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# *Dominion Status and the Origins of Authoritarian Constitutionalism in Pakistan*

Mara Malagodi\*

## **1. Introduction**

Pakistan's long, troubled history of constitutional instability and praetorian rule arcs back to the country's colonial antecedents and the circumstances of its creation as a postcolonial nation-state. A substantial amount of scholarship has analyzed Pakistan's modern developments in light of the colonial legacies, domestic political process, and international context at decolonization.<sup>1</sup> Drawing on this work, the present article contends that the legal legacy of Dominion status in Pakistan (1947-1956) helps to explain the rise and configuration of authoritarian constitutionalism in the country. In particular, the way in which New Dominion constitutionalism was operationalized in Pakistan rests on the distinction between a procedural and substantive understanding of Dominion status. Ultimately, the Dominion Constitution in Pakistan became an empty vessel: it retained the procedural constitutional language of Westminster and the legal fictions that underpin it, but its substantive commitment to democracy was subverted from within. Thus, the version of New Dominion constitutionalism that was conjured in postcolonial Pakistan accommodated, justified and normalized patterns of authoritarian governance in legal form.

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<sup>1</sup> KEITH CALLARD, PAKISTAN – A POLITICAL STUDY (1957); G.W. CHOUDHRY, CONSTITUTIONAL DEVELOPMENT IN PAKISTAN (1959); RICHARD WHEELER, THE POLITICS OF PAKISTAN (1970); AYESHA JALAL, THE STATE OF MARTIAL RULE – THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE (1990); PAULA NEWBERG, JUDGING THE STATE – COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN (1995); ALLEN McGRATH, THE DESTRUCTION OF PAKISTAN'S DEMOCRACY (1996); IAN TALBOT, PAKISTAN – A MODERN HISTORY (1998); IAN TALBOT, INVENTING THE NATION: INDIA AND PAKISTAN (2000); MAYA TUDOR, THE PROMISE OF POWER – THE ORIGINS OF DEMOCRACY IN INDIA AND AUTOCRACY IN PAKISTAN (2013); FAISAL DEVJI, MUSLIM ZION: PAKISTAN AS A POLITICAL IDEA (2013).

On 14 August 1947, Pakistan obtained independence from the British Empire as an Independent Dominion of the British Commonwealth of Nations under the India Independence Act 1947. As such, India and Pakistan were the first non-settler British colonies to attain responsible government in the form of Dominion status after Ireland. McDonagh has aptly characterized Ireland as the ‘Bridge Dominion’ between the white settler colonies that morphed into the ‘Old Dominions’ before World War I and the postcolonial non-settler colonies that became the ‘New Dominions’ after World War II.<sup>2</sup> Dominion status acted as a transitional constitutional framework between colonial dependence and national independence. In particular, New Dominion constitutionalism was instrumental in securing the smoothest possible process of imperial disengagement from the decolonizing nations while at the same time retaining the newly independent states within a British sphere of influence. These political goals were of paramount importance in the context of British India during World War II and at the outset of the Cold War, during which Asia soon became a primary battlefield – and Pakistan a key strategic Western ally.<sup>3</sup>

The political rationale of Dominion status was translated into legal form through the centrality of the British Crown in the Dominion constitutional framework. In law, the Dominions were ‘autonomous communities within the British Empire, equal in status [...] though united by a common allegiance to the Crown’.<sup>4</sup> Crucially, Dominions remained under the sovereignty of the British Crown until independent constitutions severing that executive link were adopted. In Pakistan, it was the promulgation of the first republican Constitution in 1956 that ended the Dominion era. In practice, ‘allegiance to the Crown’ meant that each Dominion featured a Governor General acting on behalf of the British monarch as the Head of State, who performed the Crown’s constitutional role. In short, Dominions were to function like Westminster-style constitutional monarchies. Furthermore, while the white settler colonies acquired Dominion status earlier on by the evolution of constitutional conventions as they were deemed culturally and politically

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<sup>2</sup> Luke McDonagh, *Losing Ireland, Losing the Empire: Dominion Status and the Irish Constitutions of 1922 and 1937*, *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* (forthcoming).

<sup>3</sup> R.J. McMAHON, *THE COLD WAR: A VERY SHORT INTRODUCTION* (2003), 71.

<sup>4</sup> Balfour Declaration, 1926.

equipped for responsible rule,<sup>5</sup> the majority of the non-settler colonies became Dominions via legislation passed in Westminster after protracted national liberation struggles. As such, Dominion status was more a temporary instrumental measure than a political goal *per se*. Pakistan saw it as a useful means to retain British personnel in the armed forces and civil service, and to mold the institutions of the state after independence.<sup>6</sup>

This article examines the legal legacy of Dominion status in Pakistan through an analysis of previously unexplored archival sources drawn from the UK National Archives, the US National Archives, the Constituent Assembly of Pakistan Debates, Ivor Jennings' Private Papers, and D.N. Pritt's Private Papers, and a close reading of four decisions in the litigation on the dissolution of Pakistan's first Constituent Assembly that took place in 1954 and 1955.<sup>7</sup> The argument is organized into two parts.

The first part of the article analyzes the configuration and operationalization of Pakistan's Dominion constitution focusing on its dual nature as *both* the constitutional framework to manage a difficult political transition *and* the juridical basis to frame the country's new permanent constitution. It is argued that constitutional praxis during Pakistan's nine year long Dominion period had a critical impact on the way in which the permanent Constitution of 1956 was framed and on the country's long-term constitutional trajectory. In particular, the flexible nature of the Westminster-derived Dominion Constitution, with its ease of amendment and its emphasis on 'conventional' or political rather than formal written legal checks and balances, provided structural opportunities for the subversion of substantive constitutional principles within the existing constitutional framework.

The combination of Pakistan's difficult circumstances at the time of independence with the flexible nature of the Dominion constitutional framework during a prolonged political

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<sup>5</sup> Peter Oliver, 'Dominion Status: History, Framework, and Context', *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* (forthcoming).

<sup>6</sup> Harshan Kumarasingham, 'The Tropical Dominions: The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Ceylon', 23 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 223, (2013).

<sup>7</sup> At first instance *Maulvi Tamizuddin Khan v Federation of Pakistan* PLD 1955 Sindh 96; on appeal *Federation of Pakistan and Others v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240. See also: *Usif Patel* PLD 1955 Federal Court 387; and *Special Reference I by His Excellency the Governor General* PLD 1955 Federal Court 435.

transition explains how unaccountable executive dominance progressively took root and was accommodated within the constitutional domain. The context of independence is of paramount importance to understand the way in which Dominion status was complicit in the rise of authoritarianism in the country. Pakistan was created as a ‘homeland to protect Indian Muslims’. As such, it acquired independence on the basis of an awkward geographical configuration comprising the Muslim majority areas of British India (aside from Kashmir) with two non-contiguous wings separated by thousands of miles of Indian territory: East and West Pakistan. The country also faced major economic and strategic imbalances due to the smaller share of the economic, military, and institutional assets at Partition. Thus, Pakistan needed to build its state structure and institutional framework almost from scratch. Moreover, the communal nature of Partition led to approximately a million casualties and the migration and displacement of over ten million people between the two newly created states, which went to war against each other over the disputed territory of Kashmir as early as 1948. The threat posed by India to Pakistan’s survival and the inequitable division of the British Indian Army between the two countries resulted into an ‘economy of defence’, i.e. a substantive commitment of Pakistan’s budget to military expenditure, which resulted into a growing role of the Army.<sup>8</sup>

In this explosive political context, Pakistan was in dire need of strong political leadership – and the Dominion constitutional framework proved to be an ideal tool to enable a strong executive. However, the concentration of political power at the center took place at the detriment of constitutional guarantees. Due to its inner plasticity and ambiguity, the Dominion Constitution lent itself to subversion from within as key tenets of the British Constitution were overturned through expedient political manipulations. On the one hand, the combination of the ‘efficient secret’ of the quasi-fusion of the executive and legislative powers<sup>9</sup> as characterized by the ‘elective dictatorship’ connotation of the executive-legislative link,<sup>10</sup> the increasing number of non-Constituent Assembly members to Cabinet posts, and the politicization of the office of the Governor General effectively marginalized the Assembly and thwarted the democratic representative

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<sup>8</sup> JALAL *supra* note 1.

