* (1999) PLD (SC) 504 (striking down the establishment of military courts for the trial of civilians for certain civil offenses); *Jamat-i-Islami Pak. v. Fed'n of Pak.*, (2000) 52 PLD (SC) 111 (striking down parts of anti-terrorism legislation that, among other things, encroached on the review jurisdiction of the courts).

courts for the trial of civilians for certain civil offences.¹⁹⁴ As with the fusion of Article 58(2)(b) jurisprudence with PIL, the Supreme Court admitted the *Liaquat Hussain* petition in its original jurisdiction on the basis of a landmark precedent from the previous year that had been decided on appeal, *Mehram Ali v. Federation of Pakistan*.¹⁹⁵ Likewise, in *Jamat-i-Islami v. Federation of Pakistan* the court was once again quick to use PIL to declare illegal the reintroduction of various provisions of an existing anti-terrorism legislation that had already been held to be *ultra vires* in the earlier appellate judgment of *Mehram Ali*.¹⁹⁶ The co-existence of judicial retreat with a heightened purpose of self-preservation is a pattern that the Supreme Court would follow even under General Musharraf's military regime.

2. Phase Four, 2000–2005

In the middle of 1999, relations between Nawaz Sharif and his Chief of Army Staff (COAS), General Pervez Musharraf, soured over an armed conflict between Pakistan and India in Kashmir, known as the Kargil War.¹⁹⁷ The war was a huge political embarrassment for Sharif's government, which was, at the time, negotiating a peace process with India.¹⁹⁸ In October 1999, Sharif attempted to replace Musharraf with a new appointee while Musharraf was en route to Pakistan from Sri Lanka on a commercial flight.¹⁹⁹ Sharif ordered a diversion of the flight in order to physically isolate Musharraf until the new COAS had been instated.²⁰⁰ The affair ended with the military taking command of civil aviation and overthrowing Sharif's government in a nonviolent coup.²⁰¹

Musharraf imposed a state of emergency and dissolved the elected assemblies and the Senate, bringing the country under the control of the Armed Forces.²⁰² One

194. (1999) 51 PLD (SC) at 549–50.

195. See *Mehram Ali v. Fed'n of Pak.*, (1998) 50 PLD (SC) 1445, 1465 (striking down several provisions of anti-terrorism legislation and directing the federal government to make the necessary amendments to ensure, among other things, that anti-terrorism judges had security of tenure and that appellate power concerning terrorism cases was vested in the high courts).

196. See *Jamat-i-Islami Pak.*, (2000) 52 PLD (SC) 111, 154 (holding sections of the act in question unconstitutional).

197. See *Nawaz Blames Muhsarraf for Kargil*, THE TIMES OF INDIA, May 28, 2006, <http://timesofindia.indiatimes.com/world/pakistan/Nawaz-blames-Musharraf-for-Kargil/article-show/1581473.cms> (describing how Sharif first learned of the Pakistani invasion from his Indian counterpart).

198. *Id.*

199. See *Under the Gun*, TIME, Oct. 25, 1999, <http://content.time.com/time/world/article/0,8599,2053991,00.html> (describing Sharif's attempt at seizing control of the military while General Musharraf was in flight).

200. *Id.*

201. For a detailed, albeit subjective, account of events, see generally AMINULLAH CHAUDRY, MUSHARRAF, NAWAZ & HIJACKING FROM THE GROUND: THE BIZARRE STORY OF PK 805 (2010). The author was director general of the Civil Aviation Authority at the time these events transpired.

202. See Proclamation of Emergency Order, 1999, The Gazette of Pakistan Extraordinary, Oct. 14, 1999, available at <http://pakistanconstitutionlaw.com/proclamation-of-emergency-order-1999/>. Musharraf, as the "Chief Executive," headed a self-appointed federal cabinet and a new National Security Council that was formalized as a constitutional body in 2002. See Legal

of his first tasks was to prime the judiciary for legitimating his coup, indemnifying his extra-constitutional actions, and neutralizing Sharif.²⁰³ He compelled constitutional court judges to take a new oath, effectively restraining them from questioning the constitutional validity of the emergency.²⁰⁴ When some judges refused the oath, Musharraf issued a fresh order just days before the judiciary was scheduled to hear constitutional challenges to the coup to ensure that recalcitrant judges would cease to hold office.²⁰⁵ Thirteen judges of the appellate judiciary—six from the Supreme Court, including the chief justice, and seven from the high courts—were accordingly purged.²⁰⁶ Unlike the military dictators of the past, including Zia, Musharraf allowed the judiciary to remain open for business as usual while maintaining control over the judges.

If the Supreme Court rolled back its activism in Phase Three, it went into active retreat in Phase Four. This is not to say that the court withdrew from intervention in political questions. To the contrary, the court adjudicated some of the most politically charged questions through PIL during this phase, but the proportion of unconstitutional rulings was at its lowest ever. In essence, the purged Supreme Court used PIL to legitimize Musharraf's regime. In May 2000, in *Zafar Ali Shah v. General Pervez Musharraf*, the court unanimously approved the military takeover on the basis of the “doctrine of State necessity” articulated in the pre-PIL *Begum Nusrat Bhutto* precedent.²⁰⁷ In doing so, the court reinforced its longstanding convention of providing a judicial solution to an extra-constitutional situation that, to the extent possible, would be mutually beneficial to the military dictator and the court itself.²⁰⁸ With this judgment, PIL came full circle and incorporated into its ambit the pre-PIL judicial function of de facto regime legitimation.

Framework Order, No. 24 of 2002, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Aug. 21, 2002, available at http://www.pakistani.org/pakistan/constitution/musharraf_const_revival/lfo.html.

203. See Provisional Constitution Order No. 1 of 1999, Oct. 14, 1999, available at <http://pakistanconstitutionlaw.com/provisional-constitution-order-1999/> (declaring the chief executive and the Proclamation of Emergency Order, 1999 cannot be challenged).

204. Oath of Office (Judges) Order No. 10 of 1999, Dec. 31, 1999, available at <http://pakistanconstitutionlaw.com/oath-of-office-judges-order-1999/>.

205. See Oath of Office (Judges) Order No. 1 of 2000, Jan. 25, 2000, available at <http://pakistanconstitutionlaw.com/21-%E2%80%93oath-of-office-judges-order-2000-1-of-2000-dated-25-1-2000/> (ordering that the oath entails compliance with the Proclamation of Emergency, 1999 and Provisional Constitution Order No. 1 of 1999 and that judges failing to take the oath will automatically cease to hold office). The new oath of judicial office specifically omitted the words “to preserve and defend the Constitution.” See *Zafar Ali Shah v. General Pervez Musharraf*, (2000) 52 PLD (SC) 869, at 1215.

206. See Siddique, *Jurisprudence of Dissolutions*, *supra* note 78, at 696 (explaining that, of the judges removed by Musharraf, the Supreme Court justices refused to take the oath while the high court judges were not offered to do so).

207. See *Zafar Ali Shah*, (2000) PLD (SC) 869, 1219.

208. *Id.* at 1220 (holding, in the same breath, that General Musharraf had “validly assumed power by means of an extra-constitutional step, in the interest of the State and for the welfare of the people,” and that the “Superior Courts continue to function under the Constitution.”).

A holistic reading of *Zafar Ali Shah* reveals the Supreme Court's deep-seated scorn for civilian politics and political parties.²⁰⁹ It additionally suggests that the court's apparent concern for democracy and so-called constitutional values was at best superficial.²¹⁰ The court could not help but launch into a diatribe against the attacks on judicial independence by the Sharif government.²¹¹ As if the irony of Musharraf's purge was completely lost on it, it accused Nawaz Sharif of disparaging and maligning the judiciary in parliamentary speeches, engaging in a "slandorous campaign" of tapping the telephones of judges, and tarnishing the judiciary's image by showing open contempt for its judgments and storming the court.²¹² The court thus justified Musharraf's coup as "merely a case of constitutional deviation for a transitional period" in restoring democracy and judicial independence.²¹³ At the same time, the court lamented the departure of Article 58(2)(b), not only signaling to Musharraf its support for the reinstatement of Zia's infamous Eighth Amendment, but also emphasizing the need for its own institutional ascendancy over and policing of the democratic process.²¹⁴

The Supreme Court justified its new oath on the basis of "the well-established principle that the first and the foremost duty of the Judges of the Superior Courts is to save the judicial organ of the State."²¹⁵ An important consequence of this, the court stated, was the preservation of the independence of the judiciary to "protect the State fabric and guarantee human rights/Fundamental rights."²¹⁶ The court expressed the necessity of its own survival in the following terms:

Independence of *Judiciary* means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience. This Court, while performing its role as "the beneficial expression of a laudable political realism", had three options open to it in relation to the situation arising out of the military take-over on Twelfth day of October, 1999: *firstly*, it could tender resignation *en bloc*, which most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be; *secondly*, a complete surrender to the present regime by dismissing these petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction . . . and *thirdly*, acceptance of the situation as it is, in an attempt to save what institutional values remained to be saved.²¹⁷

209. *See id.* at 869.

210. *Id.* at 1213 ("We are not in favor of an Army rule in preference to a democratic rule. There were, however, evils of grave magnitude with the effect that the civilian governments could not continue to run the affairs of the country in the face of complete breakdown.").

211. *Id.* at 1168–69.

212. *Id.* at 1168–69, 1217–18.

213. *Zafar Ali Shah*, (2000) PLD (SC) at 1222.

214. *Id.* at 1168 ("[P]robably the situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Article 58(2)(b).").

215. *Id.* at 1214.

216. *Id.* at 1215.

217. *Id.* (emphasis in original).

Another prominent example of judicial self-preservation was the PIL judgment in *Khan Asfandiyar Wali v. Federation of Pakistan*, also known as the NAB Ordinance judgment, that boldly struck down parts of the National Accountability Bureau Ordinance of 1999 (NAB Ordinance).²¹⁸ Amongst other things, the NAB Ordinance created special accountability courts for offenses involving political corruption and was particularly important for the Musharraf government because of its overwhelming emphasis on across the board accountability.²¹⁹ *Khan Asfandiyar Wali* came in the thick of the de facto government's drive to consolidate power and demonstrates that the constitutional courts were considerably more unforthcoming with support for Musharraf when it came to preserving their own jurisdiction and scope of authority.²²⁰

Thus, the retreat from PIL activism in Phase Four was a result of the court's simultaneous performance of the functions of regime legitimation and judicial self-preservation—and at times self-aggrandizement. On the one hand, the court provided constitutional cover to Musharraf's political and constitutional engineering in a long line of cases. On the other, its capacity to guard its turf and selectively and opportunistically apply its jurisprudence, as well as its institutional ability to exploit political questions for enhancing its judicial prestige and power, are equally important in making sense of this half-decade. Even as the court supported Musharraf's decisions, it further entrenched its own role as an indispensable arbiter in the process of democratization. Quite apart from validating Musharraf's legislative agenda, the court fashioned itself as the leading promoter of democracy by creating incentives for changes to the “political culture.”²²¹

218. See *Khan Asfandiyar Wali v. Fed'n of Pak.*, (2001) 53 PLD (SC) 607.

219. See PERVEZ MUSHARRAF, IN THE LINE OF FIRE: A MEMOIR 150 (2006) (“I established the (NAB) to put the fear of God into the rich and powerful who had been looting the state”). This was part of Musharraf's “seven-point agenda” for “guided democracy”: “(1) Rebuild national confidence and morale. (2) Strengthen the federation, remove inter-provincial disharmony, and restore national cohesion. (3) Revive the economy and restore investor confidence. (4) Ensure law and order and dispense speedy justice. (5) Revamp state institutions. (6) Devolution of power to the grass-root level. (7) Ensure swift and across the board accountability.” *Id.* at 149–50.

220. Indeed, the constitutional courts have had a history of protecting their turf when it comes to parallel court systems attempting to oust their jurisdiction—starting with a bold attempt at questioning General Zia's parallel military courts in the 1980s as a result of which the judicial powers of the constitutional courts were completely clipped. See *Khan Asfandiyar Wali*, (2001) 53 PLD (SC) at 607 (circumscribing of General Musharraf's accountability courts even as the Supreme Court strategically let stand the NAB Ordinance subject to its judicial review powers); *Mehram Ali v. Fed'n of Pak.*, (1998) 50 PLD (SC) 1445, 1477 (challenging openly Nawaz Sharif's anti-terrorism courts in the late 1990s, which brought the courts under the direct supervision of the constitutional courts); *Mahmood Khan Achakzai v. Fed'n of Pak.*, (1997) 49 PLD (SC) 324, 483, 488, 490 (discussing high court cases in reaction to which Zia suppressed the constitutional courts in the early 1980s).

221. See *Pak. Muslim League (Q) v. Chief Exec. of Pak.*, (2002) 54 PLD (SC) 994, 1001. The *Pakistan Muslim League (Q)* case related to a constitutional challenge to a legal amendment introduced by the Musharraf regime that restricted forthcoming elections to only those candidates who had at least a bachelor degree, while at the same time granting recognition to “madrasa” or seminary degrees of right-wing Islamic party candidates. See *id.*; see also *The Conduct of*

The court also retained the ultimate power of deciding which political questions were ripe for immediate judicial resolution and which could be left advantageously open-ended for future judicial interventions. Two cases offer prominent examples of the selective use of jurisprudence by the Supreme Court to strike an optimal balance between accommodation of a de facto ruler and judicial self-preservation. In *Watan Party v. Chief Executive/President of Pakistan*,²²² which challenged Musharraf's unilateral amendments to the 1973 Constitution,²²³ and *Pakistan Lawyers Forum v. Federation of Pakistan*,²²⁴ which challenged, among other things, the reintroduction of Article 58(2)(b) by Musharraf through the Seventeenth Amendment,²²⁵ the court made a strategic retreat from political questions. That the stance of the Supreme Court was decidedly anti-democratic is amply demonstrated by its consistent posture of condescension, pontification, and paternalism toward political parties, its unabashedly partisan comments in favor of Article 58(2)(b),²²⁶ and its pronouncement that the parliamentary form of government was dead.²²⁷ The strategic dissent of the Supreme Court, therefore, was limited to ensuring its own institutional survival and seldom extended to buffering

General Elections Order, No. 7 of 2002, art. 8A, Feb. 27, 2002, available at <http://pakistancanstitutionlaw.com/category/14-the-conduct-of-general-elections-order-2002/> (providing for general elections in the country for the election of members of the National Assembly and the Provincial Assemblies). In a long-winded judgment that openly discredited the democratic forces of the country, the Supreme Court stated that the "political culture" of Pakistan was such that the "record of most of the elected representatives of the four dissolved National and Provincial Assemblies speaks volumes about their psyche, lack of education and sense of responsibility." *Pak. Muslim League (Q)*, (2002) 54 PLD 1026. Referring to the politics of the 1990s, the court thought it was "crystal clear that the political scenario in Pakistan is a sad tale of failures on the part of the public representatives" and that "what was practised in those years was nothing but parliamentary dictatorship." *Id.* at 1026–27. To the argument that the government had not facilitated educational progress, especially in far-flung areas like the tribal areas and Balochistan, the court dismissively replied that this was "not supported by any authentic data." *Id.* at 1028. The court then alluded to its "duty to the posterity" and highlighted its own positive role in changing the "political culture" by upholding the amendment and creating incentives for education. *Id.* at 1027. As if all this condescension towards the political process were not enough, the court also attempted to underscore and define the nature of future politics in line with Musharraf's agenda. It reminded the politicians that the transfer of power to the local governments under Musharraf's devolution plan meant that the role of the future Parliament would "mainly be confined to lawmaking," and accordingly the new educational qualifications would raise the "level of competence" in Parliament. *Id.* at 1027–28.

222. (2003) 55 PLD (SC) 74.

223. Legal Framework Order, No. 24 of 2002, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Aug. 21, 2002, available at http://www.pakistani.org/pakistan/constitution/musharraf_const_revival/lfo.html.

224. (2005) 57 PLD (SC) 719.

225. Constitution (Seventeenth Amendment) Act, 2003, available at <http://www.pakistani.org/pakistan/constitution/amendments/17amendment.html>.

226. See *Watan Party*, (2003) 55 PLD (SC) at 80 (describing Article 58(2)(b) as a safety valve). The court referred to the "utility" of the jurisprudence of dissolutions of the 1990s "in the background of the political culture of this country," and bemoaned the repeal of Article 58(2)(b) by the former Prime Minister Nawaz Sharif. *Id.* at 79–80.