<sup>9</sup> WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (2001) 5.

<sup>10</sup> Quintin Hogg Hailsham, *Elective Dictatorship*, *The Richard Dimbleby Lecture*, *The Listener* (21 October 1976), 496; 500.

element of government. The notion of ‘the Crown in Council in Parliament’ and the constitutional conventions underpinning it, when taken out of their historical British context, in Pakistan lost their meaning and progressively morphed into executive authoritarianism. On the other hand, the doctrine of parliamentary sovereignty translated into an ineffective role of the courts as counter-majoritarian checks on the executive. In fact, the powers of judicial review were severely restricted, the Dominion Constitution did not feature a chapter on fundamental rights, and – in line with the British tradition – the courts exhibited a great deal of deference to the executive.

The second part of the article concentrates on the litigation over Governor General Ghulam Mohammad’s dissolution of Pakistan’s first Constituent Assembly, which operated between 1947 and 1954, and the creation of the second Constituent Assembly. The second Assembly operated between 1955 and 1956 and eventually succeeded in promulgating the country’s first independent republican Constitution in 1956. Four court cases are treated as a prism to investigate the legal legacy of Dominion status in the country. It is argued that the litigation had a profound impact on the drafting of the independent constitution and on long-term political and constitutional developments in the country. In particular, the outcome and dynamics of this litigation exposed the frailty of the Dominion constitutional settlement and bore long-term adverse consequences for constitutional democracy in Pakistan.

The Dominion constitutional framework structured the behavior of political actors and favored certain strategies, actors, and perceptions over others.<sup>11</sup> More precisely, a set of Pakistani and foreign political actors conjured an authoritarian version of Dominion constitutionalism consonant with its structures and procedures, but devoid of substantive guarantees for contingent and expedient political gains. This behavior was dictated by international Cold War logics and the internal tussle for control over the Pakistani state and its resources. The Government’s success in court legitimized and normalized an authoritarian procedural version of New Dominion constitutionalism in which the executive’s encroachment on substantive constitutional guarantees went largely

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<sup>11</sup> Colin Hay & Daniel Wincott, Structure, Agency and Historical Institutionalism, 46 POLITICAL STUDIES 955 (1998).

unchallenged. As a result, Pakistani constitution-makers in both Constituent Assemblies chose to depart substantially from the Westminster model in an example of aversive constitutional borrowing.<sup>12</sup> Ultimately, they preferred to enshrine checks and balances of a legal nature in the new permanent document as illustrated by the work of the first Assembly and the framework of the 1956 Constitution. Significantly both Assemblies in their constitution-making capacity borrowed extensively from the 1950 Constitution of India rather than from the British Constitution.

## 2. Pakistan's Dominion Constitution

Pakistan gained independence on 14 August 1947 as an Independent Dominion. Thus, the Government of India Act 1935 as amended by the India Independence Act 1947 became the Dominion Constitution of independent Pakistan. Chief Justice Muhammad Munir in the opening of his opinion in *Special Reference I* described Pakistan's New Dominion constitutional framework as follows:

A constitution which was imposed on this country, with the consent of its leaders, by a statute of the Parliament of the United Kingdom, called the India Independence Act 1947 [...] a provisional constitution of the federal pattern, under the India Independence Act 1947. By that Act, until a new constitution was framed, the Government of Pakistan was to be carried on in accordance with the Government of India Act 1935, with certain consequential adaptations and modification. A Governor-General was to represent the Crown and the functions of the Legislature of the Dominion, including the making of a constitution, were to be performed by a Constituent Assembly, which had also to function as the Federal Legislature.<sup>13</sup>

The imposition of the Dominion Constitution from London was mitigated only by its transitional character and by the transfer of ultimate legislative authority from London to Karachi. In fact, in line with the requirements of the Statute of Westminster 1931, the

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<sup>12</sup> K.L. Scheppele *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2003).

<sup>13</sup> *Special Reference I by His Excellency the Governor General* PLD 1955 Federal Court 435.

India Independence Act 1947 removed the provisions for imperial control contained in the Government of India Act 1935. Under s. 6 of the India Independence Act 1947, no Act of Parliament of the United Kingdom and no Order in Council were to extend to the New Dominion; conversely, no law made by the Legislature of the New Dominion was to be void or inoperative on the ground that it was repugnant to the law of England or an Act of Parliament of the United Kingdom. S. 8 of the India Independence Act 1947 also provided that ‘the powers of the Legislature of the Dominion shall, for the purpose of making provisions as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly’.

Pakistan’s Dominion constitution established a Westminster-style parliamentary form of government under a constitutional monarchy alongside a federal structure on the basis of the imperial provincial boundaries. The 1935 Act, however, still granted extensive powers to the Head of State, i.e. the Governor General as the representative of the British Crown – powers that had already been greatly expanded in 1935 from the Government of India Act 1919.<sup>14</sup> Therefore, the Government of India Act 1935 as amended by the India Independence Act 1947 continued the vice-regal legacy of the colonial state. In reality, both Acts vested even more discretionary powers in the Dominion’s Governor General than the Viceroy had enjoyed under the British Raj: ‘responding to models of governance which resembled autocracy, the enabling Acts helped to lay the groundwork for authoritarianism’.<sup>15</sup> The India Independence Act 1947 had endeavored to temper the dominance of the unelected executive branch by introducing the principle of British parliamentary sovereignty under s. 6, which conferred plenary powers to the Dominion’s Legislature.<sup>16</sup> However, the two Acts reflected the long-standing Westminster tradition of leaving key constitutional areas of political conduct to be regulated by non-legal rules, i.e. unwritten non-justiciable constitutional conventions. As such, the New Dominion constitutional framework remained unclear about the locus of sovereign authority: as such it foreboded the fault line of Pakistan’s future political confrontation between the unelected executive and the legislature.

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<sup>14</sup> Rohit De, *Constitutional Antecedents*, in THE OXFORD HANDBOOK OF INDIAN CONSTITUTIONAL LAW, 28-30 (S. Choudhry, M. Khosla, P.B. Mehta eds., 2016).

<sup>15</sup> NEWBERG, *supra* note 1, at 37.

<sup>16</sup> IVOR JENNINGS, CONSTITUTIONAL PROBLEMS IN PAKISTAN (1957) 16.

With regard to the judiciary, Pakistan's Dominion Constitution retained the structure and organization of the higher courts established under the Government of India Act 1935. As such, their jurisdiction at the time of independence was institutionally limited. The Act had created a Federal Court empowered to interpret the constitution and primary legislation, but only to issue declaratory judgments in the exercise of its original jurisdiction. Similarly, the High Courts could issue prerogative writs under very limited circumstances. Moreover, in line with the Westminster tradition, Pakistan's Dominion Constitution did not contain a chapter on fundamental rights. However, as the confrontation between Pakistan's executive and legislative branches progressively intensified in the 1950s, the Constituent Assembly aimed to strengthen constitutional constraints of a legal nature. *In primis* the legislature sought to bolster the standing and powers of the Pakistani higher judiciary. The Assembly rescinded the link with the Privy Council as the country's ultimate court of appeal by passing the Privy Council (Termination of Jurisdiction) Act 1950 – only one year after India.<sup>17</sup> Then, just before its dissolution, the first Assembly amended the Dominion Constitution to grant writ jurisdiction to the higher courts, and codify executive constitutional conventions so that a breach could be challenged in court. Similarly, when engaged with the process of framing the new constitution, both of Pakistan's Constituent Assemblies felt that a radical departure from the Westminster model would have placed more meaningful restraints on executive power and fostered constitutional democracy.

## **2.1. The Dominion Constitution as a Transitional Frame of Government**

Pakistan's Dominion Constitution proved to be a versatile governance tool for the country's political leaders. Its plasticity, however, lent itself to subversion of key British constitutional practices from within. In particular, the constitutional conventions regulating executive powers represent the most delicate and problematic area of New Dominion constitutionalism in Pakistan. In line with the British customary tradition, such conventions were not put on any statutory footing in the Government of India Act 1935 and India Independence Act 1947. The expectation was that the Westminster model

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<sup>17</sup> ALAN GLEDHILL. PAKISTAN: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION (1957) 67-68.

would have worked in the same ‘efficient’ way as in the metropolis or the Old Dominions.<sup>18</sup> Moreover, there was a strong ideological component to New Dominion constitutionalism: ‘at the heart of the Dominion Idea was the belief that in colonial societies without a common culture, adherence to British institutions and ideas was the only possible foundation for nation-building’.<sup>19</sup>

However, as late as June 1947, there was still confusion in British India about the meaning of Dominion Status and the extent of the Governor General’s powers. At that time Mountbatten sent to Jinnah a memorandum titled ‘Dominion Office Note on Dominion’s Governor General’, which stated that there were two sources to be consulted on the scope and nature of the Governor General’s office: the Letter of Instruction issued by the Crown to the Governor General and the terms of the Dominion Constitution on the Governor General. However, the Letter of Instruction was abolished for India and Pakistan during the drafting of the India Independence Act, so the role and powers of the Governor General were solely defined by the terms of the Dominion Constitution. Nonetheless, it was clear from the correspondence that the Governor General of a Dominion had to act on the advice of the Cabinet in line with customary British constitutional practice: ‘like the King, a Governor General was limited to the tendering of advice’.<sup>20</sup> Constitutional conventions, however, proved an insufficient constraint on Pakistan’s executive in the Dominion years.

Pakistan’s progressive turn towards authoritarianism is reflected, first, in the fact that long-standing Dominion constitutional conventions were disregarded in the making of the appointments for Pakistan’s top political offices. The earliest significant departure took place when Jinnah appointed himself as the first Governor General of Pakistan, a ceremonial role conventionally not filled by a politically active figure.<sup>21</sup> It was problematic that Jinnah chose to serve also as Cabinet Minister and President of the

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<sup>18</sup> Harshan Kumarasingham, *Eastminster – Decolonisation and State-Building British Asia in CONSTITUTION-MAKING IN ASIA: DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE* (Harshan Kumarasingham ed., 2016).

<sup>19</sup> John Darwin. *The Dominion Idea in Imperial Politics* in *THE OXFORD HISTORY OF THE BRITISH EMPIRE: THE 20<sup>th</sup> CENTURY* (Judith Brown and W.M. Roger Louis eds., 1999).

<sup>20</sup> McGRATH *supra* note 1, at 30-31.

<sup>21</sup> *Id.* 38-39.

Constituent Assembly.<sup>22</sup> Jennings commented on Jinnah's appointment in these terms:

The Quaid-i-Azam could not be a constitutional monarch; in whatever post he occupied he would be a disaster because of his overwhelming prestige. He added to the mistake by becoming President of the Constituent Assembly, with Tamizuddin as Deputy President. Possibly the arrangement was justified by the enormous difficulties which faced Pakistan.<sup>23</sup>

The violation of the doctrine of separation of powers was blatant, even with respect to the British constitutional criteria of 'fusion of powers'. Jinnah's departure from the Westminster tradition would set the standard for progressively more dramatic violations.

After the death of Jinnah in 1948, Liaquat Ali Khan, the then Prime Minister, took the reins of the Pakistani state. The East Bengal Chief Minister Khwaja Nazimuddin became Pakistan's second Governor General, and Tamizuddin Khan the President of the Constituent Assembly. The appointment of Nazimuddin to the post of Governor General broke another long-established convention that an active politician ought not to be appointed to that post. Eventually, when Liaquat was assassinated in 1951, the game of musical chair with the top appointments resumed. Nazimuddin was transferred from the Governor General's seat to the Prime Minister's, while Ghulam Mohammad became Pakistan's third Governor General.<sup>24</sup> Ghulam Mohammad's appointment broke another convention followed in the Old Dominions, i.e. a former civil servant could not be appointed as Governor General.<sup>25</sup> Liaquat's death had also opened the way for the unchallenged rise of General Ayub Khan, the Commander-in-Chief of the Army.

Moreover, a steady polarization along identity lines developed, especially between the Bengalis in Pakistan's East Wing and the Punjabis dominating the West Wing.

After the assassination of Liaquat in 1951, Pakistan began choosing its leadership on a geographical basis. No longer did the nation have Jinnah or Liaquat, associated with neither the west nor the east wing. Nazimuddin was a Bengali and Ghulam Mohammad a

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<sup>22</sup> Id. 41.

<sup>23</sup> Sir Ivor Jennings Private Papers, *Political Situation in Pakistan*, manuscript, 1955, ICS 125/B/15/8i.

<sup>24</sup> TALBOT 1998 *supra* note 1, at 139-140.

<sup>25</sup> McGRATH *supra* note 1, at 83.

Punjabi.<sup>26</sup>

Constitutional posts lost their *super partes* connotation and became hostage to vested interests. Ghulam Mohammad as Governor General developed closer ties between the unrepresentative elements of the executive – the bureaucracy and the Army, both dominated by Punjabis – while working internationally to deepen Pakistan’s relationship with the United States. Nazimuddin as Prime Minister controlled the Constituent Assembly and buttressed the Bengali cause for equal legislative representation, opposed the One Unit Plan (i.e. the merging of the West Pakistani provinces into one), and remained skeptical of the ever-tighter Cold War alliance with America.

The deepening political cleavage between the country’s two wings and the representative and non-representatives elements of the state led to the subversion of a key constitutional convention regulating the appointment and dismissal of the Prime Minister by the representative of the Crown in the Dominion. As the Punjabi-dominated military-bureaucratic axis grew increasingly preoccupied with Prime Minister Nazimuddin’s politics, the Governor General moved against him. In March 1953 Nazimuddin had imposed martial rule throughout the Punjab and dismissed the Chief Minister of Punjab in the wake of the anti-Ahmadi riots. The proliferation of regional parties and deepening political fragmentation forced the central state to rely increasingly on the Army and the bureaucracy to exercise its authority effectively. Thus, on 17 April 1953, Ghulam Mohammad directly intervened and effectively abandoned his ceremonial constitutional role. He issued a proclamation dismissing Nazimuddin – a Prime Minister who still commanded the confidence of the legislature. Virtually no protests followed what was essentially a *coup d’état*, even if presented in the guise of a ‘Cabinet reshuffle’. The Governor General justified his actions on the basis that the British constitutional conventions pertaining to Cabinet government did not apply in Pakistan, i.e. implying that that they had no footing in the Dominion Constitution.<sup>27</sup>

On the same day, the Governor General ‘reshuffled’ the Cabinet, recalled the Pakistani Ambassador from Washington DC – the Bengali politician Mohammad Ali Bogra, who

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<sup>26</sup> Id. 80-81.

<sup>27</sup> McGRATH *supra* note 1, at 117.

was not a Constituent Assembly Member – and appointed him as the new Prime Minister, while purging the Cabinet of all other Constituent Assembly members.<sup>28</sup> The key Westminster convention that the monarch must appoint as Prime Minister the leader of the party commanding a majority in the elected chamber had been subverted. Writing in 1955, Jennings made the following comments on the Governor General’s intervention:

On all British precedents, this action was completely unjustifiable, for the Muslim League majority in the Constituent Assembly still supported Nazimuddin. Ghulam Mohammad sought to justify his actions by reference to the provisions of the Government of India Act [s. 10(1) – ‘The Governor General’s ministers shall be chosen and summoned by him, shall be sworn as members of the council, and shall hold office during his pleasure’]. The decisions [...] created the general spirit of distrust, which is now so evident in Pakistan.<sup>29</sup>

The sacking of Prime Minister Nazimuddin and the appointment of Cabinet Ministers who were not Assembly members by the Governor General were only the first of the many instances in Pakistani history in which the unelected executive thwarted democratic politics. It is in light of this difficult and incomplete constitutionalization of executive power coupled with a disregard for conventions that Pakistan’s experiment with New Dominion constitutionalism ought to be analyzed.