227. See *Pak. Lawyers Forum*, (2005) 57 PLD (SC) at 767 (asserting a purely parliamentary system has given way to a new balance of powers).

the democratic process from military adventurism.

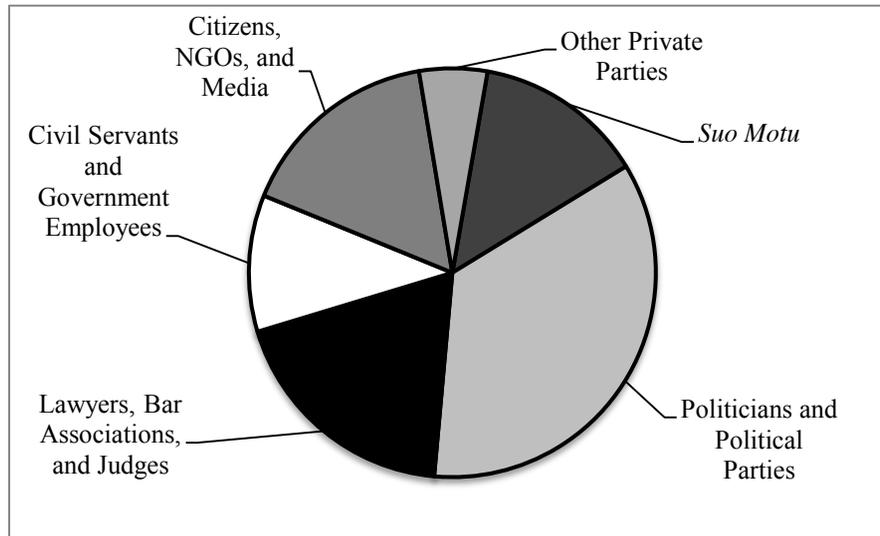
The co-optation of PIL for regime legitimation had at least two consequences for its evolution in the future. First, and most obviously, the Supreme Court descended steadily into another crisis of legitimacy, at least partly of its own making.²²⁸ Further, the umbrella of PIL was now spread out so wide that its jurisprudence could be stretched to equally gratify democratic and anti-democratic political agendas. Hereon, the court could elect to apply one or more, or even parts, of its many different threads of jurisprudence and justify them as PIL precedents. Where earlier the jurisprudence of democracy legitimation, as in *Benazir Bhutto*, and the jurisprudence of dissolutions or the jurisprudence of judicial appointments, as in the *Judges' Case*, could be identified as applicable in specifically defined situations, the jurisprudence of regime legitimation jettisoned these important distinctions. An illustration of this is the court's express references to and nostalgia for Article 58(2)(b) in *Zafar Ali Shah*. This signaled to Musharraf the court's support for the reinstatement of presidential powers of dissolution, but also emphasized the need for its own institutional ascendancy over, and policing of, the democratic process—a tradition of institutional superiority grounded in the *Begum Nusrat Bhutto* judgment. Particularly in the third wave of PIL activism, the court would resort to this kind of muddling of different parts of its jurisprudence to achieve the desired outcome.

In terms of the frequency of issues adjudicated in Phases Three and Four, Political PIL clearly surpassed Typical PIL. Politicians and political parties replaced citizens, civil society organizations, and government employees as the single largest group of petitioners. It appears that, despite a history of judicial conservatism against democratic processes, civilian politicians and political parties resolutely continued to invest in and strengthen the Supreme Court by using it as a vehicle for political solutions in the absence of other democratic avenues and consensus.

Figure Two presents a pie chart showing the share of the total PIL cases litigated of different types of PIL litigants in Phases Three and Four collectively. The total number of PIL cases reported is thirty-seven—sixteen in Phase Three and twenty-one in Phase Four.

228. For instance, Tayyab Mahmud argues that in validating coups, the Supreme Court took the path of least resistance when it could have simply declined from adjudicating regime change on the basis of the political question doctrine. *See generally* Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'état and Common Law*, 27 CORNELL INT'L L.J. 49 (1994); Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225 (1993).

FIGURE 2
Types of PIL Litigants During Phases Three & Four
 Represented by each type's share of PIL cases litigated during Phases Three & Four



C. Second Wave of PIL Activism: Judicial Self-Legitimation & Resuscitation of PIL

1. Phase Five, 2005–2007

By April 2005, Musharraf had legally secured his de facto position. He had legitimized his coup,²²⁹ ensured that his adversaries remained in exile,²³⁰ set up a local government system to undercut the power of provincial governments,²³¹

229. See *Zafar Ali Shah*, (2000) 52 PLD (SC) at 869.

230. Nawaz Sharif was convicted of hijacking and terrorism by the Anti-Terrorism Court almost simultaneously with the constitutional validation of Musharraf's coup. See *Mian Nawaz Sharif v. State*, (2000) 18 MLD (SC) 946. Sharif was sentenced to two concurrent sentences of rigorous imprisonment for life, a fine of 500,000 rupees, and confiscation of property by the government of Pakistan to the extent of 5 million rupees. *Id.* Additionally, Sharif was directed to pay 2 million rupees as compensation to all the passengers of the aircraft in equal shares. *Id.* Sharif's appeal to the Karachi High Court was dismissed in late 2000. Mian Muhammad Nawaz Sharif v. State, (2002) 54 PLD (SC) 152, 182–83. Following the dismissal of his appeal, he ostensibly went into "voluntary exile" to Saudi Arabia as part of an agreement between the Pakistani and Saudi governments, which barred him from politics for the next decade in return for the non-execution of his criminal sentence. See MUSHARRAF, *supra* note 219, at 164–66 (explaining how Musharraf reached an agreement to have Nawaz Sharif and his family exiled).

231. See Int'l Crisis Grp., *Devolution in Pakistan: Reform or Regression?*, ASIA REP. NO. 77 (2004), available at <http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/077devolution-in-pakistan-reform-or-regression.aspx> (finding that Pakistan's military government's plan launched in 2000, led by Musharraf, to transfer power to local governments actually drained their power while doing little to stop corruption or create accountability).

engineered elections,²³² maneuvered a majority in Parliament,²³³ successfully amended the 1973 Constitution for his own benefit,²³⁴ and constitutionally legitimized his dual office.²³⁵ The next time he would need to strategize about retaining his authority would be a few months prior to the late 2007 elections. He was not likely to require any significant support from the judiciary in the interregnum. In any event, Iftikhar Chaudhry, the senior-most judge who was elevated to chief justice in June 2005, was a Musharraf-loyalist.²³⁶ With his own man holding the reins of the Supreme Court, Musharraf could not have felt more invulnerable.

The Supreme Court, on the other hand, had survived through the critical phase of constitutional deviation, but not without another crisis of legitimacy. After a thriving decade of PIL, it seemed that the court had been co-opted by the military to perpetuate the new regime and that the vibrant constitutional rights jurisprudence had died a premature death. To dispel this impression, the court set down fresh targets. With Musharraf's eye turned away to larger issues of economic policy, foreign investment, and the "war on terror," the time was now ripe for the

232. See generally MOHAMMAD WASEEM, *DEMOCRATIZATION IN PAKISTAN: A STUDY OF THE 2002 ELECTIONS* (2006).

233. Musharraf's efforts to tightly control and engineer the electoral process were only partially successful. The military-backed PML-Q secured the highest number of seats but had to contend with a hung Parliament. See MUSHARRAF, *supra* note 219, at 175. The new Parliament was completely deadlocked and reported negligible activity during the first year of its operation. See *id.* at 173–76. Musharraf finally broke the stalemate by striking a deal with the right-wing Islamist Muttahida Majlis-e-Amal (MMA). *Id.* at 175. The MMA was a cohort of prominent religious parties that initially came together in opposition to the Pakistan-U.S. alliance on the "war on terror." See *id.* Some alleged that the MMA was created with the assistance of intelligence agencies to provide the PML-Q with a potential ally in a future coalition government. See *id.* Musharraf squarely denied this and expressed his profound distrust of the Islamist party, recalling that negotiations with the MMA were successful only after "a laborious and often very frustrating series of parleys . . ." See *id.* at 175–76 (describing how Musharraf was able to authenticate a new "Legal Framework Order" in getting the Seventeenth Amendment passed). Be that as it may, the military well knew that the MMA could be used as a pawn for filling up constitutional gaps. For an account of the historical ties between security forces and right-wing elements in Pakistan, see generally Int'l Crisis Grp., *Pakistan: The Mullahs and the Military*, ASIA REP. NO. 49 (2003), available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/Pakistan%20The%20Mullahs%20and%20the%20Military.pdf>.

234. See *Pak. Lawyers Forum*, (2005) 57 PLD (SC) at 736 (finding that under the Seventeenth Amendment, Musharraf can hold two offices in certain circumstances—the president of Pakistan and COAS); *Watan Party*, (2003) 55 PLD (SC) at 78–80 (finding that the president could create amendments to the constitution, and, as a result, under the Eighth Amendment, Article 58(2)(b) of the constitution was revived, giving the president greater powers and the ability to dissolve the National Assembly in certain circumstances).

235. See *Pak. Lawyers Forum*, (2005) 57 PLD (SC) at 735 (stating that under the Seventeenth Amendment to the constitution, Musharraf became COAS and president of Pakistan).

236. See Ghias, *supra* note 29, at 991 (finding that Chaudhry, along with other justices, was handpicked by Musharraf to be appointed to the Supreme Court to replace the justices who refused to take an oath under the Provisional Constitution Order No. 1 of 1999 and that Chaudhry supported Musharraf's government in many Supreme Court cases).

court to try to restore its legitimacy and regenerate public confidence in its capacity to deliver justice to the common man.

There are many parallels to be drawn between the judicial activism of this period with the PIL movement of the 1990s. At both times, the Supreme Court had emerged from an ignominious past that it wished to bury. In both instances, the court had the scope and opportunity for innovation and an enhanced interpretation of its own powers. And at both times, the court had only to signal its eagerness for an expanded role to set in motion a cascade of public interest petitions. In fact, the court in 2005 had an important advantage in that it had only to select and apply Fundamental Rights principles from a developed jurisprudence. But at another level, the court was treading risky and uncharted territory by resuscitating PIL while Musharraf was still president and COAS. Understandably, in the first year of Chief Justice Chaudhry's leadership, the court dealt with governance and policy questions of relatively low political salience, slowly building up its tempo and raising the stakes as it gained more visible publicity and support.²³⁷

One of the first steps that the court took was to set up a special Human Rights Cell to reduce the backlog of human rights and other PIL cases.²³⁸ The primary objective was "to check the abuse of power or misuse of authority or arbitrary or *mala fide* acts and decisions of the authorities."²³⁹ The Supreme Court specially mobilized its *suo motu* powers to take cognizance of newsworthy human rights abuses. The résumé of early PIL cases set the tone for future cases involving abuse of public office and created the foundation upon which the court could deploy its wide investigative and remedial powers. Four different prototypical categories of PIL cases can be identified in Phase Five: (1) human rights; (2) policy reform; (3) environmental and land use regulation; and (4) legislative override.

The first category, human rights cases, comprised mostly complaints regarding the growing number of missing persons who were reported by newspapers and human rights groups to have disappeared as a result of counter-terrorism activities of the Pakistani military and intelligence agencies (collectively, the *Missing Persons Cases*).²⁴⁰ In December 2005, after noting a newspaper article about these enforced disappearances, the Supreme Court took *suo motu* action and directed the government to either produce the detainees or provide information

237. See *id.* at 991–94 (describing how the court under Chaudhry expanded its presence in PIL and judicial functions, starting first with construction safety and urban planning, then deregulation of price controls, and then the privatization of public enterprises).

238. See *id.* at 992 (stating that Chaudhry started an ambitious program of PIL and further expanded this by creating the Human Rights Cell at the Supreme Court).

239. Supreme Court of Pak., REPORT OF THE SUPREME COURT REPORT JUBILEE EDITION, at 6 (2005–2006). The report states that since the start of the Human Rights Cell, over 3,600 human rights applications were registered, out of which 450 were disposed of in the first year. *Id.*

240. See AMNESTY INT'L, PAKISTAN DENYING THE UNDENIABLE: ENFORCED DISAPPEARANCES IN PAKISTAN 1, 4 (2008), available at <http://www.amnesty.org/en/library/asset/ASA33/018/2008/en/0de43038-57dd-11dd-be62-3f7ba2157024/asa330182008eng.pdf>

(providing evidence of how the practice of enforced disappearances had grown since 2001 as Pakistan, under Musharraf, had been holding individuals without charging them or putting them on trial and denying knowledge of their whereabouts despite witnesses identifying them in detention).

about their whereabouts.²⁴¹ The *suo motu* intervention invited a flood of petitions, and in less than a year about 186 persons had been traced from the list of 458 *Missing Persons Cases* pending before the court at the time.²⁴² These persons were either released or transported to known detention centers.²⁴³

The second category, policy reform cases, attempted to go beyond the remit of the immediate controversy to lay down standards for effective regulatory frameworks in instances where the problem was likely to persist due to systemic policy failures.²⁴⁴ The third category, environmental and land use regulation cases, dealt with issues of urban planning in which the Court invoked several different Fundamental Rights to directly restrain or induce government authorities to abandon development projects that posed a significant threat to the environment.²⁴⁵ The fourth category, legislative override cases, sought to impose outright bans on certain social activities in contradiction to existing legislation.²⁴⁶ Cases in this category continued over many months without any resolution, with the court reimposing a ban, Parliament overruling it through amended legislation, and the court attempting to revoke the legislation and charging individuals with contempt for non-compliance with its previous restraint orders.

A micro-study of about fifteen major *suo motu* petitions under the Supreme Court's original jurisdiction from the second half of 2005 to the first half of 2007, sampled from the PIL data used in this article—reported either through official judgments or recurrent newspaper reports—shows that these petitions responded

241. *Id.* at 5.

242. *Id.*

243. *Id.*

244. *See, e.g.*, Eng'r Zafar Iqbal Jhagra v. Fed'n of Pak., (2009) 61 PLD (SC) 363 (concerning frequent increases in oil prices); Saad Mazhar v. Capital Dev. Auth., (2007) 40 SCMR (SC) 1925 (concerning defective construction of buildings in the context of a natural disaster); Saad Mazhar v. Capital Dev. Auth., (2005) 38 SCMR (SC) 1973 (stating that the builders of multi-dwelling homes had to take responsibility for tenants displaced by an earthquake); Criminal Miscellaneous Application, No. 66 of 2006 (laying down basic guidelines for regulation of the pharmaceuticals sector to check the flow of spurious drugs in the market).

245. *See, e.g.*, *Suo Motu Case No. 10 of 2005*, (2010) 43 SCMR (SC) 361, 363 (concerning a potential threat to large areas of a reserve forest resulting from a government-sponsored tourist development project); Moulvi Iqbal Haider v. Capital Dev. Auth., (2006) 58 PLD (SC) 394, 399 (holding that land could not be converted from a public park to a mini golf course through a lease without the general public having an opportunity to place bids on the property or state their objections); *Suo Motu Case No. 3 of 2006*, (2006) 58 PLD (SC) 514 (concerning construction of a multistoried car park in a forested area that had for decades been a public park and holding that although the project had been abandoned, the government was restrained from converting the park into something else in the future); *Suo Motu Case No. 13 of 2005 (SC)* (concerning environmental threat caused by housing schemes).