## **2.2. The Dominion Constitution as the Basis for Constitution-Making**

The India Independence Act 1947 envisioned a key role for the Constituent Assembly in framing the New Dominion’s permanent constitution. Pakistan’s first Assembly featured the same institutional foundations as the Indian one, but the outcome of the two processes could have not been more different. Both bodies were indirectly elected by the Provincial Legislatures in 1946, rather than by a direct vote of the electorate, and had the right to amend unilaterally the Dominion Constitution, i.e. without the consent of London. In Pakistan, however, the Constituent Assembly became gradually marginalized and the country’s difficult political circumstances partly legitimized the frequent executive intrusions. As Talbot explains,

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<sup>28</sup> Id. 97-98.

<sup>29</sup> Sir Ivor Jennings Private Papers, *Political Situation in Pakistan*, manuscript, 1955, ICS 125/B/15/8i.

The Constituent Assembly was in theory a crucial cog in the political process at the center. The national cabinet was responsible to it [...] and it also possessed the authority to restrict the Governor General's powers. In reality authority lay in descending order with the Governor General, the Prime Minister and the central cabinet.<sup>30</sup>

The Constituent Assembly functioned both as ordinary legislature and constitution-making body and this configuration led to inordinate delays in drafting. Eventually, by July 1954, a full draft was completed and it gained the Assembly's vote of approval on 21 September. On 15 October the document was then submitted to Ivor Jennings, the Assembly's advisor, who made only minor changes to it and sent it back to the Assembly for promulgation.<sup>31</sup>

The Governor General and the military-bureaucratic axis supporting him, however, were displeased with the draft constitution prepared by the Constituent Assembly. The document was passed by the Bengali-dominated Muslim League with the support of the Islamist parties. The draft featured a Preamble known as the Objectives Resolution, a republican and parliamentary democratic framework in which the President was reduced to 'a mere figurehead', a federal structure retaining the existing units (i.e. rejecting a One Unit Plan for the provinces of West Pakistan), a bicameral legislature organized on the basis of the Mohammad Ali Bogra's formula granting a clear majority of seats to East Pakistan in the lower house, substantial concessions to the Islamic factions, a section on fundamental rights, a Supreme Court empowered to strike down primary legislation on the basis of constitutionality and to issue prerogative writs, and extensive emergency provisions.<sup>32</sup> In short, the Constituent Assembly – mindful of the perils of the flexible nature of the British constitution – sought to move away from the Westminster model and enshrine legal checks on executive power. Jalal elucidates the reasons for the Governor General and the bureaucratic-military axis' dissatisfaction with the draft:

A federal constitution with a Bengali majority in the lower house was anathema to the civil bureaucracy and the defence establishment, not simply because a lot of them belonged to the Punjab [...] but because] politicians were seen as a danger to the larger imperative of

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<sup>30</sup> TALBOT 1998 *supra* note 1, at 134.

<sup>31</sup> McGRATH *supra* note 1, at 121-124.

<sup>32</sup> *Id.* 124-125.

streamlining the state and inserting it into the international system. So it was not provincial but institutional interests that demanded a unitary instead of a federal form of government [...] state-building [was placed] on a collision course with the political process.<sup>33</sup>

These arrangements were perceived to weaken Pakistan's sovereignty and ultimately threaten its security. Moreover, concessions to the Islamic factions with regard to the judicial review of laws alleged to be 'repugnant to Islam' opened the way for the religious groups to interfere with governmental affairs.<sup>34</sup> Opposition to the emerging constitution draft also came from East Bengal, where Muslim League politicians in the Assembly faced great resistance from regional parties, especially since the League's electoral debacle in March 1954 in East Pakistan. The victorious United Front in Bengal demanded the adoption of Bengali as the national language and greater autonomy from the center.<sup>35</sup>

Tensions between the legislature and the executive grew as the Constituent Assembly made progress on the constitution-drafting front and the Governor General became more assertive in curbing dissent. In response, the Assembly went on the offensive by exploiting the ease with which the Dominion Constitution could be amended and actively attempted to restrict the Governor General's powers. The aim was to increase the role of the courts and codify constitutional conventions into statute, ultimately by moving away from the Westminster model and seeking to build into the Dominion Constitution legal checks and balances. First, on 6 July 1954, the Assembly amended the Dominion Constitution by passing the Government of India (Fourth Amendment) Act. The Act inserted Section 223-A, which gave the Higher Courts the power to issue prerogative writs, i.e. specific public law remedies. Constituent Assembly member A.K. Brohi explained the rationale for a greater role of the courts in Pakistan's constitutional life:

It is of the essence of good Government that the executive should, within the limits imposed by law, exercise properly the powers that have been conferred upon it by the legislature. [...] There are checks which are usually imposed on the arbitrary exercise of executive authority such as the setting up of advisory committees, departmental and public

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<sup>33</sup> JALAL *supra* note 1, at 175.

<sup>34</sup> *Id.* 185.

<sup>35</sup> *Id.* 189.

enquiries, questions asked during parliamentary debates, and so on and so forth. But there methods are [...] more or less in the nature of a belated post-mortem examination into any general or special complaint. The most important of all these checks, however, is judicial control over the executive exercised through the writs of prohibition-*certiorari*, *mandamus*, *quo warranto* and *habeas corpus*.<sup>36</sup>

Brohi then compared the nature of the writs and the powers of the courts ‘in other parts of the civilized world’, citing examples from Australia, Canada, the USA, and most significantly the Constitution of India, upon which the proposed amendment of Pakistan’s Dominion Constitution was based.<sup>37</sup>

Second, on 21 September 1954, the Constituent Assembly sought to protect itself from further interference by the Governor General and to make the government entirely dependent on the Assembly through the Government of India (Fifth Amendment) Act with a view of constitutionalizing key executive conventions.<sup>38</sup>

The amendments precluded the Governor General from acting except on the advice of his ministers. All ministers were to be members of the Assembly at the time of their selection and continue to hold office only so long as they retained the confidence of the legislature. The Cabinet was declared to be collectively responsible to the Assembly, and would be required to resign if any one of its members lost the confidence of the Assembly. The Assembly stated that their purpose was ‘to give legislative sanction to certain accepted principles and conventions connected with the formation and working of government in a parliamentary system’.<sup>39</sup>

The Deputy-President of the Assembly, M.H. Gazder, commented that the amendment ‘would revitalize our political life and re-establish our reputation of being a democratic country’.<sup>40</sup> The new statutory basis of the executive constitutional conventions effectively meant that a breach of those conventions could be litigated in court, thus posing a potential stumbling block to the Governor General’s political strategy. Shortly afterwards

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<sup>36</sup> Pakistan Constituent Assembly Debates, Vol. 16 N. 17, 6 July 1954, 189-190.

<sup>37</sup> Id. 192-194.

<sup>38</sup> CALLARD *supra* note 1, at 105-6.

<sup>39</sup> McGRATH *supra* note 1, at 123.

<sup>40</sup> Pakistan Constituent Assembly Debates, Vol. 16 N. 31, 21 September 1954, 499.

the Governor General dissolved the Assembly using his prerogative powers with the Prime Minister's acquiescence.

### **3. The Pakistani Court Room as a Cold War Theater**

The growing tensions between Governor General Ghulam Mohammad and the Constituent Assembly culminated in the Governor General's dissolution of the Assembly on 24 October 1954. The response of the Assembly's President, Tamizuddin Khan, was swift and on 7 November he filed a petition in the Chief Court of Sindh claiming that the Governor's dissolution was unconstitutional. As Jalal succinctly elucidates, 'the petition was a test of the judiciary's independence from the executive'.<sup>41</sup> The case was of fundamental constitutional importance, and it was followed closely in Pakistan and abroad by journalists, diplomats, and politicians. The abundance of British and American archival records on the litigation testifies to the international significance of these cases at such a key historical moment. In fact, in September 1954, Pakistan had just become the only South Asian member of the South East Asia Treaty Organization (SEATO), the Asian equivalent of NATO,<sup>42</sup> and irrevocably aligned itself to the West in the Cold War. Moreover, foreign concerns with the case were not merely academic: three key British legal actors were directly involved in the litigation as lawyers and consultants. The argument put forward is that the involvement of Ivor Jennings QC, D.N. Pritt QC, and Kenneth Diplock QC was not just in their professional capacity as lawyers, but also of an opaque political nature in the intricate context of the Cold War.

The interplay of Pakistani and foreign legal actors in the courtroom (and outside) raises two important corollary questions. First, to what extent were the interests of Pakistani political actors aligned with foreign actors? Secondly, were the British lawyers involved in the litigation truly independent or did they have a 'shadow client' that they also

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<sup>41</sup> JALAL *supra* note 1, at 197.

<sup>42</sup> The Southeast Asia Treaty Organization (SEATO) was an international organisation for collective defence in Southeast Asia created by the Southeast Asia Collective Defence Treaty, or Manila Pact, signed in September 1954 in Manila. The member states were Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the United Kingdom and the United States. It was eventually dissolved in 1977.

indirectly reported to? The litigation over the dissolution of Pakistan's first Constituent Assembly is a useful prism to investigate the strategies through which a set of Pakistani and foreign actors conjured – and resisted – an authoritarian version of New Dominion constitutionalism. Contingent and expedient political and legal strategies – which were framed within the paradigm of New Dominion constitutional structure, dictated by international Cold War logics, and enmeshed with the internal tussle for control over the state – ultimately enabled Pakistan's initial turn towards authoritarian constitutionalism. Moreover, the Government's victory in court succeeded in normalizing and legitimizing this version of New Dominion constitutionalism.

### **3.1. *Dramatis Personae*: British Lawyers in the Pakistani Courtroom**

Ivor Jennings was the chief legal consultant for the Government of Pakistan in the litigation, later on alongside Kenneth Diplock QC (later a Law Lord), while D.N. Pritt acted as counsel for the dissolved Constituent Assembly. The Cold War context is pivotal to the framing of these actors' strategies and their interpretation of Pakistan's Dominion Constitution. Jennings was originally employed by the Constituent Assembly as the chief draftsman replacing Sir Robert Drayton in April 1954.<sup>43</sup> He had left Karachi in mid-October 1954 upon completing his revision of the draft and returned to Colombo. It is interesting to compare the different documents available in Jennings' Private Papers and published work. In an unpublished manuscript titled *Revolution in Pakistan* dated 25 October 1954 – the day after the Governor General had dissolved the Constituent Assembly – Jennings recorded his first reading of the situation in Pakistan, which disapproved of the executive intervention in parliamentary politics:

Prime Minister Ali returned to Karachi from the USA yesterday. The Governor General promptly declared a state of emergency, dissolved the Constituent Assembly, and commissioned Ali to form a new Government, which he has done. Prime Minister Ali thus makes himself responsible for the actions of the Governor General. [...] What happens to the Constitution is anybody's guess. East Bengal will want more powers but will not want

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<sup>43</sup> For a detailed account of Sir Ivor Jennings' constitutional advisory work in South Asia see: Mara Malagodi, Ivor Jennings's Constitutional Legacy beyond the Occidental-Oriental Divide, 42 JOURNAL OF LAW AND SOCIETY, 102.

a one-unit West Pakistan. I suspect that the Governor General and Prime Minister Ali will have to draft their own Constitution and put it into operation without the approval of the Constituent Assembly. Once you start on illegality you can never stop. This is not 1688: in England everybody tried to keep as close to the law as possible and there was no party conflict. Even so the Nonjurors movement was quite substantial. Before I left Karachi I pointed out to Sheikh Abdul Hamid how fine was the line between law and anarchy. There is, of course, an alternative to anarchy, dictatorship. At the moment that seems to be where Pakistan is heading.<sup>44</sup>

In another manuscript titled *The Position in Pakistan* dated 29 October 1954 and marked as ‘confidential’, Jennings presented a very lucid analysis of the internal situation in Pakistan, and the Army’s growing support to the Governor General, leading to the appointment of two Army men (Ayub Khan and Iskander Mirza) to Cabinet posts:

There is no provision in the Government of India Act 1935 for the dissolution of the Constituent Assembly. The action taken was therefore both unconstitutional and illegal. This raised certain problems, which seem to have been solved at least temporarily with considerable success [...] There is thus initial dictatorship. It seems very unlikely that either the Governor-General or the Prime Minister would wish to perpetuate this position: but, now that there has been departure from strict legal principles, there is no great practical difficulty about going further. So long as the Army and the police support the Governor-General, anything whatever may happen.<sup>45</sup>

It is interesting to compare the above with Jennings’ writing in 1957: ‘the proposals accepted by the Constituent Assembly were in many respects controversial’ impliedly justifying the Governor General’s executive intervention to suspend the work of the country’s constitution-making body.<sup>46</sup> It is during his experience in Pakistan that Jennings’ transformation from law professor to constitutional consultant and ‘Cold warrior to boot’ became complete.<sup>47</sup>

The circumstances of Jennings’ instruction as the Governor General’s legal advisor in the

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<sup>44</sup> Sir Ivor Jennings Private Papers, *Revolution in Pakistan*, manuscript, 25 October 1954, ICS 125/B/15/6ii.

<sup>45</sup> Sir Ivor Jennings Private Papers, *The Position in Pakistan*, manuscript, 29 October 1954, ICS 125/B/15/6ii.

<sup>46</sup> JENNINGS *supra* note 16, at 3.

<sup>47</sup> Patrick McAuslan, Sir Ivor Jennings’ Democracy (for Africa), 13 TRANSITIONS (1964) 13.

*Tamizuddin* case shed light on the nature and purpose of his work in Pakistan. On 1 November 1954, the Pakistan Law Secretary, Sir Edward Snelson – another British civil servant working in Pakistan – travelled to Ceylon to meet with Jennings in secret. The Pakistani Government feared that the Constituent Assembly would use the courts, and sought an opinion from Jennings on the constitutionality of the dissolution and the potential grounds for challenge.<sup>48</sup> Significantly, Jennings responded requesting written formal ‘instruction from the [Pakistani] Law Ministry addressed to me as one of Her Majesty’s Counsel’:

It would be improper for me to express opinions on the controversial issues, which you put before me unless I were consulted professionally. I am a citizen of the United Kingdom and I am not an employee of the Government of Pakistan [...] I remain bound to advise the Constituent Assembly about the Draft Constitution; but it would not be inconsistent with that duty to accept a further obligation to answer the questions which you put to me.<sup>49</sup>

To be instructed as a barrister in a case entails the professional obligations to respect the confidentiality of the client. The Government of Pakistan’s concern about the secrecy surrounding the case is evident from the cryptic Biblical references in the correspondence between the two (e.g. Philippians 2:14 and Revelation 5:1).<sup>50</sup> In fact, Snelson was preoccupied with the secrecy of Jennings’ instructions and specifically asked him to keep the matter confidential:

I trust the references are not too cryptic, if that is a permissible word/use of a semi-ecclesiastical telegram. The reference to seals means a request that you will be good enough when you have written your opinion to send it in the double envelope to the Pakistan High Commission for transmission to me marking the inner sealed envelope “To be opened only by the Law Secretary”. The [Pakistani] Cabinet is particularly anxious not only that the opinion should not be made known to anyone else but also that the fact of our

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<sup>48</sup> Sir Ivor Jennings Private Papers, *Sir Edward Snelson’s Letter to Jennings*, 3 November 1954, ICS 125/B/15/4.

<sup>49</sup> Sir Ivor Jennings Private Papers, *Jennings’ Letter to Sir Edward Snelson*, 4 November 1954, ICS 125/B/15/4.