246. *See, e.g.*, *Suo Motu Case No. 11 of 2005*, (2006) 58 PLD (SC) 1 (concerning lack of regulation of kite-flying activities allegedly resulting in deaths and damage to property); Muhammad Siddique v. Gov't of Pak., (2005) 57 PLD (SC) 1, 18–19 (holding that a provincial regulation prohibiting wasteful and exploitative expenses at wedding ceremonies is unconstitutional as it conflicted with existing federal law).

invariably to critical newspaper reports.²⁴⁷ Usually, a news item struck a chord with an individual judge and was directly converted into a petition by the chief justice. At other times, an individual or interest group submitted a newspaper cutting along with a letter requesting action, known as “epistolary” petitions.²⁴⁸ In fact, most *suo motu* and epistolary petitions in Phase Five can easily be traced back to specific news items.²⁴⁹

The early *suo motu* petitions seemed to create a feedback loop between the Supreme Court and the media. The newspapers reported on an important policy failure or human rights issue.²⁵⁰ The court took notice of it and summoned assistance from various stakeholders on the basis of its inherent jurisdiction.²⁵¹ The newspapers then publicized the court’s actions.²⁵² The court was prompted to gain more publicity by, at times, raising the stakes in the current petitions and, at other times, taking cognizance of more reported abuses and regulatory lapses.²⁵³ This feedback loop also signaled civil society members and citizens groups to approach the court with similar issues that did not gain any media coverage but that were otherwise newsworthy. With the passage of time, not only did the frequency of *suo motu* cases increase rapidly, but the court’s investigative style also crystallized into a pattern of: summoning important officials for information and accountability; setting up judicial commissions for stakeholder coordination and input; galvanizing police action, arrests, and trials where required; and initiating contempt proceedings against those who violated the court’s directives.²⁵⁴ Within the first few months of Iftikhar Chaudhry’s term as chief justice, it was obvious that the Supreme Court and its chief justice, quite apart from being media favorites, had transformed into champions of human and environmental rights and other public interest groups by creating a judicial counter-narrative to the so-called governance endeavors of the Musharraf government.²⁵⁵ Newspapers brimmed with

247. See Ghias, *supra* note 29, at 992–1002 (examining the effect of the court’s judgments, reported through official judgments or recurrent newspapers, on the media and the resulting growth of PIL). The actual number of *suo motu* petitions that the chief justice claimed to have initiated during this period was 6,000. See *I am innocent, want open trial: Justice Iftikhar*, DAWN, Mar. 23, 2007, <http://www.dawn.com/news/238826/i-am-innocent-want-open-trial-justice-iftikhar> (finding that in the two years since becoming the chief justice, Chaudhry has cleared a massive backlog of *suo motu* cases).

248. Syed Mansoor Ali Shah, Advocate, Supreme Court of Pakistan, International Judicial Conference 2006, *Salvaging Democracy—Judiciary our Last Hope: going beyond public interest litigation* (Aug. 4, 2006) at 6, available at <http://www.supremecourt.gov.pk/ijc/Articles/17/1.pdf>.

249. This corroborates Ghias, *supra* note 29, at 992–1002, which describes how Chaudhry encouraged the courts’ media presence while the media encouraged the court to expand its independence and power.

250. See *id.* at 1001 (providing a chart showing the feedback loop between the public, Supreme Court, and media).

251. *Id.*

252. *Id.*

253. *Id.* at 992–1002.

254. *Id.*

255. Ghias, *supra* note 29, at 992–1002.

even the most trivial reportage on the Supreme Court.²⁵⁶ The chief justice received this publicity with much fervor and dedicated an entire section of the Supreme Court's annual report to a selection of newspaper clippings applauding the court's vision and courage.²⁵⁷

The steadily intensifying political consensus against Musharraf at this juncture emboldened the court to take stronger action against government officials. During 2006 and 2007, the Supreme Court did not let pass any opportunity to admonish senior police, intelligence officers, and other public officials in strong language, particularly in the context of the *Missing Persons Cases*,²⁵⁸ and permitted these admonishments to be published in newspapers. Musharraf initially chose to tolerate the court's excesses.

The real turning point in relations between the executive and judiciary arose when the Supreme Court stalled the privatization of Pakistan's largest state-owned steel mill in June 2006 through its PIL jurisdiction in *Wattan Party v. Federation of Pakistan*.²⁵⁹ Quite apart from causing revenue losses, the *Wattan Party* judgment was a big blow to Musharraf's liberalization plans.²⁶⁰ Prior cases had attempted to check relatively low-level corruption in narrow instances of development policy. The present case, on the other hand, boldly insinuated that Musharraf's handpicked prime minister was complicit in a grand corruption scandal.²⁶¹

Yet, the government announced that it would honor the court's directives. The calculus of the Musharraf government suggested that reacting negatively to the Supreme Court would entail higher costs and raise greater suspicions than abiding by its process requirements for privatization of state enterprises that would only add to the government's credibility in the long term. Nevertheless, by early 2007, the Musharraf government moved to neutralize the court to achieve the twofold objective of depriving anti-Musharraf mobilizations of their political mileage in general and preventing the Court from defecting on the impending issue of the re-election of Musharraf as president-COAS.

Though Phase Five did include a few Political PIL cases as anti-Musharraf opposition escalated, the more frequent category of cases concerned Class Action PIL in which the court's *suo motu* intervention as well as regular petitions sought

256. *Id.*

257. *See* Supreme Court of Pak., *supra* note 239. The report also emphasized that the "approach and methodology of the Chief Justice of Pakistan is gaining popularity among the masses, which is apparent from the press comments on the actions taken by him," and that "[m]ore and more people are sending their grievances to the Chief Justice . . ." because of which "the work in the HR Branch is increasing at a tremendous pace." *Id.*

258. *See* Ghias, *supra* note 29, at 995–1002, 1011 (explaining how the court increased its power to taking on the *Missing Persons Cases*).

259. (2006) 58 PLD (SC) 697 (holding that the process of the privatization of the Pakistan Steel Mill Corporation resulted in violations of the law and the Letter of Acceptance and Share Purchase Agreement were invalid).

260. *See id.* at 698 (stating that the privatization had its own merits in the economic indicators).

261. *Id.*

to expose petty corruption in development projects and restrain government action on behalf of a large group of affected people.

2. Phase Six, 2007

On March 9, Musharraf declared Chief Justice Chaudhry non-functional through a Presidential Reference that officially charged the chief justice with misconduct and abuse of office.²⁶² A Supreme Judicial Council (SJC) was constituted to hear the Presidential Reference.²⁶³ Just days later, lawyers associations around the country came out onto the streets in a show of angry protest against the government.²⁶⁴ Images of the “black coats” heatedly chanting anti-Musharraf slogans by the hundreds and braving bleeding wounds inflicted by an over-reactive police force captured the headlines week after week.²⁶⁵ As a result of various pressure tactics employed and political alliances forged by this lawyers movement, the Supreme Court wrested jurisdiction of the Presidential Reference from the SJC on the basis of its PIL powers in *Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan v. The President of Pakistan*.²⁶⁶

262. The charges against the chief justice included misuse of public funds for private expenses, misuse of authority, personal bias in appointment of judges, wanton use of luxury cars and protocol, and unethical attempts to place his son at a high-level position in the government. See Mansoor Ahmed, Secretary, *Notification No. F.1(2)/2005.A.II*, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Mar. 12, 2007, at 675.

263. See Mansoor Ahmed, Secretary, *Notification No. F.529(2)/2007-Secy.*, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Mar. 12, 2007, at 675 (stating that a reference was filed against Justice Chaudhry so he could not perform his functions). The SJC, composed of senior judges, was first established by the military dictator General Ayub Khan in 1962 as a court-centered mechanism to prescribe a code of conduct for constitutional court judges and to recommend to the president the removal of recalcitrant judges. See PAKISTAN CONST. (1962) art. 128. The 1973 Constitution retained the SJC with certain modifications. See PAKISTAN CONST. (1973) art. 211. Further, Musharraf’s Seventeenth Amendment conferred *suo motu* power on the SJC to itself initiate complaints against judges. Constitution (Seventeenth Amendment) Act, 2003, available at <http://www.pakistani.org/pakistan/constitution/amendments/17amendment.html>. Ironically, Chief Justice Iftikhar Chaudhry had played an instrumental role, before his own removal, in institutionalizing this *suo motu* power and formalizing a code of conduct for judges of the appellate judiciary. See, e.g., *Body formed for superior judges’ accountability*, DAWN, Sept. 25, 2005, <http://www.dawn.com/news/158245/body-formed-for-superior-judges-accountability>.

264. See, e.g., Zahid Hussain, *Pakistan: Can the ‘Black Coats’ Restore Democracy?*, THE TIMES (June 26, 2008), <http://www.thetimes.co.uk/tto/law/article2211483.ece> [hereinafter Hussain, *Pakistan*] (stating that thousands of protestors converged on Islamabad, pressing for the immediate restoration of the sixty judges sacked by Musharraf); Anne-Marie Slaughter, *Pakistan’s Black Revolution*, THE GUARDIAN (Apr. 25, 2008), <http://www.guardian.co.uk/commentisfree/2008/apr/25/pakistansblackrevolution> (describing the lawyers’ protests, mentioning that the lawyers were routinely beaten, gassed, brutalized, and humiliated).

265. The lawyers movement came to be known as the “black coat revolution.” Hussain, *Pakistan*, *supra* note 264.

266. See Chief Justice of Pak., *Iftikhar Muhammad Chaudhry v. The President of Pak.*, (2007) 62 PLD (SC) 61, 116 (referring to the short order of the court dated July 20, 2007 and stating that the Presidential Reference is set aside). Arguably, the 1973 Constitution did not envisage such a move. The constitutional provision relating to the SJC—Article 211—vests exclusive jurisdiction in the SJC to decide questions of the removal of judges, and bars “any court” from calling into question the SJC’s proceedings, its report to the president, or its

This was the second time in Pakistan's history that the Supreme Court was seized with questions surrounding the constitutionality of the removal of its own chief justice—the first being the expulsion of Sajjad Ali Shah during Phase Two.²⁶⁷ But never before had a sitting military dictator pretended to use or acquiesced in using a constitutional channel to eliminate the highest judicial officer of the country.

Moreover, unlike previously, the contestation was not merely between the president and the chief justice, but more broadly between the Musharraf government on the one hand, and the lawyers, media, and civil society members, as well as certain political parties in support of the chief justice on the other. The Supreme Court—now composed of thirteen justices, mostly sympathetic to the cause of the chief justice—set aside the Presidential Reference as unlawful and reinstated Chief Justice Chaudhry.²⁶⁸ Through PIL, apex court justices strategically overrode an existing constitutional mechanism for the removal of judges. The identification of PIL with the chief justice's reinstatement—in other words, the move from PIL as a mere instrument to an embodiment of judicial independence and power—marks a distinct phase in its evolution.

The chief justice believed that his normative authority, along with the Supreme Court's, had been tremendously enhanced by the lawyers movement.²⁶⁹ The newfound zeal and the broad judicial consensus with which the court mounted challenges to the executive in the succeeding months reflected this belief. In August 2007, the court initiated (or reactivated) hearings on three important constitutional controversies under PIL: the *Missing Persons Cases*; *Pakistan Muslim League (N) v. Federation of Pakistan*, concerning a petition regarding the return of Nawaz Sharif from exile to contest elections;²⁷⁰ and *Jamat-i-Islami v.*

recommendation for the removal of a judge. See PAKISTAN CONST. (1973) art. 211. The Supreme Court justified its stance “in view of admitted fact that the present cases involve unprecedented important constitutional and legal issues.” *Ifthikhar Muhammad Chaudhry*, (2010) 62 PLD (SC) at 261 (quoting from the interim order of the court dated May 7, 2007).

267. See Munir, *Public Interest Litigation*, *supra* note 43, at 115 (describing how PIL was used to determine the eligibility of the Chief Justice Sajjad Ali Shah to hold office).

268. See Justice Ifthikhar Muhammad Chaudhry, Chief Justice of Pak. (2007) 59 PLD (SC) 578, 582 (stating that the justices voted 10–3 that Chaudhry could be reinstated).

269. On various occasions after his restoration, the chief justice is reported to have said that the responsibility of the judiciary had “doubled” due to the “trust and confidence” bestowed upon it by society. *No One Can Violate Verdicts: CJ*, DAWN, Sept. 2, 2007, <http://www.dawn.com/news/264204/no-one-can-violate-verdicts-cj>. He also said that the Supreme Court could “not sit idle” when state institutions failed to provide “succor” to the aggrieved, and that the court would continue to intervene on behalf of private parties when their complaints indicated a “pattern of violation of fundamental rights by a state agency.” *Institutions Have Failed to Help the Aggrieved: CJ*, DAWN, Sept. 11, 2007, <http://www.dawn.com/news/265684/institutions-have-failed-to-help-the-aggrieved-cj/print>. Lastly, he stated that judges must take special care because “the public scrutinizes judges from their decisions and they are before public eyes at all times.” *People Judge Judges from Judgments: CJ*, DAWN, Sept. 28, 2007, <http://www.dawn.com/news/268682/people-judge-judges-from-judgments-cj>.

270. See *Pakistan Muslim League (N) v. Fed'n of Pak.*, (2007) 59 PLD (SC) 642, 680 (holding that Nawaz Sharif has the right to enter and remain a citizen of Pakistan).

Federation of Pakistan, petitions challenging Musharraf's reelection and his dual office of president-COAS.²⁷¹ Later, two other petitions were added to these: *Wajihuddin Ahmed v. Chief Election Commissioner*, a petition against the Election Commission's decision to allow Musharraf to run for the presidential election,²⁷² and *Dr. Mobashir Hassan v. Federation of Pakistan*, a petition challenging the constitutionality of Musharraf's National Reconciliation Ordinance of 2007 (NRO).²⁷³ Evidently, the Supreme Court actively used PIL to oust the dictator and became the epicenter of political contestation. As the hearings in all these PIL cases brought questions of government accountability into sharp relief, the court's posture became more threatening and confrontational, particularly in the *Missing Persons Cases*. Together, these cases pushed the political temperature to a crescendo, culminating in the imposition of a second emergency by Musharraf in November 2007.²⁷⁴

All the cases adjudicated by the Supreme Court in Phase Six were thus highly political and can be squarely categorized as Political PIL. Even the *Missing*

271. *Jamat-i-Islami v. Fed'n of Pak.*, (2008) 60 PLD (SC) 30, 38.

272. (2008) 60 PLD (SC) 13, 21–22.

273. The final NRO judgment—decided in December 2009—is reported as *Dr. Mobashir Hassan v. Fed'n of Pak.*, (2010) 42 PLD (SC) 265 and held that the NRO is illegal and unconstitutional. The NRO was a piece of executive legislation negotiated between Musharraf and the PPP. Faisal Siddiq, *The NRO Mystery*, DAWN, Dec. 31, 2011, <http://www.dawn.com/news/684586/the-nro-mystery>. The beneficiaries of the NRO were persons found to be “falsely involved for political reasons or through political victimization in any case initiated between 1st of January, 1986 to 12th of October, 1999.” *TI Pakistan: Promulgation of National Reconciliation Ordinance*, TRANSPARENCY INTERNATIONAL (Oct. 5, 2007), http://www.transparency.org/news/pressrelease/20071005_ti_pakistan_promulgation_of_national_reconciliation_ordinance. This sought to provide amnesty to Benazir Bhutto and her husband Asif Ali Zardari from several different ongoing corruption cases, but deliberately left intact Nawaz Sharif's conviction in the Anti-Terrorism Court. In return, the PPP agreed to desist from voting against Musharraf in the 2007 presidential election. *See, e.g., National Reconciliation Ordinance: Supremely divisive law called NRO revisited*, EXPRESS TRIBUNE, Jan. 17, 2012, <http://tribune.com.pk/story/322744/national-reconciliation-ordinance-supremely-divisive-law-called-nro-revisited>.

274. Proclamation of Emergency, (Nov. 3, 2007), *available at* http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html. Quite apart from the fact that the constitution could not be suspended under a constitutional emergency, Musharraf's “emergency” amounted to martial law as Musharraf declared it in his capacity as the COAS and not president. *See, e.g., Muhammad Faisal Ali, Martial Law imposed in garb of emergency*, DAWN, Nov. 7, 2007, <http://www.dawn.com/news/274738/martial-law-imposed-in-garb-of-emergency>. The Proclamation of Emergency departed from conventional justifications for a “state of emergency,” namely political failure, internal security, and national interest, and instead was overwhelmingly predicated on the alleged expansion and abuse of judicial authority. *See infra* note 276. Musharraf claimed that the judiciary had brought the government to a standstill:

All senior functionaries of the government have to frequent the courts, they are being sentenced, they are subjected to humiliation in the courts Around 100 *suo motu* cases are being processed in the Supreme Court and I have been told that there are thousands of applications. And all these *suo motu* cases are concerned with government departments. So now the system of governance stands paralyzed.

Tika Iqbal Muhammad Khan v. Gen. Pervez Musharraf, (2008) 60 PLD (SC) 178, 294–98.

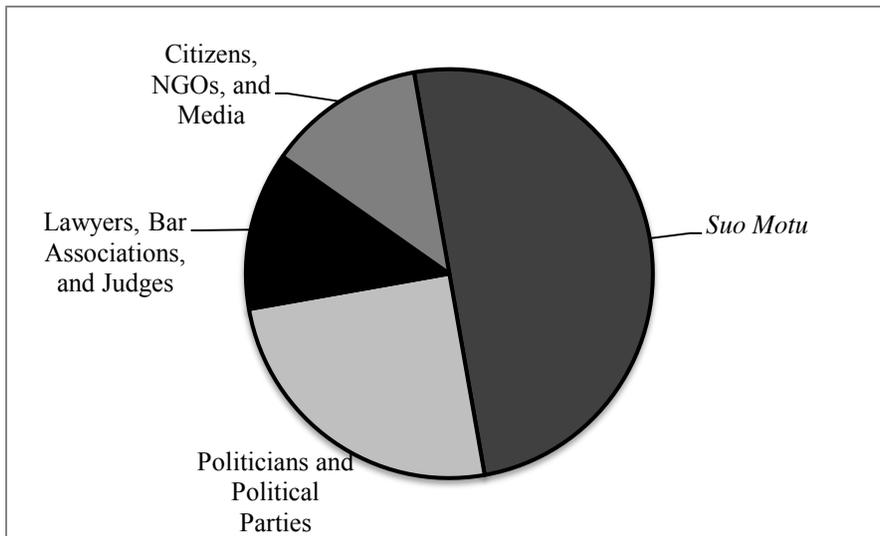
Persons Cases took on a political character, with the court repeatedly summoning, condemning, and threatening the law enforcement and military agencies with contempt and other repercussions. However, this genre of Political PIL could not be more divergent from the Political PIL cases of Phase Four. Unlike the latter, which was based on regime legitimation, Political PIL in Phases Five and Six was based on a series of progressively more serious judicial challenges to the incumbent government and the proportion of unconstitutional rulings by the court was strikingly high.²⁷⁵

Figure Three presents a pie chart showing the share of the total PIL cases litigated of different types of PIL litigants in Phases Five and Six collectively. Noticeably, half the reported judgments were *suo motu* interventions, while the type “civil servants and government employees” did not appear as litigants during that period, pointing to the cramming of the Court’s docket with and the court’s own fixation on a select menu of political issues. The total number of PIL cases reported is twenty-six—sixteen in Phase Five and ten in Phase Six.

FIGURE 3

Types of PIL Litigants During Phases Five & Six

Represented by each type's share of PIL cases litigated during Phases Five & Six



D. Judicial Retreat

1. Phase Seven, 2007–2009

The sole aim of Musharraf’s second emergency was to purge the

275. See *infra* Part III, Section F for discussion of the court’s move to aggressively oppose the incumbent government through unconstitutional rulings.

constitutional courts so as to retrospectively obtain judicial affirmation for his reelection as president.²⁷⁶ Musharraf swiftly and unceremoniously removed a large majority of the incumbent judges and installed Abdul Hameed Dogar as the new chief justice.²⁷⁷ Chief Justice Dogar's court admitted several petitions—once again under its PIL jurisdiction—challenging the validity of Musharraf's emergency.²⁷⁸ These petitions have become jointly known as *Tika Iqbal Muhammad Khan v. General Pervez Musharraf*.²⁷⁹

The court's verdict came after a mere ten-day deliberation, making it one of the speediest judgments to be generated on a highly important political question. The court held, for the third time, that the de facto ruler's actions were "in the interest of State necessity and for the welfare of the people" so as to "save the country from chaos and anarchy."²⁸⁰ But the *Tika Iqbal* judgment stands apart from the previous two precedents in one peculiar way: the focal point of the court's ire and scorn was the Chaudhry court's unfettered intervention in political questions.²⁸¹ The gravamen of the court's disapproval was the former chief justice's excessive reliance on, and habitual misuse of, the original jurisdiction of the court under Article 184(3).²⁸² The court indulged in a lengthy survey of precedents to make it "abundantly clear that the power and jurisdiction under Article 184(3) of the Constitution cannot be invoked for redress of individual grievances," but that "[u]nfortunately, the former Chief Justice of Pakistan paid no heed to the judicial

276. A peculiar feature of Musharraf's "emergency" was that all legislative assemblies were left unscathed and allowed to function as before. *See* Proclamation of Emergency, (Nov. 3, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html. Had Musharraf's objective been to dissolve the government, he could have exercised his presidential power under Article 58(2)(b) without resorting to emergency powers, or—better still—he need only have waited a few more days until November 15 for the constitutional term of the assemblies to expire in the ordinary course. Clearly, the only state institution directly affected by the "emergency" was the judiciary. Further, nine out of the eleven grounds in the Proclamation of Emergency directly implicated the judiciary as the institution responsible for the crisis. *See, e.g., Gen Musharraf's second coup: Charge-sheet against judiciary; 'Media promoting negativism'; Country's 'integrity at stake'; Legislatures intact*, DAWN, Nov. 4, 2007, <http://www.dawn.com/news/274263/gen-musharraf-s-second-coup-charge-sheet-against-judiciary-media-promoting-negativism-country-s-integrity-at-stake-legislatures-intact>.

277. *See* Provisional Constitutional Order No. 1 of 2007 (Nov. 3, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html (stating that all judges are governed by and subject to the Oath of Office Judges Order and will also be subject to any such further orders as the President may pass); Oath of Office (Judges) Order 2007 (Nov. 3, 2007), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/judges_oath_order_2007.html (holding that under the Provisional Constitutional Order, a judge needs to take the Oath of Office); *see also*, Ghias, *supra* note 29, at 1014 (stating that sixty-four judges were replaced when they refused to take an oath under the Provisional Constitutional Order).

278. *See Tika Iqbal Muhammad Khan*, (2008) 60 PLD (SC) 178 (allowing the petitions challenging Musharraf's Proclamation of Emergency under Article 184(3) of the constitution).

279. *Id.*

280. *Id.* at 289.

281. *Id.* at 267.

282. *Id.*

precepts.”²⁸³ The court further carped that Chief Justice Chaudhry had exercised hegemonic powers over the rest of the judiciary by arrogating to himself the function of superintending the subordinate courts and siphoning off selective cases pending in the high courts and subordinate courts to the apex court.²⁸⁴ The court thus signaled a major retreat from PIL activism—ironically through PIL itself. The total number of PIL cases reported in Phase Seven is ten.

E. Third Wave of PIL Activism

1. Phase Eight, 2009–2013

In March 2009, Iftikhar Chaudhry was reinstated, for the second time, to the chief justiceship of the Supreme Court.²⁸⁵ By this time, Musharraf had been effectively routed and a freshly elected government inducted through general elections in early 2008, resulting in Asif Ali Zardari, co-chairperson of the PPP, as president.²⁸⁶ The coalition government of the PPP was a fragile and contingent attempt at keeping the new civilian democratic process from faltering. The Supreme Court’s position and its capacity to assert itself against political institutions, on the other hand, could not have been stronger. Riding on the heady wave of the lawyers’ movement, the court redeployed its PIL activism with renewed intensity against the new government. The reinstated judges, foremost the chief justice, had a special inducement to do so. Upon replacing Musharraf as president, Zardari procrastinated on his agreement with other political leaders that his government would expedite the reinstatement of the deposed judges.²⁸⁷ This only provoked the lawyers and Chaudhry supporters in the political opposition, including Nawaz Sharif, to redouble their efforts through a “Long March” protest in March 2009, which was successful in restoring the judges.²⁸⁸

With such unqualified ascendance of the Supreme Court over the government in combination with the popular political and social legitimacy on which it firmly rested, the court hoped to exercise its powers in an unrestrained and expansive manner. The most striking statistic of PIL activism in Phase Eight is the sheer

283. *Id.*

284. *Tika Iqbal Muhammad Khan*, 2008) 60 PLD (SC) at 267.

285. *See, e.g., Pakistan reinstates sacked judge*, BBC, (Mar. 16, 2009 3:07 PM) http://news.bbc.co.uk/2/hi/south_asia/7945294.stm (detailing the reinstatement of Chaudhry by Prime Minister Yousaf Raza Gilani and jubilant reactions of his supporters).

286. *See Kennedy, Judicialization of Politics, supra* note 29, at 151 (explaining that Musharraf resigned as president on August 18, 2008, and Asif Zardari was elected by Parliament to be president on September 6, 2008).

287. *See id.* at 152 (finding that Zardari delayed in restoring the judges to their former positions); *see also* James Traub, *The Lawyers’ Crusade*, N.Y. TIMES, Jun. 1, 2008, http://www.nytimes.com/2008/06/01/magazine/01PAKISTAN-t.html?_r=2& (detailing how the PPP leader, Asif Ali Zardari, made and kept breaking agreements to reinstate the judges within a specified amount of time).

288. *See Kennedy, Judicialization of Politics, supra* note 29, at 152 (finding that due to the possibility of carnage of a planned “Great March” supported by the Sharifs and the growing movement, Zardari restored the judges to their former positions).

quantity of reported Supreme Court judgments under its original jurisdiction. The court adjudicated nearly as many reported cases in Phase Eight as it did prior to it.²⁸⁹ Another clear indication of the court's conviction in an ever-increasing demand for judicial populism is that well over one-third of the total reported cases were *suo motu*. This number, of course, does not take account of the hundreds of unreported *suo motu* petitions specifically under the court's "Human Rights Cell," a small sample of which the Supreme Court showcased in summary form in its Annual Reports.²⁹⁰ According to the court's own estimates, it appears that these human rights petitions made up roughly three-quarters of the total number of cases heard annually by the Supreme Court (both reported and unreported, under all its jurisdictions—original, appellate, and advisory).²⁹¹

PIL issues adjudicated in Phase Eight belong to three broad categories. The first of these corresponds jointly to judicial and executive powers. In this category of cases the Supreme Court essentially restricted legitimate powers of other branches of government while simultaneously insulating itself from constitutional checks and balances. In more specific terms, the issues related to judicial appointments and other judge-related matters implicating or adversely affecting judicial independence and integrity according to the court, high-profile executive appointments and promotions, and exercise of executive powers and authority. A representative case in this category dealt with the court's disapproval of the Eighteenth Amendment to the constitution,²⁹² which reflected a broad-based, cross-party consensus on various proposed improvements to the 1973 Constitution.²⁹³ One component of the Eighteenth Amendment was to make judicial appointments to the constitutional courts more participatory and transparent. This was accomplished by establishing a two-step process involving multiple stakeholders, including judges, legal representatives from the government, and professional lawyers organizations, as well as parliamentary representatives from both the

289. The number of cases reported in Phase Eight are 107. Compare this to the total of 108 cases reported prior to this phase since the introduction of Article 184(3) of the 1973 Constitution.

290. See, e.g., SUPREME COURT OF PAK., ANNUAL REPORT JAN. 2012 TO MAR. 2013, at 131–33, available at http://www.supremecourt.gov.pk/Links/Annual_Rpt_2012-13/index.html#/0 (providing an overview of the Human Rights Cell, statistics on how many cases it has taken, and a brief background on some of the cases it has taken).

291. This estimation is based on the volume of litigation recorded by the Supreme Court for different kinds of cases. See *id.* at 2–3. The "human rights" cases are not defined in any particular manner and consist of a highly diversified set of matters. *Id.* at 135–41. They also include pre-registration investigations, ad hoc administrative reviews, instructions and directions to subordinate courts and executive officers, and rolling reviews. *Id.*

292. Constitution (Eighteenth Amendment) Act, 2010, available at <http://www.pakistani.org/pakistan/constitution/amendments/18amendment.html>.

293. Osama Siddique, *Across the Border*, WE THE PEOPLE: A SYMP. ON THE CONST. OF INDIA AFTER 60 YEARS, 1950-2010, SEMINAR NO. 615 (2010), available at http://www.india-seminar.com/2010/615/615_osama_siddique.htm (stating that the Eighteenth Amendment was achieved through a fairly transparent and rigorous engagement conducted by a special parliamentary committee composed of representatives from all such parties and that court proceedings signify that at least part of the Eighteenth Amendment may fail).

government and the opposition.²⁹⁴

In *Nadeem Ahmed v. Federation of Pakistan*, the Supreme Court demanded changes to this new process for judicial appointments on the pretext of safeguarding judicial independence, focusing particularly on severely limiting the discretion of parliamentary representatives.²⁹⁵ To avoid political fallout from a confrontation with the apex court, the government accepted the court's demands through another constitutional amendment.²⁹⁶ Thus, a new precedent was set in favor of the court's authority to override Parliament's power to amend the constitution. In a series of subsequent decisions, the court affirmed its internal control over issues of judicial appointments and accountability, decisively insulating itself from both the executive and the legislature.²⁹⁷

Insofar as executive power and discretion were concerned, the apex court intervened time and again to declare various key executive appointments illegal on the basis of process-based arguments.²⁹⁸ More often than not, the court additionally

294. See, e.g., *id.* (describing how the proposed judicial appointment system compares to the current system).

295. See Constitution Petition, No. 11 of 2010, available at http://www.supremecourt.gov.pk/web/user_files/file/18th_amendment_order.pdf. (asserting that Parliament reconsider the appointment process of judges under Article 175A of the Eighteenth Amendment).

296. See Constitution (Nineteenth Amendment) Act, 2010, available at <http://www.pakistani.org/pakistan/constitution/amendments/19amendment.html> (amending the process by which judicial appointments are made).

297. See *Sheikh Riaz-ul-Haq v. Fed'n of Pak.*, (2013) 74 PLC Civil Services (S.C.) 1308, 1364 (finding that federal and provincial governments need to make fresh appointments of chairmen and members of the Service Tribunals, because the Service Tribunals perform vital judicial functions by adjudicating issues pertaining to the terms and conditions of civil servants); *Munir Hussain Bhatti v. Fed'n of Pak.*, Constitution Petitions, No. 10 & 18 of 2011, (2011) 63 PLD (SC) 407 (noting the importance of making judicial appointments independent of the executive and the legislature for an independent judiciary under the new process introduced by the Eighteenth Amendment); *Criminal Original Petitions*, No. 93–98 of 2009 (holding that proceedings should be taken against the respondent judges because they were not immune from contempt of court ordinances); *Sindh High Ct. Bar Ass'n v. Fed'n of Pak.*, Constitution Petition, No. 9 of 2009 (finding the removal of judges by Musharraf and the appointment of certain other judges, including the appointment of Chief Justice Dogar, unconstitutional and declaring all laws introduced by Musharraf during the 2007 emergency *void ab initio*).

298. See *Asaf Fasihuddin Khan Vardag v. Gov't of Pak.*, Constitution Petition, No. 33 of 2013 (finding that the appointment by the federal government of the director general of the Civil Aviation Authority was illegal, because it was made in a non-transparent manner); *Muhammad Ashraf Tiwana v. Pak.*, (2013) 46 SCMR (SC) 1159, 1171–72 (holding that the appointment of the commissioner and chairman of the Securities and Exchange Commission of Pakistan does not meet the requirements of the law and providing details about how the appointment process should take place); *Muhammad Yasin v. Fed'n of Pak.*, Constitution Petition, No. 42 of 2011, (2012) 64 PLD (SC) 132, 163–64 (finding that the selection process of chairman of the Oil and Gas Regulatory Authority was insufficient); *Ch. Nisar Ali Khan v. Fed'n of Pak.*, Constitution Petition, No. 73 of 2011, (holding that the appointment of chairman of the National Accountability Bureau (NAB) was not made in accordance with the law); *Mir Muhammad Idris v. Fed'n of Pak.*, (2011) 63 PLD (SC) 213 (striking down the reappointment of the chairman, president, and other members of the Board of National Bank of Pakistan); *Shahid Orakzai v. Pak.*, Constitution Petitions, Nos. 60 and 61 of 2010, (2011) 63 PLD (SC) 365 (finding the appointment

directed the concerned ministry or department to make fresh appointments in accordance with the proper constitutional process explicated by the court itself. However, much more controversial than the executive appointment cases were those that forced accountability on members of the executive for matters exclusively within their domain and discretion.

*Watan Party v. Federation of Pakistan*²⁹⁹—known popularly in Pakistan and referred to throughout this article as *Memogate*—is a prominent example.³⁰⁰ In late 2011, the Supreme Court began an inquiry into the contents of a column published in the *Financial Times* that alleged that a Pakistani official had delivered a “memo” to the U.S. military on behalf of President Zardari.³⁰¹ Among other things, this memo solicited the U.S. government’s support in forming a new national security team in Pakistan that undercut the de facto powers of the Pakistani army and intelligence services.³⁰² Allegedly, the motive behind the memo was to prevent yet another military coup in the aftermath of the U.S. raid on Osama bin Laden earlier that year.³⁰³ This was arguably a purely political issue. It had no constitutional ramifications, and there was no infringement of Fundamental Rights. Nonetheless, the court accepted jurisdiction on the basis of a potential risk to national security, insinuating that the government was accountable and subordinate to the military and the intelligence services.³⁰⁴ It also pointed to a “conspiracy” within the government, arguing that when citizens know that their rulers are conspiring against them, it is a violation of their dignity.³⁰⁵ In its vitriolic pursuit of the suspected author of the memo—the Pakistani Ambassador to the United States at the time—the court further fueled an impression the media had created that executive officers of the civilian government were involved in anti-state activity.³⁰⁶

of the chairman of the NAB by the president to be illegal); *Suo Motu Case, No. 4 of 2010* (discussing the court’s communications with the attorney general on how he should proceed in appointing a new chairman of the NAB).