<sup>50</sup> Sir Ivor Jennings Private Papers, *Sir Edward Snelson’s Telegram to Jennings*, 6 November 1954, ICS 125/B/15/6.

consultations should not be mentioned.<sup>51</sup>

Jennings' instructions were twofold: first, to assist with the Pakistan Government's litigation in the *Tamizuddin* case; second, to start preparing a new constitution that the Governor General might have promulgated independently.

Jennings, however, regardless of the confidential nature of his professional instructions by the Pakistani Government, maintained an open line of communication with the British Government with regard to his work in Pakistan. A letter to Jennings dated 4 November 1954 from the Office of the High Commissioner for the United Kingdom in Colombo thanked Jennings for his offer to share his work with the British Government:

It is most kind of you to offer me a copy of your memorandum about the position in Pakistan and I should indeed be grateful if you would let me have it. It would be of the greatest interest to me personally and I know that those at the top of the Commonwealth Relations Office in London would be equally interested in seeing the views of an acknowledged expert. I can assure you that we will all respect your confidence and see that no word about it gets back to the Government of Pakistan.<sup>52</sup>

This position is confirmed in a later USA Department of State dispatch dated 7 March 1955:

The British have learnt from Sir Ivor Jennings, the British constitutional expert employed as a consultant to the Government of Pakistan, that the new constitution is entirely ready for promulgation. It is apparently a much shorter document than the one prepared by the Constituent Assembly.<sup>53</sup>

Jennings was uniquely placed to influence Pakistan's Dominion constitutional politics at the intersection of Pakistani and British praxis in the Cold War context. He returned to Karachi on 26 November 1954 and started working on the litigation immediately.

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<sup>51</sup> Sir Ivor Jennings Private Papers, *Sir Edward Snelson's Letter to Jennings*, 6 November 1954, ICS 125/B/15/6.

<sup>52</sup> Sir Ivor Jennings Private Papers, *Office of the High Commissioner for the United Kingdom in Colombo' Letter to Jennings*, 4 November 1954, ICS 125/B/15/4.

<sup>53</sup> USA National Archives, Department of State, *Memorandum of Conversation*, 7 March 1955, 790D.00/3-755.

Little is known of the circumstances of the involvement of Kenneth Diplock QC (1907-1985) in the litigation in Pakistan. What is very clear, however, is that Diplock was always close to British Government circles. Ian Cobain reports that as soon as Winston Churchill entered Downing Street in 1940, he sacked the director general of MI5 and indirectly placed the service under the supervision of the Security Executive, a secretive Whitehall Committee chaired by Philip Cunliffe-Lister, the 1<sup>st</sup> Earl of Swinton. The Executive's Secretary was a young barrister: Diplock.<sup>54</sup> Both men had attended University College, Oxford. Most significantly, however, Lord Swinton was Secretary of State for Commonwealth Relations from November 1952 until April 1955, i.e. throughout the litigation over the dissolution of Pakistan's first Constituent Assembly. His Ministry was also the one to which the British High Commissioner in Colombo was passing the information he was receiving from Jennings as early as November 1954. Thus, it seems reasonable to infer that the British Government was somehow involved in the instruction of Diplock.

The Assembly, on its part, engaged British barrister Denis Nowell Pritt QC to represent them. D.N. Pritt (1887-1972) was a British barrister and left-wing politician; he was a Member of Parliament for the constituency of Hammersmith North from 1935 to 1950. After his first visit to the Soviet Union in 1932 with the New Fabien Research Bureau, Pritt became – in the words of George Orwell – ‘perhaps the most effective pro-Soviet publicist in this country’. Expelled from the Labour Party in 1940, he eventually lost his seat in Parliament in 1950 due to the political changes brought by the Cold War. Between 1950 and 1960, he dedicated himself to legal work for the labor and anti-colonial movements.<sup>55</sup> In his autobiography, Pritt records that he had to travel to Pakistan in disguise for his clients feared he might have been excluded from Pakistan. However, he successfully arrived in Karachi and even if he was not a member of the Pakistani Bar, the Chief Court granted him permission to be heard with no difficulty.<sup>56</sup> Pritt was instrumental in securing a victory for the Assembly at first instance, but due to the lack of funding he was unable to return to argue the appeal in the Federal Court. He was recalled

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<sup>54</sup> IAN COBAIN, *CRUEL BRITANNIA: A SECRET HISTORY OF TORTURE* (2012), 8-9.

<sup>55</sup> K. Morgan 2004. ‘Pritt, Denis Nowell (1887–1972) Lawyer and Political Activist’ in *Oxford Dictionary of National Biography* < <http://www.oxforddnb.com/view/article/31570>>.

<sup>56</sup> D.N. PRITT, *AUTOBIOGRAPHY OF D.N. PRITT: THE DEFENCE ACCUSES* 48-50 (1966).

to act in the later *Special Reference I* case.<sup>57</sup>

The interaction of British and Pakistani lawyers during the litigation over the dissolution of the Constituent Assembly inside the courtroom and with their clients and political allies outside the courtroom had transformed the Pakistani courts also into an ideological battleground, a site of political contestation, and an international Cold War theater. The reverberations of those legal battles and constitutional engagements would be felt for years to come.

### **3.2. *Tamizuddin*: The Proceedings at First Instance**

On 7 November 1954, the President of the disbanded Constituent Assembly, Tamizuddin Khan, initiated proceedings in the Chief Court of Sindh challenging the legality of the Governor General's dissolution of the Assembly. The extent of executive hostility to the case is demonstrated by the ruse necessary to avoid the police intercepting the lawyer heading to court to file the petition. While one of Pirzada's associates acted as a decoy and was arrested, the other disguised as a *burqa*-clad woman went to the Registrar's office and succeeded in filing the petition with Pirzada, who had joined him in a borrowed diplomatic car.<sup>58</sup> Arguments were then heard from 6 December until 23 December, and resumed between 10 and 15 January 1955.

Tamizuddin asked the court for writs of *mandamus* and *quo warranto* to restrain the Government from giving effect to the proclamation and obstructing the petitioner in the exercise of his functions and duties as President of the Constituent Assembly; and to determine the validity of nine ministerial appointments.<sup>59</sup> As Newberg illustrates, 'more generally the High Court was asked to determine the extent of the Assembly's powers, its relationship to the executive, and the judiciary's authority to limit executive authority'.<sup>60</sup> The Government sought to attack the jurisdiction of the court by arguing that the amendment to the Dominion Constitution that had introduced the court's writ jurisdiction

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<sup>57</sup> *Special Reference I by His Excellency the Governor General* PLD 1955 Federal Court 435.

<sup>58</sup> McGRATH *supra* note 1, at 158.

<sup>59</sup> Sir Ivor Jennings Private Papers, *Judgement by the Full Bench of the Honourable Sind Chief Court in Writ Petition N. 43 of 1954 for the issue of Writ of Mandamus and Quo Warranto in the case of Moulavi Tamizuddin Khan vs. The Federation of Pakistan & Others*, 9 February 1955, ICS 125/B/15/6.

<sup>60</sup> NEWBERG *supra* note 1, at 42.

had not received royal assent from the Governor General and therefore was invalid. D.N. Pritt found the nature of the Government's submissions incongruous:

Our claim was for an order under what is called "Writ Procedure" in India and Pakistan, and "Crown Practice" in England, declaring that the assembly had not been validly dissolved. This procedure, which works relatively quickly, was obviously the correct one, but the Government, in addition to arguing that we were not entitled in law to the declaration for which we asked, also argued that Writ procedure was not appropriate. It was absurd that a government, challenged as to the validity of its action, which must obviously be determined on its merits sooner or later, should attempt to win on a point which would not decide the substance of the matter, and thus leave the whole constitutional position of the country in suspense.<sup>61</sup>

Jennings was aware of the main weakness of the case, namely that there was no provision in the Government of India Act 1935 granting powers to the Governor General to dissolve the Constituent Assembly. Therefore, he focused his submissions on behalf of the Government on the issue of royal assent in line with the British tradition on the royal prerogative. Since Pakistan's Governor General had not assented to the majority of ordinary legislation and constitutional amendments passed by the Constituent Assembly, Jennings' argument was that this legislation was invalid. As a consequence, there would be no legal basis for the court to issue the writs.