299. (2012) 64 PLD (SC) 292.

300. See *Watan Party*, (2012) 64 PLD (SC) at 292–93, 357 (holding that the petitions are maintainable to conduct a probe to ascertain the origin, authenticity and effect of the memo to enforce Fundamental Rights and noting that the effect of the probe would determine the liability of the official who wrote it). Since this judgment, the news media has characterized the scandal as “Memogate.” See, e.g., *Memogate unleashes storm in Pak*, INDIAN EXPRESS, Nov. 19, 2011, <http://archive.indianexpress.com/news/memogate-unleashes-storm-in-pak/877778/0>.

301. See *Watan Party*, (2012) 64 PLD (SC), at 292–93, 306–14 (analyzing the memo published in the *Financial Times*).

302. See *Memogate unleashes storm in Pak.*, *supra* note 300 (finding that the memo could fuel politically charged accusations of collusion with the United States).

303. *Id.*

304. See Khan, *Legal Solution*, *supra* note 191 (explaining how the Memogate issue is a political question that should have been decided by the executive and legislative branches, but the Supreme Court took jurisdiction seemingly based on national security, meaning that the multiple provisions in the Constitution that make the military and intelligence services subordinate and accountable to elected representatives could not have gone unnoticed).

305. See *Watan Party*, (2012) 64 PLD (SC) at 317–18, 335 (finding that the existence of the memo may have the effect of compromising the dignity of its citizens).

306. Compare *id.* at 354–57, with *Memogate unleashes storm in Pak.*, *supra* note 300.

Another politically loaded case involved the court's exercise of power to remove then-Prime Minister Yousaf Raza Gillani from office for contempt of court.³⁰⁷ Gillani was convicted on the ground that he refused to carry out its order to ask the Swiss government to reopen corruption cases—specifically money laundering—against President Zardari.³⁰⁸ The court thus created a constitutional crisis that embroiled the country for months.³⁰⁹

The second category of cases related to general issues of governance, as well as political corruption and election regulation—including pre-electoral, electoral, and post-electoral matters and issues pertaining to the Election Commission—as significant subsets of governance. Both the first and second categories of cases, but particularly this second category, show a trend in PIL jurisprudence that is not grounded in precedent. The Supreme Court's meddling in traditional writ issues that are, constitutionally speaking, within the exclusive domain of the high courts is a new phenomenon. This type of PIL, which one may classify as High Court Writ PIL, has the effect of undercutting the overall jurisdiction of the high courts while siphoning away more powers to the original jurisdiction of the Supreme Court under Article 184(3).³¹⁰ While the apex court's successful attempts at emasculating the Fundamental Rights-related jurisdiction of the high courts under Article 199(1)(c) are as old as PIL itself,³¹¹ its latest practice of issuing prerogative writs, including mandamus, *prohibito*, certiorari, habeas corpus, and *quo warranto*,

307. Suo Motu Case, No. 4 of 2010, available at http://www.supremecourt.gov.pk/web/user_files/file/crl.o.p.6of2012.pdf (“Contempt Proceedings Against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan regarding non-compliance of this Court’s order dated 16.12.2009”).

308. See, e.g., Qasim Nauman, *Pakistan Supreme Court disqualifies prime minister*, REUTERS, June 19, 2012, <http://www.reuters.com/article/2012/06/19/us-pakistan-gilani-idUSBR E8510KS20120619> (stating that the Supreme Court found Gillani ineligible for office).

309. See *id.* (explaining how this was the first time in Pakistan that the Supreme Court removed a prime minister, which was thought by many to only be a power of Parliament).

310. See *infra* text and note 92 for discussion of PAKISTAN CONST. art. 184(3), which provides the Supreme Court with jurisdiction over questions of public importance with reference to the enforcement of certain Fundamental Rights).

311. The Supreme Court generally showed a certain level of deference to the high courts as the loci of Fundamental Rights-based writ adjudication in the pre-PIL period and the early years of PIL on the premise that its jurisdiction was extraordinary and one of last resort, even if concurrent with the high courts in some matters. However, from Phase Two onwards there was a growing tendency for the apex court to assert its jurisdictional superiority over the high courts. For instance, in the *Third Dissolution* case, the apex court opined that the nature of the jurisdiction and relief conferred by Article 184(3) was much wider than Article 199. *Muhammad Nawaz Sharif*, (1993) 45 PLD (SC) at 660–61. On the other hand, the PIL jurisprudence, overall, abounds with contradictions on the jurisdictional space of the Supreme Court vis-à-vis high courts, even to the extent that it would not be farfetched to argue that the law on the relative ambit of PIL jurisdiction remains unsettled. The judicial response to this question generally tends to vary with the cyclical evolution of judicial activism, but not necessarily. In a Supreme Court PIL case decided in Phase Six, for example, the court held that the scope of Article 199 was much wider than the jurisdiction conferred under Article 184(3), as high courts could pass orders on various matters other than those relating to Fundamental Rights. See *Pak. Muslim League (N)*, (2007) 59 PLD (SC) at 669.

is manifestly a usurpation of the high courts' powers.³¹² This is most apparent in the first category of cases, which declared executive appointments illegal, and the second category, which overturned government contracts and dealings with various third parties on the basis of arbitrariness, illegality, irrationality, or procedural impropriety. Such cases do not have an obvious connection with the enforcement of Fundamental Rights. The Supreme Court has nevertheless adjudicated numerous cases of High Court Writ PIL, sometimes applying Fundamental Rights in a rather loose and impromptu fashion and at times conspicuously evading the question of whether an issue relating to the enforcement of such rights had arisen at all.

There are multiple examples of High Court Writ PIL. One of these cases dealt with promotion policies in the civil services on the basis that they were "likely to affect the good governance as well as framing of policies [for] the welfare of the public."³¹³ Another case addressed government contracts in relation to natural resources on the ground that huge losses had been caused to the public exchequer through corruption, "depriving the public at large of resources that could have been used for their welfare."³¹⁴ Another case involved executive appointments to regulatory and other public sector bodies like the Oil and Gas Regulatory Authority on the basis that the functioning of these bodies affected, "quite literally, every person in the country . . . everyone from the farmer who tills the earth using a diesel powered tractor to the urban slum dweller who commutes on a CNG-fitted bus from his little shanty to his work-place in some affluent housing society."³¹⁵ In *Memogate*, the court exercised its authority over the executive as of right, arguing that "[w]ith the expanding horizon of Articles dealing with Fundamental Rights, every executive action of the Government or other public bodies, if arbitrary, unreasonable or contrary to law, is now amenable to writ jurisdiction of Superior Courts and can be validly scrutinised on the touchstone of the Constitutional mandates."³¹⁶ Likewise, the court in *Khawaja Muhammad Asif v. Federation of Pakistan* went even further, asserting, "Article 184(3) was meant

312. Take for example Justice Tariq Mehmood's assertion that the Supreme Court under Chief Justice Chaudhry was abusing judicial discretion, in that PIL cases resembled ordinary civil cases and that the court needed to circumscribe its jurisdiction by articulating principles according to which PIL was to be invoked and applied. HUMAN RIGHTS COMM'N OF PAKISTAN, PUBLIC INTEREST LITIGATION: SCOPE AND PROBLEMS 26 (Mar. 28, 2010). See also former Chief Justice Saeeduzzaman Siddiqui's opinion that Article 184(3) is an extraordinary jurisdiction only meant for laying down the "policy of law which is to be followed by the government and its functionaries," and not for adjudication. *The Supreme Court Provided Relief to the People*, SOUTH ASIA, January, 2014 at 20, available at <http://www.southasia.com.pk/Images/archives/2014/sa-jan14.pdf> (providing an interview with former chief justice of the Pakistan Supreme Court, Saeeduzzaman Siddiqui); see also *Mian Muhammad Shahbaz Sharif v. Fed'n of Pak.*, (2004) 56 PLD (SC) 583 (restricting the Supreme Court's jurisdiction under Article 184(3) from considering habeas corpus petitions). These wider powers, the court stated, were conferred on the high courts. *Mian Muhammad Shahbaz Sharif*, (2004) 56 PLD (SC) at 598.

313. *In re Tariq Aziz-ud-Din*, (2010) 43 SCMR (SC) 1301, 1341.

314. See *Suo Motu*, Case No. 5 of 2010, (2010) 62 PLD (SC) 731, 733, available at http://www.supremecourt.gov.pk/web/user_files/file/smcase5of2010.pdf (discussing how taking resources away from the welfare of the public constitutes an issue of Fundamental Rights).

315. *Muhammad Yasin v. Fed'n of Pak.*, (2012) 64 PLD (SC) 132, 144.

316. *Watan Party*, (2012) 64 PLD (SC) at 352 (emphasis added).

*precisely for the purpose of ensuring that assets belonging to the people were managed and exploited to their benefit and also for ensuring that waste or abuse of such assets was not allowed to take place or continue.*³¹⁷

The third category of cases involved issues of citizen rights, environmental rights, and criminal law matters that mostly dealt with unsatisfactory progress and negligence on the part of law-enforcing agencies in handling criminal cases such as murder, rape, and kidnapping. Figure Four presents a pie chart showing the relative proportion of cases in each of the three categories of PIL issues in Phase Eight. By far, the largest category of issues litigated under PIL was the second category—those cases dealing with governance, corruption, and election regulation—that made up well over half of the total reported cases. Interestingly, almost half of the cases in this largest category were *suo motu*, which demonstrates the centrality of the issues of governance and corruption to the court's activism. However, not a single *suo motu* case was reported in relation to election regulation per se. One may argue that there was already a critical mass of petitioners in the form of opposition political parties agitating election regulation issues, which restrained the court from intervening of its own motion. But the situation was no different in governance and corruption cases in general. The data shows that the court made *suo motu* interventions in all other categories and sub-categories of cases alongside admitting regular petitions.³¹⁸ The total number of PIL cases in Phase Eight is 107.

317. *Khawaja Muhammad Asif v. Fed'n of Pak.*, (2013) 46 SCMR (SC) 1205 (emphasis added).

318. Though it is premature to come to any conclusion on the question of why the court exercised self-restraint vis-à-vis election regulation, recent allegations suggest that the Chaudhry court colluded with the Election Commission in rigging elections in favor of Nawaz Sharif's Pakistani Muslim League (N) (PML-N) party. See, e.g., Azam Khan, *Former CJP to sue Imran Khan over rigging allegations*, THE EXPRESS TRIB., Jul. 6, 2014, <http://tribune.com.pk/story/732070/former-cjp-to-sue-imran-khan-over-rigging-allegations/>.

FIGURE 4**Categories of Issues Raised in PIL During Phase Eight**

Represented by each category of issues' share of PIL cases litigated during Phase Eight

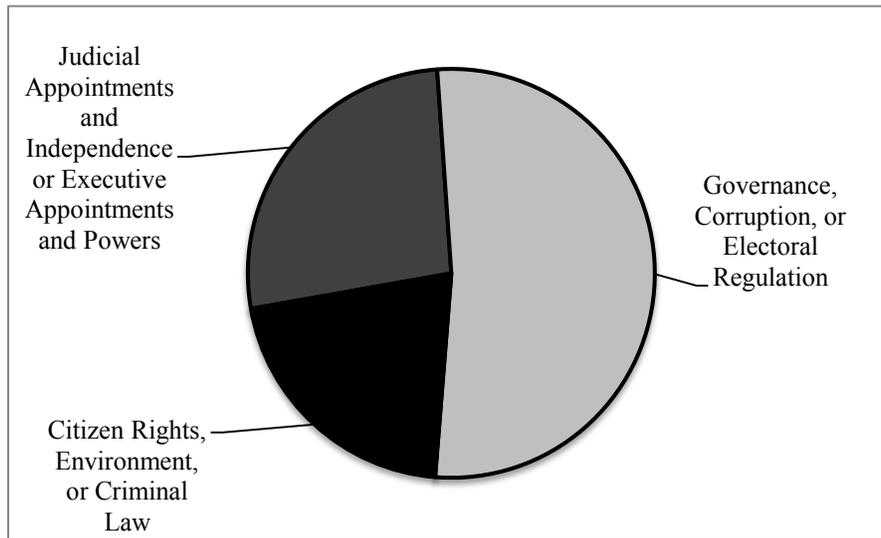


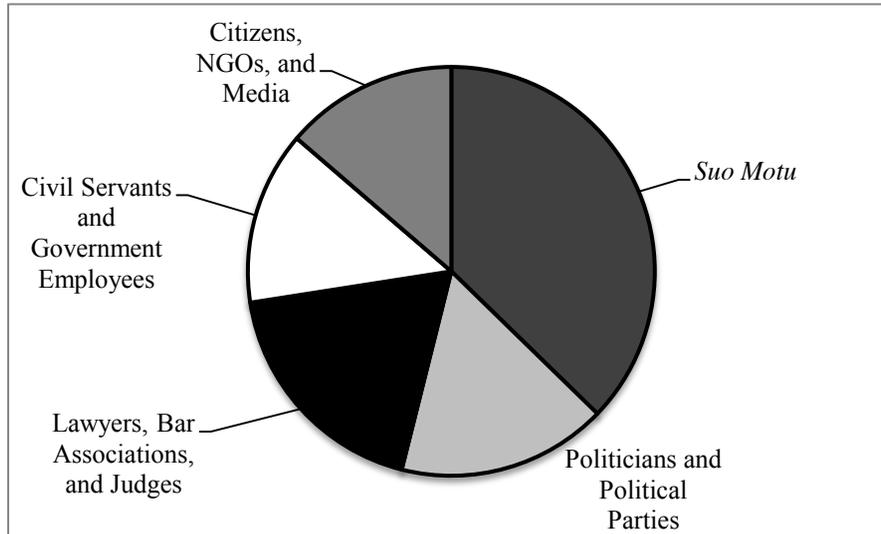
Figure Five presents a pie chart showing the share of the total PIL cases litigated of different types of PIL litigants in Phase Eight. Remarkably, at least one-third of all reported cases were *suo motu*, while the remaining petitions were roughly divided equally between politicians and political parties, lawyers and bar associations,³¹⁹ government employees, citizens, non-governmental organizations, and the media. If the data in Figures Four and Five is juxtaposed, it appears that there is a cross-cutting of litigants and issues, thereby meaning that all categories of litigants ventured into different issues at different times.

319. The category of lawyers and bar associations includes various lawyers organizations like Al-Jehad Trust and Wukala Mahaz Barai Tahafaz Dastoor, which have earned a reputation for frivolous litigation in the constitutional courts. See Osama Siddique, *Legal Drones*, THE NEWS ON SUNDAY, Oct. 13, 2013, <http://jang.com.pk/thenews/oct2013-weekly/nos-13-10-2013/dia.htm#5> (satirizing these legal organizations).

FIGURE 5

Types of PIL Litigants During Phase Eight

Represented by each type's share of PIL cases litigated during Phase Eight

***F. Key Findings and Observations of the Periodized Study***

Figures Six, Seven, and Eight provide schematic representations of the broad periodized trends in PIL-based judicial activism. Figure Six shows the relative frequency of reported rulings according to three general categories: (1) constitutional—those that uphold the constitutionality of executive action or challenged legislation; (2) unconstitutional—those that declare executive action or legislation unconstitutional, including interim orders, rolling reviews, and declaratory or directory cases that indicate a clear posture of the court toward a ruling of unconstitutionality; and (3) other—cases that have been admitted or registered for hearing, are at an initial inquiry stage, are interim judgments, or are limited to setting out guidelines, but in which the court reserves its opinion on the merits.

FIGURE 6

Frequency of Reported Constitutional, Unconstitutional, and Other Rulings in PIL Cases by Phase

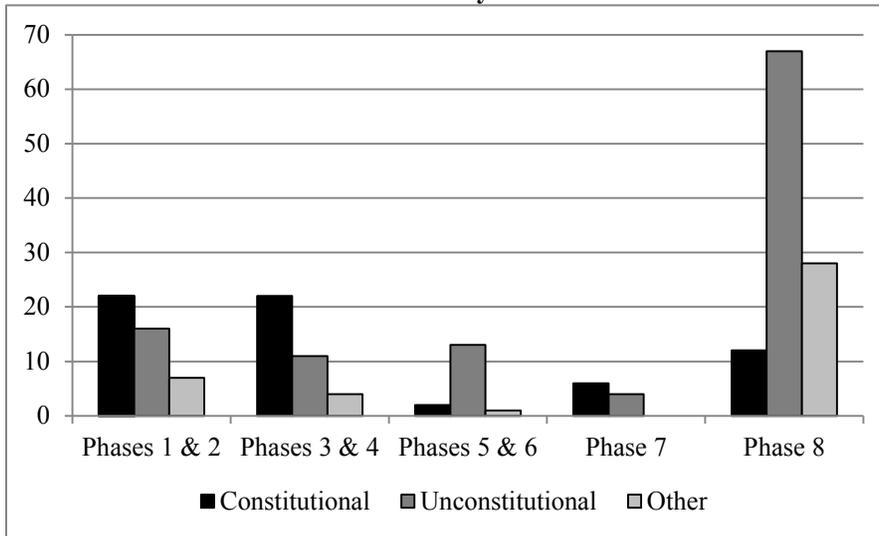


Figure Seven indicates the ratio of reported unconstitutional to constitutional rulings in different periods. It is interesting that in the first wave of judicial activism (Phases One and Two), the ratio of unconstitutional rulings vis-à-vis constitutional rulings was roughly 1:1, whereas in the second (Phases Five and Six) and third waves (Phase Eight), the ratio increased to 5.5:1. Clearly, judicial activism in the first wave was much more balanced and restrained than in the subsequent waves.

FIGURE 7
Ratio of Reported Constitutional and Unconstitutional Rulings in PIL Cases by Phase

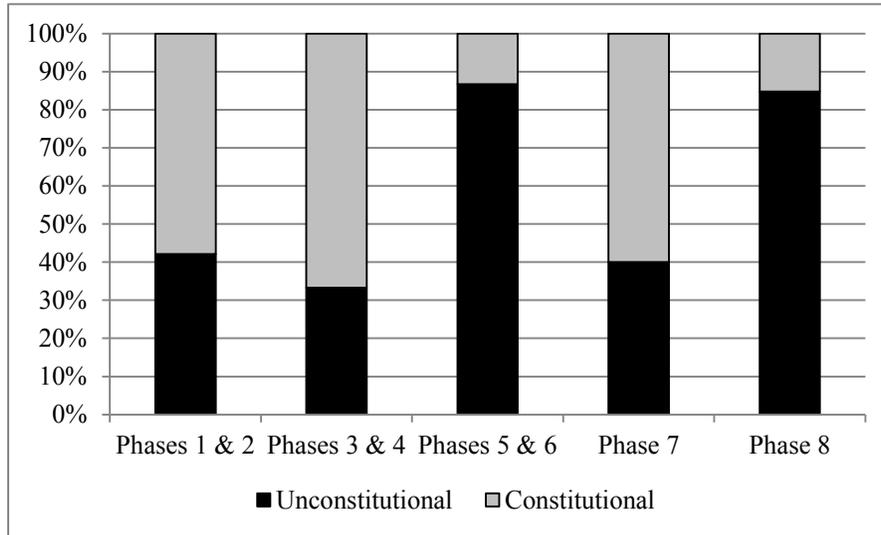
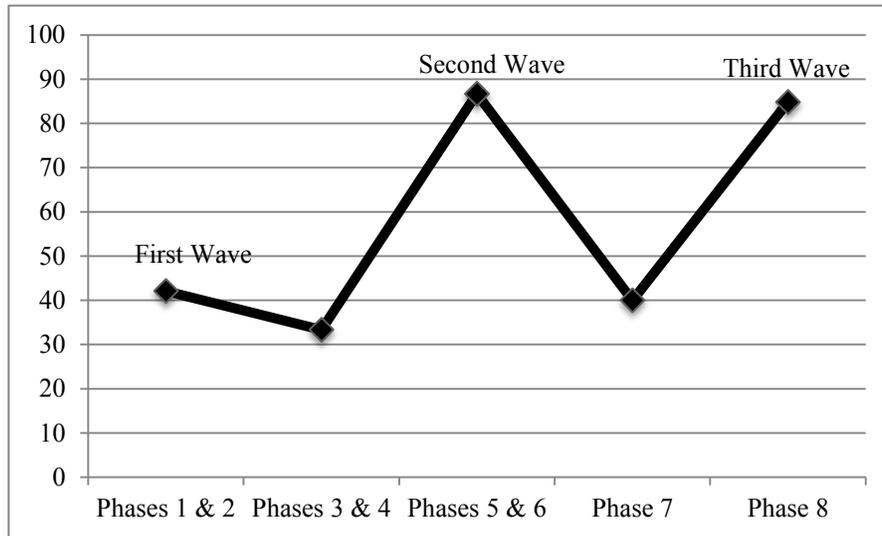


Figure Eight is a line graph representation of the data in Figure Seven. It brings into sharp focus the alternating waves and troughs signifying the waxing and waning of judicial power based on the percentage of unconstitutional rulings in PIL cases.

FIGURE 8
Percentage of Reported PIL Cases Ruled Unconstitutional by Phase



The main findings indicate that since the beginning of PIL in 1988, periods of high judicial activism have generally coincided with democratic interludes under both popularly elected governments and “civilianized” dictatorships. During each of these periods, the Supreme Court was emerging from and wished to bury an ignominious phase of validating a military coup. At the same time, it was able to assert its autonomy against other state institutions because of either relatively weak and nascent democratic governments or increasingly unpopular or decaying “civilianized” military governments.

Conversely, periods of judicial retreat have generally coincided with phases of either judicial legitimation of coups and extra-constitutional governments or with the curtailment of judicial autonomy by representative governments with a majority mandate or benefiting from a judicial purge in the recent past. Put another way, there is a structural pattern to judicialization in the transitional context of Pakistan. The court-led genesis and episodic reemergence of judicialization correlate to the court’s strategy for establishing and asserting popular legitimacy in the aftermath of an “unholy alliance” with anti-democratic forces. In other words, the overlapping of waves of judicial activism with the revival of democracy—or installation of “civilianized” governments under authoritarian regimes—suggests that the Supreme Court has used PIL for popular self-legitimation. Periods of active judicial retreat, on the other hand, correlate to the court’s inward-looking need to protect its institutional survival and territory in the face of an extra-constitutional takeover of government, judicial purge, or both. Political PIL has been a central feature of periods of both activism and retreat, and increasingly so in recent years.

IV. CHANGE AND CONTINUITY IN PIL JURISPRUDENCE: STRUCTURAL PATTERNS OF JUDICIALIZATION

In twenty-five years of PIL, the Supreme Court of Pakistan has steadily and strategically chipped away at the threshold requirements for invoking its original jurisdiction. It achieved this through overbroad interpretations of PIL-related powers, ever-expanding definitions of constitutional rights and creation of new ones, synonymy of the concept of access to justice with judicial independence, extension of an extraordinary PIL jurisdiction into the domain of traditional judicial review, and the use of devices such as *suo motu*. The extent of judicial overreach into politics was most certainly at its highest and most visible in the third wave of judicial activism (2009–2013). Nevertheless, a temporal view of the kinds of issues adjudicated under the umbrella of PIL reveals interesting continuities between past and present.

The following section first discusses important inflection points in the development of PIL jurisprudence over the years, then turns to a discussion of the continuities underlying change, and finally provides a critical analysis of the implications of judicialization for the structural relations between the judiciary and other state institutions and democracy in general.

A. Changes in PIL Jurisprudence

Changes in PIL jurisprudence tend to follow the overall trends in the episodic rise and fall of PIL-based judicial activism over time. If one were to identify the single overarching principle of the Supreme Court's PIL jurisprudence that embraces all other transformations, it would be the court's interpretation of the threshold requirements for invoking its original jurisdiction. A plain reading of Article 184(3) shows that there are, in general terms, two threshold requirements that must be shown if the court is to take cognizance of the matter. The first is that the matter in question must be of "public importance," and the second is that it must relate to the "enforcement of Fundamental Rights" enumerated in the 1973 Constitution.³²⁰

While the definitions of various Fundamental Rights have shifted—some more significantly than others—the definition of public importance has remained relatively constant. In fact, those PIL cases that expressly allude to the precondition of public importance trace back its meaning approvingly to the first pre-PIL Supreme Court judgment under Article 184(3), *Manzoor Elahi v. Federation of Pakistan*.³²¹ Simply put, public importance cases are those "in which the general interest of the community, as opposed to the particular interest of the individuals, is directly and vitally concerned."³²² Further, "the case must be such as gives rise to questions affecting the legal rights or liabilities of the public or the

320. PAKISTAN CONST. art. 184, § 3; *see also id.* arts. 8–28 (outlining the Fundamental Rights).

321. (1975) 27 PLD (SC) 66, 82.

322. *Id.* at 144.

community at large, even though the individual, who is the subject matter of the case, may be of no particular consequence.³²³

With the beginning of PIL, there were some attempts at making this definition more open-ended. In *Benazir Bhutto*, for instance, the court opined that public importance should be construed broadly to mean any serious question related to enforcement of Fundamental Rights.³²⁴ By and large, however, most subsequent PIL cases have relied on the *Manzoor Elahi* construction.³²⁵ Regardless, the canvas of issues that has been absorbed under the umbrella of public importance has become quite enlarged because of the discretionary nature of the definition. This is self-evident from the periodized study in Part III. Typical PIL, Class Action PIL, Political PIL, and High Court Writ PIL cases—each of which can be further divided into sub-categories—have all found a place in PIL jurisprudence.

While public importance is a significant requirement, the mainstay of PIL-based judicial activism is Fundamental Rights. Without a concrete reference to the enforcement or violation of one or more Fundamental Rights, it is not possible to invoke the original jurisdiction of the Supreme Court. Not surprisingly, this is the threshold requirement on which most PIL innovation is concentrated. In Phase One of PIL, the first step of inquiry in most cases was whether the enforcement of a Fundamental Rights issue was involved. If the finding was in the affirmative, the next line of reasoning related to the existence of the public importance pre-condition. For instance, a number of petitions for electoral reform made their way to the court after the *Benazir Bhutto* judgment between 1988 and 1990.³²⁶ These were dismissed on the grounds that they did not relate directly to the violation of a specific Fundamental Right.³²⁷ Therefore, the question of public importance did not even arise in these instances.

As PIL slowly started gaining ground in Phase Two, cases continued to emphasize Fundamental Rights but increasingly neglected to discuss public importance, presumably taking this to be self-evident.³²⁸ This was the period during which the court moved from relaxed standing and process requirements to a more substantive engagement with Fundamental Rights. Noticeably, the court creatively

323. *Id.* at 145.

324. *Benazir Bhutto*, (1988) 40 PLD (SC) at 491.

325. *See, e.g.*, Abdul Wahab v. HBL, (2013) 46 SCMR (SC) 1383; *Watan Party*, (2012) 64 PLD (SC) 292; *Suo Motu Case No. 13 of 2007*, (2009) 61 PLD (SC) 217; *Ch. Muhammad Siddique v. Gov't of Pak.*, (2005) 57 PLD (SC) 1; *Mian Muhammad Shahbaz Sharif*, (2004) 56 PLD (SC) 583; *Liaquat Hussain*, (1999) 51 PLD (SC) 504; *Zulfiqar Mehdi v. Pak. Int'l Corp.*, (1998) PLC (SC) 615; *State Life Ins. Emps. Fed'n of Pak. v. Fed. Gov't of Pak.*, (1994) 27 SCMR (SC) 1341.

326. *See, e.g.*, *Haji Muhammad Saifullah v. Fed'n of Pak.*, (1989) SCMR (SC) 22, 24; *Noor Muhammad v. Fed'n of Pak.*, (1988) SCMR (SC) 1987, 1988; *Kabir Ahmad Bukhari v. Fed'n of Pak.*, (1988) 21 SCMR (SC) 1988.

327. *E.g.*, *Haji Muhammad Saifullah*, (1989) 22 SCMR (SC) at 24.

328. *See, e.g.*, *In re Abdul Jabbar Memon*, (1996) 29 SCMR (SC) 1349; *Malik Muhammad Ramzan v. Punjab Univ.*, (1995) 28 SCMR (SC) 338(2); *Arshad Ali Khan v. Gov't of Punjab*, (1994) 27 SCMR (SC) 1532; *Suo Motu Petition No. 9 of 1991*, (1994) 27 SCMR (SC) 1028; *Human Rights Case No. 1 of 1992*, (1993) 26 SCMR (SC) 2001; *M. Ismail Qureshi v. M. Awais Qasim*, (1993) 26 SCMR (SC) 1781.

used and expansively interpreted the right to life to bring within its jurisdiction various issues that did not appear to fit comfortably with any of the other Fundamental Rights. The right to life under Article 9 of the 1973 Constitution simply provided that “no person shall be deprived of life or liberty save in accordance with law.”³²⁹ This is one of the shortest and barest descriptions amongst the enumerated Fundamental Rights in the constitution.

The first celebrated case under Article 9, *Shehla Zia*,³³⁰ concerned a potential environmental and health hazard from an electricity grid station constructed in a residential locality in the capital city of Islamabad.³³¹ Relying on precedents from both India and the United States, the court argued that:

[t]he word ‘life’ is very significant as it covers all facts of human existence. The word ‘life’ has not been defined in the Constitution but it does not mean nor can be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.³³²

The court further proposed that the right to life should be read along with the right to dignity under Article 14.³³³ It rhetorically asked whether “a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.”³³⁴ A similar case of environmental rights was *West Pakistan Salt Miners Labour Union v. Industries and Mineral Development Punjab*, in which the court ruled that the “right to have unpolluted water is the right of every person wherever he lives.”³³⁵

But aside from these cases that directly affected the health and well-being of ordinary citizens—some admittedly more privileged than others—the court also invoked Article 9 on very different facts. In *Employees of Pakistan Law Commission v. Ministry of Works* for instance, a group of government employees alleged discrimination in the allocation of residential accommodation during tenure of service.³³⁶ The court ruled in favor of the petitioners, arguing rather tenuously that the accommodation was “necessary for maintaining adequate level of living” under Article 9.³³⁷ Even more tenuous was the court’s interpretation of Article 9 in the *Judges’ Case*, concerning judicial appointments and the powers of the chief

329. See Khan & Siddique, *supra* note 43, at 221–22 (addressing the right to life under Article 9).

330. *Shehla Zia v. WAPDA*, (1994) 46 PLD (SC) 693.

331. *Id.* at 696.

332. *Id.*

333. *Id.* at 714. Article 14 states, “The dignity of man and, subject to law, the privacy of home, shall be inviolable.” PAKISTAN CONST. art. 14(1).

334. *Shehla Zia*, (1994) 46 PLD (SC) at 714.

335. *Labour Union v. Indus. and Mineral Dev. Punjab*, (1994) 27 SCMR (SC) 2061, 2068.

336. *Emp. of Pak. Law Comm’n v. Ministry of Works*, (1994) 27 SCMR (SC) 1548, 1549.

337. *Id.*

justice to overrule the president's nomination,³³⁸ and *Malik Asad Ali v. Federation of Pakistan*, through which the court ousted Chief Justice Sajjad Ali Shah.³³⁹ In both these cases, access to justice was subsumed within right to life and was held to include the right to an impartial court.³⁴⁰ *Malik Asad Ali* elaborated that the "exercise of this right is dependent on the independence of judiciary which can be secured only through appointment of persons of high integrity, repute and competence, strictly in accordance with the procedure prescribed under the Constitution to the high office of the Judges of Superior Courts."³⁴¹ Article 9 thus became a kind of a receptacle for unenumerated rights like access to justice. In Phase Two, there was already little semblance between the expansion of the right to life in favor of citizen-residents in *Shehla Zia* and in favor of politicians and lawyer-petitioners in *Malik Asad Ali*. This leap of faith in the interpretation of Article 9 was the Supreme Court's self-empowering strategy for claiming jurisdiction over questions affecting and relating purely to judicial power and status. Indeed, it was Article 9 that came to the rescue of Chief Justice Iftikhar Chaudhry when he was first reinstated by the Supreme Court in 2007 in *Iftikhar Muhammad Chaudhry v. President of Pakistan*.³⁴²

In the third wave of judicial activism, Article 9 was further expanded to include human rights cases concerning non-supply of electricity,³⁴³ as well as cases involving "reputation and status, and all other ancillary privileges which the law confers on a citizen."³⁴⁴ Moreover, the Supreme Court justified jurisdiction over several cases of High Court Writ PIL on the basis of Article 9, arguing that the provision extended to the protection of national wealth and resources,³⁴⁵ and to "any transaction, which is not transparent" including appointments to institutions responsible for running governmental affairs, generating funds for the welfare of citizens, and improving their standard of life.³⁴⁶ At the same time, Article 9 was continually invoked in a plethora of cases for which there was a clear line of precedents grounded in Phase Two. By and large, these involved environmental cases, public employee grievances over employment agreements, and criminal cases.