The creation of legal checks and balances on the executive (e.g. writs) was obviously unpalatable to the authoritarian Pakistani Government. In fact, the New Dominion constitutional framework had proved to be an expedient means for the Government to assert control over the state machinery over the years and retain a guise of constitutionality. However, Pakistan's intention of becoming a republic and remaining in the Commonwealth on the same basis as India had already been made clear by 1953.<sup>62</sup> In that year Pakistan had also technically converted into a Commonwealth Realm, and the Crown transformed into the 'Queen of Pakistan' through the principle of divisibility of the Crown enshrined in the Royal Styles and Titles Act 1953.

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<sup>61</sup> PRITT *supra* note 49, at 49.

<sup>62</sup> UK National Archives, DO 35/5377 (1952-54) – Review of Pakistan events by High Commission.

Since the Governor General's dissolution of the first Constituent Assembly, the debate over Pakistan's form of state reopened. On 17 November 1954 – ten days into the litigation – the British High Commission in Karachi sent to the Commonwealth Relations Office in London a dispatch on Pakistan's political developments, including its relations with the Crown. This passage illustrates the reasoning behind the sudden 'monarchical turn' of the Pakistani military-bureaucratic axis:

The Governor General [Ghulam Mohammad] is no convinced republican in spite of his supposed ambition to be the first President if Pakistan becomes a republic [...] Mohammad Ali's republicanism was never more than a vote-retaining device. Iskander Mirza is certainly unsympathetic to the establishment of a republic. He had said to me personally "we intend to remain as a Dominion for as long as we possibly can" [...] The Army have throughout been reluctant to lose their direct connection with the Royal Family, and their influence is now of course greater than before.<sup>63</sup>

Pakistan's unelected executive was acutely aware of the obstacles that constitutional constraints of a legal nature might have posed for their political ascendancy. The outcome of the *Tamizuddin* case at first instance proved their concerns to be warranted.

On 9 February 1955, the Chief Court of Sindh unanimously rejected the Government's submissions that the court had no jurisdiction to decide the matter and that the Governor General's dissolution of the first Constituent Assembly was within the lawful exercise of his royal prerogative powers in the absence of explicit statutory powers, and found for the Assembly.<sup>64</sup> The Chief Court interpreted Pakistan's Dominion status as the basis for the country's independence, hence the Assembly was deemed to be sovereign: Pakistan was at liberty to frame any constitution for itself. Moreover, the court also expressed policy concerns: if the court held invalid all the Acts passed by the Constituent Assembly for want of assent, the country's legal system would have been thrown into chaos. The Assembly's victory, however, was just the beginning of a drawn out legal battle.

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<sup>63</sup> UK National Archives, PREM 11/1521 (1952-56) – Constitutional Developments in Pakistan.

<sup>64</sup> *Maulvi Tamizuddin Khan v Federation of Pakistan* PLD 1955 Sindh 96.

### 3.3. *Tamizuddin*: Appeal to the Federal Court

On 17 February 1955, Ghulam Mohammad swiftly appealed to the Federal Court, and on 1 March 1955, the appeal came up for arguments.<sup>65</sup> The Governor General brought in Kenneth Diplock QC alongside Jennings, while the Constituent Assembly did not even have sufficient funds to agree to the offer by Pritt to act pro bono upon the reimbursement of his living expenses.<sup>66</sup> The appeal saw a shift in legal tactics. Jennings had advanced the following argument: as Pakistan was a Dominion, the Assembly's amendments to the Government of India Act 1935 were invalid because they did not receive the assent of the Governor General; thus, in such circumstances the dissolution was lawful. One of the key points raised by Jennings was that *all* the legislation passed by the first Constituent Assembly, not just ordinary legislation but also constitutional legislation, necessitated the Governor General's assent to be legally valid under English law as the Governor General represented the British monarch.<sup>67</sup> Jennings argued that Pakistan's Dominion Status required that the constitutional basis of the country, the Government of India Act 1935 and the India Independence Act 1947, to be interpreted in light of the English common law position on prerogative powers.<sup>68</sup>

The arguments put forward by the lawyers for the Constituent Assembly relied on Section 1 of the India Independence Act 1947, which provided for the establishment of the two 'independent Dominions' of India and Pakistan. As Jennings highlights,

Counsel for Moulvi Tamizuddin Khan sought to show that there was a difference between a 'Dominion' and an 'independent Dominion', because the former had no right to change its constitution whereas India and Pakistan were provided with constituent assemblies so that they could provide, and from time to time alter, their own Constitutions.<sup>69</sup>

The Chief Justice opined that the Dominion Constitution stated nowhere that the Constituent Assembly was the sovereign of the New Dominion of Pakistan, while it

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<sup>65</sup> Sir Ivor Jennings Private Papers, *Diary – Constitutional Developments in Pakistan*, manuscript, 1955, ICS 125/B/15/8v.

<sup>66</sup> McGRATH *supra* note 1, at 175.

<sup>67</sup> Section 6(3) India Independence Act 1947.

<sup>68</sup> *Federation of Pakistan and Others v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240.

<sup>69</sup> JENNINGS, *supra* note 16, at 13.

clearly stated that the Dominion owed allegiance to the Crown. He further contended that the Governor General was not imposed by London but appointed and dismissed on the advice of the Dominion Cabinet, and as such the sovereignty of the legislature was not affected by the provision relating to assent. This reasoning, however, could be justified only if the Governor General had remained a ceremonial figure, which he had not been since Pakistan's independence. On 21 March 1955, the Federal Court, with a 4:1 split, reversed the decision of the Chief Court and found for the Government. Justice Cornelius in dissent pointedly highlighted that while India obtained independence as a Dominion as well it promulgated the 1950 Constitution without the Governor General's assent. In the end, the Federal Court had accepted Jennings' argument that Pakistan's Dominion status required that the constitutional basis of the country to be interpreted in light of the English common law position on prerogative powers.<sup>70</sup> The decision confirmed the worst suspicions of the national liberation leaders that Dominion status did not equate to full independence.

From an international perspective, the Western bloc had heavily invested in the allegiance with Pakistan and selected the military-bureaucratic axis as their main interlocutor. The USA Department of State Memorandum of 7 March 1955 on the conversation between the American diplomat J. Jefferson Jones III and the First Secretary of the British Embassy in Karachi, D.J.C. Crawley, illustrates the reasons behind the extensive Western interest in the ongoing litigation over the dissolution of the Assembly:

Fundamentally our Embassy in Karachi continues to believe that the group in power has the means and the determination to retain control even in the face of an unfavorable decision by the Federal Court. Whatever their constitutional position, the group in power continues willing to cooperate with the west and it would appear to our advantage to have them continue to control the country and to maintain stability, although it would be of course desirable that this be done with an appearance of legitimacy.<sup>71</sup>

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<sup>70</sup> *Federation of Pakistan and Others v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240 (Appellate Jurisdiction).

<sup>71</sup> USA Department of State, Memorandum of Conversation, 7 March 1955, 790D.00/3-755.

Ultimately, Pakistan's highest court played a pivotal role in sealing the fate of the first Constituent Assembly and in providing a justification in legal form to its untimely demise. But that was only a short-term result. In the long run, the involvement of the Pakistani judiciary in the politically controversial litigation over the dissolution of the Assembly considerably weakened the legitimacy and standing of the courts as an effective check on executive power.