Phase Eight also witnessed the creation of another new Fundamental Right of

338. (1996) 48 PLD (SC) 324, 373.

339. (1998) 50 PLD (SC) 161, 161.

340. *Id.*; *Judges' Case*, (1996) 48 PLD (SC) at 373.

341. *Malik Asad Ali*, (1998) 50 PLD (SC) at 189.

342. (2007) 59 PLD (SC) 579.

343. *See* Human Rights Case No. 14392 of 2013, *available at* http://www.supremecourt.gov.pk/web/user_files/File/hrc_14392_2013.pdf; *see also* Human Rights Case No. 7734-G of 2009, *available at* http://www.supremecourt.gov.pk/web/user_files/File/HRC7734-G_1003-GOF2009%5BAllegedCorruptionInRentalPowerPlants%5D.pdf (remarking that Article 9's scope has extended to all aspects of human life).

344. Sindh Civil Servants Ordinance, Constitution Petition, No. 71 of 2011, 92, *available at* http://www.supremecourt.gov.pk/web/user_files/File/CrI.O.P.89of2011.pdf.

345. *Khawaja Muhammad Asif v. Fed'n of Pak.*, (2013) 46 SCMR (SC) 1205.

346. *Asaf Fasihuddin Khan Vardag v. Gov't of Pak.*, Constitution Petition, No. 33 of 2013, at 70, 77.

“judicial independence.” While “access to justice” in Phase Two was a derivative concept based on Article 9, the Fundamental Right of “judicial independence” is autonomous of Article 9, and in fact a precondition for the enforcement of all existing Fundamental Rights. The Supreme Court has consistently adopted this position in a series of cases on judicial appointments, from *Nadeem Ahmed v. Federation of Pakistan*,³⁴⁷ to *Munir Hussain Bhatti v. Federation of Pakistan*,³⁴⁸ to *Baz Muhammad Kakar v. Federation of Pakistan*.³⁴⁹ Interestingly, *Munir Hussain Bhatti* indicated that “judicial independence” was both a Fundamental Right as well as a matter of public importance, and cited *Zafar Ali Shah*—part of the jurisprudence of regime legitimation—as a valid precedent for this conclusion.³⁵⁰ The strategic cross-fertilization of PIL principles between different forms of jurisprudence has, thus, carried over into the third wave of judicial activism.

Figure Nine presents a pie chart showing the proportion of the three most favored and recurrent Fundamental Rights used by the Supreme Court in reported PIL cases in Phase Eight in comparison to the aggregate of other Fundamental Rights that were used in more than five reported judgments. The aggregate category includes the right to property (Articles 23 and 24); the right to lawful trade, business, and profession (Article 18); and the freedom of association (Article 17). The right to life (Article 9) stands out as the most frequently invoked Fundamental Right, followed by the right to equality (Article 25) and the right to dignity (Article 14), which often accompany the right to life on different issues.³⁵¹ In the context of Phase Eight of PIL, it is interesting to note that while the right to life and the right to dignity have been used across a wide canvas of issues, the right to equality has not once been invoked for the group of litigants classified as citizens, non-governmental organizations, and the media in Figure Five.

Overall, it appears that under the Chaudhry court, as well as generally, no PIL cases have been reported in reference to the safeguards against arrest and detention (Article 10); the prohibition against slavery and forced labor (Article 11); the safeguards in relation to religion (Articles 21 and 22); the safeguard against discrimination in services (Article 27); or the preservation of language, script, and culture (Article 28). A number of these provisions implicate minority rights based on religion, ethno-linguistic identity, and culture, but it seems that these issues are not part of the priority agenda of the Supreme Court—particularly when acting *suo motu*—under its PIL jurisdiction.³⁵²

347. Constitution Petition, No. 11 of 2010, available at http://www.supremecourt.gov.pk/web/user_files/file/18th_amendment_order.pdf.

348. (2011) 63 PLD (SC) 407.

349. (2012) 64 PLD (SC) 923, 990.

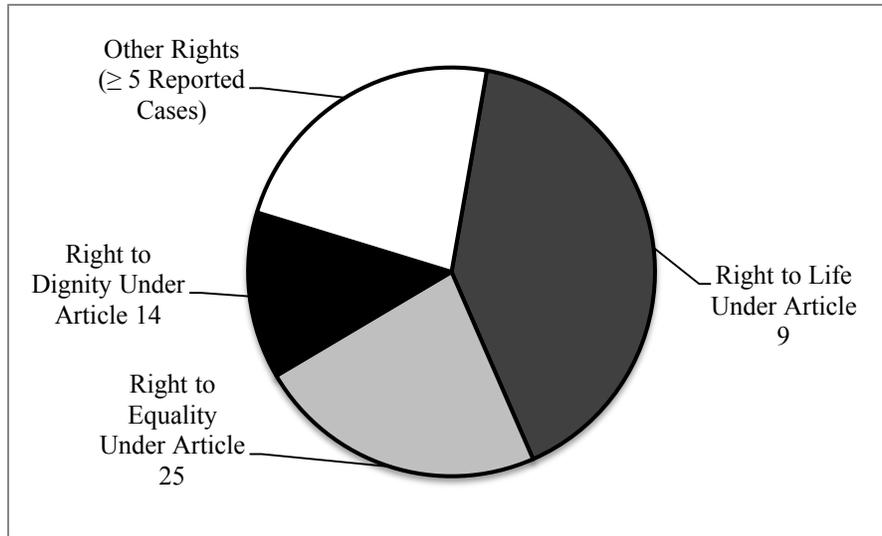
350. *Munir Hussain Bhatti*, (2011) 63 PLD (SC) at 451–52, 466.

351. PAKISTAN CONST. arts. 9, 14, 17, 18, 23, 24, 25.

352. This aspect of PIL jurisprudence is also highlighted and corroborated by the lawyer-activist Asma Jahangir in HUMAN RIGHTS COMM’N OF PAKISTAN, *supra* note 312, at 8 (arguing that the judiciary’s track record shows a bias against women and minorities); *see also* INT’L COMM’N OF JURISTS, *supra* note 29, at 12 (discussing the Supreme Court’s handling of issues relating to human and minority rights).

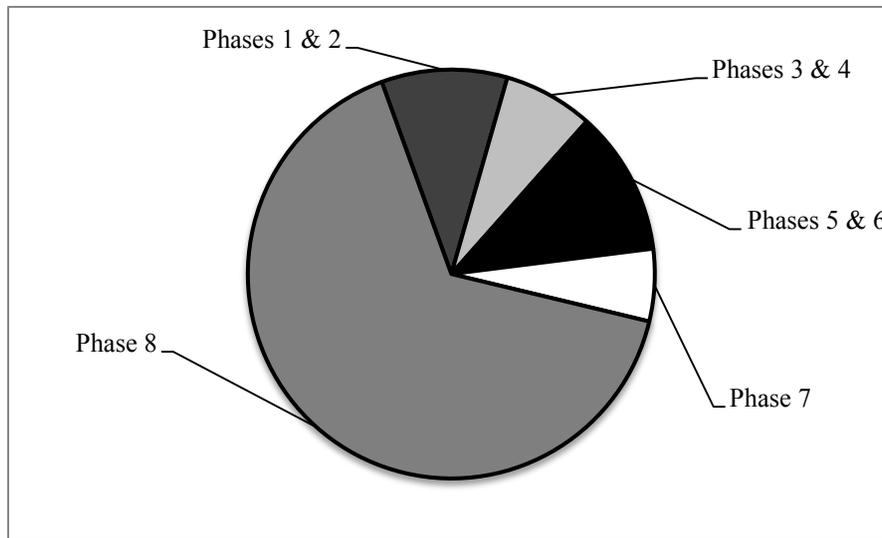
FIGURE 9**Fundamental Rights Invoked in PIL Cases During Phase Eight**

Represented by each Fundamental Right's share of PIL cases litigated during Phase Eight



Furthermore, relative to previous phases of PIL, *suo motu* cases in Phase Eight account for two-thirds of the total number of *suo motu* cases reported since the beginning of PIL in 1988. Figure Ten presents a pie chart representing this hard-hitting statistic.

FIGURE 10
Number of Reported *Suo Motu* PIL Cases by Phase
 Represented by each phase's share of all *suo motu* PIL cases



B. Underlying Continuities in PIL Issues

Despite the many changes that PIL has undergone in the quarter-century of its existence—including the alternating waves of judicial activism and retreat, as well as qualitative and quantitative changes—it continues to evolve on a continuum that is remarkably unchanging in terms of the structural relationship between the judiciary and civilian-democratic government. The figurative “judge as paternalist” who first made an appearance in the pre-PIL judgment of *Begum Nusrat Bhutto* in 1977, has only become more strengthened over the course of PIL’s development. This has been possible because of the periodic military interventions that have stunted, even hijacked, democratic transition and, in the process, used the constitutional courts for the twin purposes of legitimation of de facto government and delegitimation of civilian politics. In turn, the courts have responded by constructing a fluid jurisprudence, one that aspires to give the appearance of passing seamlessly, but repeatedly, from the jurisprudence of regime legitimation to one of democratic legitimation, with the primary objective of judicial self-legitimation and preservation. This process of jurisprudential reinvention is a kind of defense or survival mechanism, deeply institutionalized in the Supreme Court.³⁵³

As an institution that straddles both authoritarian and elected governments,

353. See Maryam S. Khan, *Grave Implications*, THE NEWS ON SUNDAY, Dec. 8, 2013, http://tns.thenews.com.pk/grave-implications-2/#.U8N_sreKDIU (citing Chief Justice Chaudhry’s attempts to connect past, more narrow jurisprudence with a contemporary issue as a means of reinvention).

the Supreme Court both constitutes and is constituted by its role as mediator between the deep state and the civilian leadership. Its unique status as an intermediary allows it to assert its autonomy and ascendancy over the political sphere in periods of civilian rule.³⁵⁴ Recently, the court has asserted its judicial independence even against strategic military-civilian partnerships that derive their formal legitimacy through international aid and rule of law rhetoric. The Supreme Court's assertion of autonomy grows out of its need for self-legitimation at the beginning of every cycle of democratic transition, including at opportune moments of such transition in military-led "guided democracy."³⁵⁵ The main casualty of judicial self-legitimation is the democratic process.³⁵⁶

An illustration of the structural pattern of judicialization underlying the more cosmetic changes in PIL jurisprudence is the continuing—indeed growing—Supreme Court intervention in issues of political salience that rub judicial autonomy the wrong way. One such issue is judicial appointments and other matters generally related to judicial independence. Judicial appointments first became a deeply political and contentious issue in 1996 during Phase Two. In the *Judges' Case*, the court ruled that the chief justice's opinion had primacy over that of the executive in judicial appointments.³⁵⁷ Since then, institutional conflict over this issue, including intra-judicial conflict, has been grievous and recurrent, leading to such extremes as the *Fourth Dissolution* in 1996 and the forced expulsion of Chief Justice Sajjad Ali Shah the following year by the court itself in *Malik Asad Ali*.³⁵⁸

PIL cases on judicial appointments resurged in Phase Eight, after the reinstatement of Chief Justice Chaudhry and other Supreme Court justices. The court moved swiftly to consolidate its position vis-à-vis the post-Musharraf civilian government. Quite apart from carrying out an intra-judicial purge of pro-government judges, the Chaudhry-led court thwarted Parliament's constitutional amendments to make the judicial appointments process more transparent and participatory and less partisan. By subjecting their opinions to judicial review by the Supreme Court, parliamentary representatives' discretion was severely

354. See, e.g., Kalhan, *supra* note 31, at 39 (contending that the Pakistani judiciary "in fact has exhibited significant autonomy from civilian political actors"); PAULA R. NEWBERG, JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN 11 (1995) ("By stepping into the vacuum too often created by conflicts that might render the state ungovernable, the superior judiciary has occupied a place of unique political opportunity.")

355. See Aqil Shah, *The Transition to 'Guided' Democracy in Pakistan*, in THE ASIA-PACIFIC: A REGION IN TRANSITION 207, 214 (Jim Rolfe ed., 2004), available at <http://www.apcss.org/Publications/Edited%20Volumes/RegionalFinal%20chapters/Chapter13Shah.pdf> (explaining the term "guided democracy" is in reference to General Musharraf's plan for military-led democratization in Pakistan).

356. See, e.g., Waseem, *supra* note 29, at 30 (arguing that "the courts' operations in an activist mode has the potential to discredit a civilian government that operates within the framework of a military-dominated power structure").

357. *Judges' Case*, (1996) 48 PLD (SC) at 327.

358. *Fourth Dissolution* (1998) 50 PLD (SC) 388; *Malik Asad Ali*, (1998) 50 PLD (SC) at 355.

circumscribed.³⁵⁹ Among other things, the court argued that the precedents in the *Judges' Case* and *Malik Asad Ali* “would continue to apply to the new mechanism with full force. In fact, these principles can be said to be applicable even more strongly after the introduction of the newly constituted bodies. . . .”³⁶⁰ The court thus reaffirmed the pre-amendment control of Supreme Court justices over the judicial appointments process through PIL. The important thing to note is that the court’s posture toward the issue of judicial appointments was not new; the posture was a regeneration of its old position and, as such, an indication of its structural dominance over representative institutions.

Another example of a contentious issue confronted by the court concerns the eligibility to run for, hold, or remain in political office. The Chaudhry court’s removal of Prime Minister Gilani in Phase Eight is highly reminiscent of its jurisprudence of dissolutions under Article 58(2)(b) in Phase Two. Though some may argue that the questions under the court’s scrutiny are distinguishable under the two modes of removal of the executive, there is no gainsaying that the thrust of the court’s reasoning and its attitude of contempt for politics have been strikingly similar in both scenarios. In the two Article 58(2)(b) cases in which the Supreme Court upheld the dissolution—both times against Prime Minister Benazir Bhutto in 1990 and 1996—it did so on grounds that included, among other things, ridiculing of the judiciary (1990)³⁶¹ and a “sustained assault on the [judiciary]” (1996).³⁶²

In removing Prime Minister Gilani in 2012, the court rested its decision on the most open-ended grounds under Article 63(1)(g) of the 1973 Constitution for disqualification from parliamentary membership.³⁶³ The relevant part of this provision reads, “he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to . . . the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan” Thus, both times, the court endorsed the principle that political representatives who interfere with the judiciary’s autonomy—whether through verbal criticism, resistance to the court’s dominance in judicial appointments, or non-implementation of the court’s orders—may be legitimately deposed by or through the court. Thus, the Supreme Court’s power to stand in judgment of and act as a patronizing watchdog over representative institutions of government has deep roots in its historical function of de-legitimizing politics, strengthened further by the jurisprudence of dissolutions in the 1990s.

Interestingly, the Chaudhry-led Supreme Court has made no secret of its

359. *Munir Hussain Bhatti*, (2011) 63 PLD (SC) at 456–74 (holding that the court was empowered to judicially review the decisions of the parliamentary committee in the judicial appointments process).

360. *Id.* at 446.

361. *Ahmad Tariq Rahim v. Pak.*, (1992) 44 PLD (SC) 646, 652–54. This case was decided under the Supreme Court’s appellate, not original, jurisdiction. *Id.* at 660.

362. *Fourth Dissolution*, (1998) 50 PLD (SC) at 436.