### **3.4. Aftermath of the *Tamizuddin* litigation**

The Federal Court's decision to accept Jennings and Diplock's submissions engendered further political instability in Pakistan. It undermined the sovereignty of Pakistan's first constitution-making body, questioned the country's legal basis of independence, and threw the nation into legal uncertainty by invalidating much of the legislation passed by the Assembly. The court's decision also gave a cloak of legality to what was effectively a *coup d'état* by the Governor General. In fact, Ghulam Mohammad had intended to take control of the constitution drafting process since the beginning of the court proceedings, which he was in any case prepared to ignore had the Court ruled against him.<sup>72</sup>

As Chief Justice Munir recalled later in his memoirs, the President of Pakistan's first Constituent Assembly had lost his case even before entering the courtroom.<sup>73</sup> Western media and diplomats, on their part, welcomed the outcome of the *Tamizuddin* litigation, as it seemed to normalize and legitimize Pakistan's political status quo. Most importantly, the courts had supported the military-bureaucratic axis that had engineered Pakistan's military alliance with the West in the Cold War context. It was the flexibility of the Dominion Constitution that had permitted such political accommodation through an internal subversion of constitutional principles rather than the complete overthrowing of the constitution like in the Weimar Republic. Ultimately, the outcome of the appeal preserved a semblance of legality. Unsurprisingly, on 9 June 1955, Jennings was rewarded for his services. He received the title of Ordinary Knight Commander of the

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<sup>72</sup> Sir Ivor Jennings Private Papers, *Letter from Jennings to Pakistan PM*, 8 December 1954, ICS 125/B/15/7i.

<sup>73</sup> McGRATH *supra* note 1, at 216-217.

Civil Division of the Most Excellent Order of the British Empire as Constitutional Adviser to the Government by Her Majesty on the advice of Her Majesty's Pakistani Ministers.<sup>74</sup> Similarly, Kenneth Diplock QC was appointed as a judge of the High Court in 1956 immediately after his return from Pakistan and retained a close proximity to the British Government, most notably in his work on the juryless courts in Northern Ireland.

On 27 March 1955, only six days after the judgment of the Federal Court, the Governor General declared a state of emergency and promulgated an Emergency Powers Ordinance under s. 42 of the Government of India Act 1935 granting him powers, amongst many others, to make provisions for framing the permanent Constitution of Pakistan.<sup>75</sup> A string of constitutional cases ensued, shaking the legal and political foundations of the Pakistani state. In *Usif Patel*, a challenge to the validity of the Governor General's emergency order, the apex Court sought to restore its reputation and ruled that the Government was required to call for a second Constituent Assembly.<sup>76</sup> In *Special Reference N. 1 of 1955*, however, the Federal Court found for the Government on all issues: invoking the 'doctrine of necessity' it ruled that the Governor General's dissolution of the Constituent Assembly was lawful and that while a second Constituent Assembly had to be convened, its life could not be indefinite.<sup>77</sup>

Pritt reflected on the legacy of the *Tamizuddin* litigation in these terms:

The Government won on a point of procedure, and thus spent nearly a year in avoiding a decision on a vital and urgent constitutional matter. It then had to get the point really decided, by making a "special reference" to the Federal Court! That Court, when giving directions as to when and how the reference should be argued, pressed my client, the Speaker of the Assembly, in open court, to secure somehow that I should attend. He accordingly asked me to do so, saying that he hoped to be able to collect enough money to pay my fees. I felt it was my duty to accept, and went to argue the reference. We had a very interesting legal struggle, but in the end we lost; the Court did not feel equal to telling the Government that it had not only acted illegally but had in effect been governing the country

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<sup>74</sup> *London Gazette*, 9 June 1955, Supplement, 3308.

<sup>75</sup> HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN (2001) 143.

<sup>76</sup> *Usif Patel* PLD 1955 Federal Court 387.

<sup>77</sup> *Special Reference I by His Excellency the Governor General* PLD 1955 Federal Court 435.

for a year or more in defiance of the constitution.<sup>78</sup>

Pritt's comments highlight the distinction between a procedural and substantive understanding of New Dominion constitutionalism. The version that prevailed in 1950s Pakistan was one informed by an expedient understanding of the Constitution, devoid of the substantial and effective commitments to constitutional democracy. All that remained in Pakistan was the empty simulacrum of the 'dignified' constitution, whose primary purpose had been subverted in the name of efficiency and reason of state. Ultimately, the unwritten procedures underpinning Pakistan's Dominion Constitution proved unable to fulfill its key function of placing meaningful constraints on the executive.

Eventually, on 10 May 1955, the Governor General summoned a second indirectly elected Constituent Assembly and, in June, Jennings was recalled to Karachi to aid with the drafting, but he was eventually sacked in September 1955.<sup>79</sup> Pakistan's first republican Constitution was adopted on 23 March 1956. It featured a parliamentary form of government and a federal structure; it was remarkably similar to the draft prepared by the first Assembly with a few notable differences such as the acceptance of the One Unit Plan for West Pakistan. In October 1958, however, the military coup led by General Ayub Khan put an end to this fragile experiment in constitutional democracy. It was the first of the many recurring cycles of praetorian rule in Pakistan.

## 4. Conclusions

This article has examined the procedural and substantive configuration and legacy of New Dominion constitutionalism in Pakistan through the prism of the constitutional praxis under the Dominion Constitution and the litigation over the dissolution of the first Constituent Assembly. It is argued that the New Dominion constitutional structures provided a platform for the behavior of Pakistani and foreign political actors in the early phase of the Cold War in Pakistan, leading to the manipulation and subversion of key

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<sup>78</sup> PRITT *supra* note 49, at 49-50.

<sup>79</sup> Sir Ivor Jennings Private Papers, *Diary – Constitutional Developments in Pakistan*, manuscript, 1955, ICS 125/B/15/8v.

tenets of Westminster constitutionalism in the country. More precisely, the way in which New Dominion constitutionalism framed executive power by relying extensively on constitutional conventions as well as the limited role of courts as a legal check explain the inability of Pakistan's Dominion Constitution to bind and restrain executive authority in that particular historical context. Pakistan's high politics during the Dominion period was channeled through malleable New Dominion constitutional procedures, which in turn shaped the political and legal strategies of the main political actors at the national, regional, and international level.

These dynamics resulted in constitutional principle giving way to political expedience for short to medium-term political, strategic, military, and economic gains. Pakistan's Dominion Constitution eventually became 'a constitution without constitutionalism' to quote Okoth-Ogendo,<sup>80</sup> a hollow vessel dressed up in the guise of the 'dignified' British constitution, but substantially and fatally subverted from within. Thus, it was unable to prevent the turn towards authoritarianism and became complicit in it. Ultimately, the Crown in Pakistan became more powerful than it was in Britain: the sovereign was not bound by constitutional conventions because the culturally and historically specific basis for those forms of customary law ultimately could not be exported. The tragedy is that Pakistani constitution-makers in both Constituent Assemblies were aware of the fact that the 'efficient secret' at the heart of the unwritten British Constitution did not suit postcolonial realities. In fact, already during the life of the first Constituent Assembly, they sought to amend the Dominion Constitution and frame the permanent constitution by radically departing from the Westminster model. The unelected executive saw legal constitutionalism as an obstacle to its ascendancy and succeeded in terminating the life of the first Assembly under a cloak of legal legitimacy sanctioned by the Federal Court.

The litigation over the dissolution of the first Constituent Assembly taught an important lesson in political constitutionalism to the members of the second Constituent Assembly. Unsurprisingly, the models that Pakistan's constitution-makers chose to replicate in framing the 1956 Constitution were those of written rigid constitutions with legal

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<sup>80</sup> H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox* in CONSTITUTIONALISM AND DEMOCRACY (DOUGLAS GREENBERG et al. 1993) 65.

counter-majoritarian checks and balances. In particular, they looked at the 1950 Constitution of India, which had already successfully mediated, assimilated and adapted American, Irish, Canadian, Australian and other modern constitutional developments to the South Asian context. In 1958, however, the Pakistan Army again intervened into democratic politics—this time to suspend outright the recently promulgated 1956 Constitution. This article has sought to demonstrate that the rise and configuration of authoritarian constitutionalism in Pakistan ought to be understood in light of the country’s troubled experience with New Dominion constitutionalism.