363. PAKISTAN CONST. art. 61, § 3(1)(g).

idealization of Article 58(2)(b) even after its second repeal by the PPP government in 2010.³⁶⁴ In a 2011 *suo motu* PIL case concerning the deteriorating law and order situation in Karachi,³⁶⁵ the court nostalgically harked back to Article 58(2)(b) while pontificating on the failures of the government in controlling the bloodshed. As if the irony of the ignominious origins and history of Article 58(2)(b) was completely lost on the judges, the court stated that it could unilaterally revive the jurisprudence of dissolutions.³⁶⁶ It alluded in specific detail to *Fourth Dissolution*, which upheld the dissolution of Benazir Bhutto's government in 1996,³⁶⁷ arguing that if similar circumstances of breakdown of law and order prevailed in Karachi, then the court would be "bound" by that ruling.³⁶⁸ Presumably, this meant that the court would arrogate to itself the discretionary powers of dissolving the National Assembly, thus effectively taking on a dual judicial-executive role that was not envisaged under the original Article 58(2)(b). The court, however, saw no apparent contradiction in either granting primacy to a defunct body of jurisprudence over a clear parliamentary consensus against Article 58(2)(b) or sitting in judgment over the performance of the government in the absence of an express constitutional mandate.

The following section engages in more substantive detail with the persistence of the judge as paternalist in PIL discourse in Pakistan to demonstrate the structural patterns of judicialization that tend to get obscured by narratives emerging from the lawyers' movement that the judicial activism under Chief Justice Chaudhry is unprecedented.

C. Judicialization & PIL's Anti-Democracy Discourse: Persistence of the Judge as Paternalist

The third wave of judicial activism that began in 2009 coincided with the second reinstatement of the constitutional court judges who had been deposed by Musharraf in 2007. The Supreme Court justices, and especially the chief justice, did not waste time in signaling to the new government their intention to oversee and regulate the nascent, fledgling democracy. In the first year post-reinstatement, the court assumed a patronizing, but reconciliatory, even hopeful tone. In one of the first cases on judicial appointments, *Sindh High Court Bar Association v. Federation of Pakistan*, the court, referring to the government's decision to restore the judges, opined that, "[w]e are sanguine that the current democratic dispensation comprising of the President, the Prime Minister, Ministers and the Parliament shall

364. Article 58(2)(b) was reintroduced by Musharraf through the Seventeenth Amendment and repealed by the succeeding PPP-led coalition government through the Eighteenth Amendment. CONSTITUTION (SEVENTEENTH AMENDMENT) ACT, 2003, *available at* <http://www.pakistani.org/pakistan/constitution/amendments/17amendment.html>; CONSTITUTION (EIGHTEENTH AMENDMENT) ACT, 2010, *available at* <http://www.pakistani.org/pakistan/constitution/amendments/18amendment.html>.

365. *In re* Law & Order Situation in Karachi, *Suo Motu* Case No. 16 of 2011, *available at* http://www.supremecourt.gov.pk/web/user_files/File/SMC16of2011_detailed_judgment.pdf.

366. *Id.* at 43.

367. *Fourth Dissolution*, (1998) 50 PLD (SC) at 388.

368. *In re* Law & Order Situation in Karachi, *Suo Motu* Case No. 16 of 2011 at 91.

continue to uphold the Constitution, its institutions and sacred values.³⁶⁹ At the same time, in *Dr. Mobashir Hassan v. Federation of Pakistan*—dealing with the constitutionality of a law passed by Musharraf for reaching a compromise settlement with political parties—the court laid out its limits of tolerance for undemocratic behavior:

[T]his Court cherishes the democratic system and the will of the electorate. It also wants the Federation to remain strong and stable If such representative betrays his trust by involving himself into corruption or the offence of moral turpitude, he disqualifies himself to continue as a member of the Parliament[.]³⁷⁰

However, as instances of institutional conflict and deadlock began to emerge, the court's tone very quickly escalated to a reproachful, and at times threatening, decibel. Responding to rumors generated by the media that the government was considering withdrawal of its decision to restore the judges, the court expressed its apprehensions about being throttled and declared the government's action, if true, as tantamount to subversion of the constitution.³⁷¹ From then on, the court actively began to check instances of democratic deficit and corruption. Interestingly, the petitioners in many of these cases were politicians, themselves trying to score political points by calling for judicial intervention. In a case concerning delay on the part of the government in constituting an Election Commission, the court turned its discretionary PIL jurisdiction on its head, asserting that, “[w]here inaction of State functionaries, their deviation or disregard or delay in the mandated performance of the functions under the Constitution are challenged . . . the courts have no jurisdiction to permit the State functionaries to remain static, inefficient, or lukewarm towards their constitutional duties.”³⁷² In a case in which the court intervened to ostensibly deescalate violence in Karachi, the court unreservedly targeted the provincial authorities for their failure to control the law and order situation.³⁷³ The court proclaimed that “people do not have trust in the law enforcing agencies to counter the deadly and influential persons who happen to terrorize the innocent citizenry.”³⁷⁴ In contrast, the court justified its own actions by arguing that its *suo motu* intervention “ensure[s] and strengthen[s] the hands of those who actually apply the law . . . stopping corruption and mal-administration”³⁷⁵ By way of a rap on the

369. *Sindh High Court Bar Association*, Constitution Petition, No. 9 of 2009, available at <http://www.dawn.com/news/889917/text-of-supreme-court-judgment>.

370. *Dr. Mobashir Hassan v. Fed'n of Pak.*, (2010) 62 PLD (SC) 265, 330.

371. The reference is to treason under PAKISTAN CONST. (1973) art. 6. *Sindh High Court Bar Association*, Constitution Petition, No. 9 of 2009, available at <http://www.dawn.com/news/889917/text-of-supreme-court-judgment>.

372. *Mubasher Lucman v. Fed'n of Pak.*, (2011) 63 PLD (SC) 775, 778.

373. *In re Law & Order Situation in Karachi*, *Suo Motu Case No. 16 of 2011*.

374. *Id.* at 72.

375. *Id.* at 48; see generally Human Rights Case No. 19526-G of 2013, available at http://www.supremecourt.gov.pk/web/user_files/File/HRC19526of2013.pdf; *Suo Motu Case No. 10 of 2011*, available at http://www.supremecourt.gov.pk/web/user_files/File/Suo_Motu_Case

knuckles, the court added: “All over the democratic world, judicial review only strengthens democracy and should be welcomed by democratic governments, not resented and resisted.”³⁷⁶

In a case relating to governmental negligence in managing a natural disaster, *Marvi Memon v. Federation of Pakistan*, the court tried to garner popular public support against a government perceived as deeply corrupt and deliberately neglectful of the poor. The court insisted that it had a “duty” to intervene on behalf of “non-resourceful” persons, and that, “[i]f SC does not intervene, powerful and influential persons, with collaboration of executive, will continue to deny the poor their rights.”³⁷⁷

By late 2011 and early 2012, cracks began to appear in the popular support for the Supreme Court. This was largely a consequence of the court’s hyper-activism as well as its condescending and peremptory attitude toward litigants, government officials, and lawyers.³⁷⁸ The court’s PIL discourse at this time took on a noticeable self-congratulatory and aggrandizing quality. For instance in *Memogate*, while ruling that the government’s action was tantamount to compromising the security and sovereignty of Pakistan, the court stressed that “[i]t is for the first time the judiciary asserted its authority and as a result thereof the democratic system is prospering in the country.”³⁷⁹ In another highly political case, *Arsalan Iftikhar v. Malik Riaz Hussain*³⁸⁰—in which the chief justice personally took *suo motu* notice of allegations that his own son was involved in influencing the judicial process through hefty bribes—the court, while absolving the chief justice’s son of any wrongdoing, eulogized its role in putting democracy back on its rails:

Three years ago, in another case of great public importance, we wrote: “the 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. It is with this sense of the nation’s past that we find

_No10of2011.pdf; Human Rights Case No. 1356-P of 2009, available at http://www.supremecourt.gov.pk/HR_Cases/7th%20final/1356-Pof2009.pdf.

376. *In re* Law & Order Situation in Karachi, *Suo Motu* Case No. 16 of 2011 at 48.

377. *Marvi Memon v. Fed’n of Pak.*, (2011) 63 PLD (SC) 854.

378. See generally Khaled Ahmed, *Autumn of the Patriarch*, NEWSWEEK PAKISTAN, Dec. 28, 2013, <http://newsweekpakistan.com/autumn-of-the-patriarch/>; Matthew Green & Qasim Nauman, *Pakistan’s Gun-Slinging Chief Justice Faces Backlash*, REUTERS, June 24, 2012, <http://www.reuters.com/article/2012/06/24/us-pakistan-politics-idUSBRE85N05D20120624>; Saroop Ijaz, Op-Ed., *Please, Not Again*, EXPRESS TRIBUNE, June 23, 2012, <http://tribune.com.pk/story/398189/please-not-again/>; Anil Kalhan, *Herald Exclusive: Courting Power*, DAWN, Nov. 19, 2013, <http://www.dawn.com/news/1057181/herald-exclusive-courting-power>; Markandey Katju, Op-Ed., *Pakistan Supreme Court Has Gone Overboard*, THE HINDU, June 22, 2012, <http://www.thehindu.com/opinion/op-ed/pakistans-supreme-court-has-gone-overboard/article3553558.ece>; Babar Sattar, *Judging Chaudhry*, DAWN, Dec. 12, 2013, <http://www.dawn.com/in-depth/chief-justice-departs/>.

379. *Watan Party v. Fed’n of Pak.*, (2012) 64 PLD (SC) 292, 350 (quoting approvingly from the judgment *In re: Corruption in Hajj Arrangements*, (2011) 63 PLD (SC) 963).

380. *Arsalan Iftikhar v. Malik Riaz Hussain*, (2012) 64 PLD (SC) 132.

ourselves called upon to understand and play the role envisaged for the Supreme Court by the Constitution. The Court has endeavored to uphold the Constitution and has stood up to unconstitutional forces bent upon undermining it.” It has been another three years since then and we can say with confidence that Pakistan’s constitutional journey has gone not one step backwards. Today, as ever before, the Court has endeavored to uphold the Constitution and has stood up to unconstitutional forces bent upon undermining it.³⁸¹

Finally, in a high profile case relating to the non-implementation of the NRO, the court reminded its varied audience, “[l]et nobody forget that in the not too distant past we stuck to our commitment to the Constitution and constitutionalism and were not shy of giving personal sacrifices for fulfillment of that commitment.”³⁸² The court further reminded that:

This Court has already shown a lot of grace and magnanimity in the matter and has demonstrated a lot of patience and restraint in this regard over the last about two years but in the present dismal and most unfortunate state of affairs the Court is left with no other option but to, as warned in categorical terms on the last date of hearing, take appropriate actions in order to uphold and maintain the dignity of this Court and to salvage and restore the delicately poised constitutional balance in accord with the norms of constitutional democracy.³⁸³

The court showed customary brazenness and irreverence in referring to then president Asif Ali Zardari as the “co-Chairperson of the major political party . . . who also happens to be the President of Pakistan.”³⁸⁴ The court rumbled with a final note of warning:

Obedience to the command of a court, and that too of the apex Court of the country, is not a game of chess or a game of hide and seek. It is, of course, a serious business and governance of the State and maintaining the constitutional balance and equilibrium cannot be allowed to be held hostage to political tomfoolery or shenanigans.³⁸⁵

The “judge as paternalist” is thus deeply ingrained in the collective psyche of the Supreme Court. This image is unlikely to make a permanent exit as long as military intervention in politics—direct or indirect—continues to instrumentalize the constitutional courts for legitimation of de facto government and de-legitimation of democratic politics.

381. *Suo Motu Case, No. 5 of 2012, 2, available at* http://www.supremecourt.gov.pk/web/user_files/File/S.M.C.5of2012dt14-6-2012.pdf (italics omitted).

382. *Suo Motu Case, No. 4 of 2010, 6–7, available at* http://www.supremecourt.gov.pk/web/user_files/File/NROCaseDt.10.01.2012.pdf.

383. *Id.* at 4.

384. *Id.* at 5.

385. *Id.*

V. TOWARD A DYNAMIC THEORY OF JUDICIALIZATION IN TRANSITIONAL SOCIETIES

A dynamic theory of judicialization must endeavor to provide a positive explanation for a number of things. To begin with, it must explain the episodic and recurring rise and fall of judicial activism and power, as well as the timing and sources of this phenomenon. Moreover, it must explain the changes in the judicialization jurisprudence over time, particularly why judicial activism of one period appears to be different or unprecedented in relation to another period.

As far as the first element of the rise and fall of judicial activism is concerned, the periodized study in Part III presents preliminary evidence of a broad *structural pattern* of judicialization in Pakistan. The coincidence of waves of judicial activism with the Supreme Court's efforts at garnering popular legitimacy as an independent, democratic institution and asserting its autonomy in the political sphere, points to two conclusions in Pakistan, but also in other transitional societies. First, the sources of judicial power are embedded in the larger structures of historical and evolving power relations, and are, therefore, best observed over a long time period. Temporary configurations, alliances, and courageous judicial leadership may provide the immediate triggers for judicialization at specific moments in time, but are not self-determining or autonomous of historical-structural factors. Second, despite the appearance of change in judicialization jurisprudence, there are deep continuities over time in the effect and impact of judicialization on political institutions and the political process as a whole.

In transitional societies like Pakistan, democratization does not follow a linear path.³⁸⁶ Indeed, if there is any prototypical evolutionary cycle for democratic transition, then it is instantiated by the oscillation between authoritarian and elected governments in Pakistan, with the latter rooted within and deeply constrained by authoritarian norms and institutions.³⁸⁷ In such societies, judicialization is likely to have a cyclical pattern, with every successive cycle of transition providing an enabling environment for the judiciary to assert its autonomy with renewed force for the primary objective of self-legitimation. Transition in this context refers not only to a shift toward ordinary electoral democratic processes, but also toward models of controlled or guided democracy led by authoritarian governments pursuing an international donor agenda of rule of law and democratic reform.

The Pakistani case study shows that each new interlude of democracy, in this broad sense, is accompanied by an intensification of judicial activism. This is

386. New theories of democratic transition in the political science and law and development literature have debunked the so-called "transition paradigm," which presumed a pattern of linearity in democratization on the basis of democratic evolution in the West. *See, e.g.*, Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5 (2002), available at <http://www.journalofdemocracy.org/article/end-transition-paradigm>.

387. Larry Diamond labels this phenomenon "the democratic rollback." Larry Diamond, *The Democratic Rollback: The Resurgence of the Predatory State*, 87 FOREIGN AFFAIRS, no. 2, 2008, available at <http://www.foreignaffairs.com/articles/63218/larry-diamond/the-democratic-rollback>; *see also*, Kalhan, *supra* note 31, at 3–13.

evident from total volume of constitutional litigation, the high ratio of unconstitutional judgments, a more liberalized interpretation of the constitutional courts' jurisdiction and powers, and growing intervention in purely political questions. These changes occur for a number of reasons. Subsequent periods of activism have the advantage of an existing jurisprudence that the courts can enhance and develop further without the labored and gradual justification that accompanies the establishment of new principles. In addition, courts have the liberty to strategically and selectively apply jurisprudential principles in later periods by drawing on an internally inconsistent and at times openly contradictory body of precedents that emerged in different periods of the transition cycle. Another reason relates to the kinds of issues that the courts encounter and are able to prioritize at the point of transition without any direct and immediate threat to their autonomy, and the litigants and groups that are mobilized in support of the courts, including the media that provides the added visibility to the courts' initiatives. Widespread opposition to the incumbent government may also be a significant factor in the relative ease with which the courts are able to swiftly enhance their prestige and credibility through a high volume of unconstitutional rulings.

Aside from the changes in jurisprudence, a dynamic theory of judicialization also reveals the structural continuities in the construction of judicial power over time and the effect of judicialization on democratic institutions and processes. The institutionalized ascendancy of the judiciary over the political sphere is a consequence of the persistence of authoritarian structures that create space for the judiciary to assert itself as a paternalistic, even disciplinarian force over representative institutions at times when the judiciary is facing a crisis of legitimacy or is seeking to demonstrate its heightened normative authority after reinstatement.

In the current judicial dispensation, there seems to be a lull in judicial activism. This is somewhat similar to Phase Three, but not entirely. The exit of Chief Justice Chaudhry was voluntary and has not precipitated an immediate crisis. The chief justice's departure has allowed the Supreme Court to roll back from the hyper-activism of the past almost five years and to undertake damage control in respect to the increasing criticism it has attracted as a result of its trigger-happy posture toward the government. The court, under the leadership of a new chief justice, has strategically chosen to exercise restraint, which is reflected, among other ways, in the definite slowdown in *suo motu* interventions.³⁸⁸

388. In fact, the Supreme Court has shown open willingness to introspect about judicial overreach through excessive use of *suo motu* interventions. See, e.g., *SC Suggests Review of Suo Motu Powers*, EXPRESS TRIB. (Apr. 4, 2014), <http://tribune.com.pk/story/691250/sc-suggests-review-of-suo-motu-powers/>.