

Imtiaz Omar

# EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN

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# Emergency Powers and the Courts in India and Pakistan

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## EMERGENCY POWERS AND THE COURTS IN INDIA AND PAKISTAN

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## PREFACE

This book is a comparative study of emergency powers, constitutional rights, and judicial review under the Constitutions of India and Pakistan. The easy availability of emergency powers within the constitutional schemes of these countries has often facilitated the continuance of extensive periods of extraordinary rule with serious adverse consequences on the operation of individual rights. In Pakistan, 'extra-constitutional emergency' in the form of martial law has also been in operation recurrently. While the initial validity of most of the proclamations of emergency in Pakistan and India cannot be seriously questioned, the protracted continuation of the states of emergency, long after the crises that originally justified their issue have ceased to exist, indicate that the notional political controls envisaged by the respective Constitutions have failed. In this regard, the need to ensure 'limited government' by alternative means assumes crucial dimensions.

The fundamental premise of this study is that where Constitutions, such as that of India and Pakistan, articulate legal norms which limit the scope of executive power to derogate from individual rights during states of emergency, there must likewise exist an effective control mechanism to ensure that the Executive acts within the scope of that power. In the absence of efficacious political controls, the Courts must necessarily shoulder the responsibility of providing effective safeguards against the abuse of emergency powers. In the light of this proposition, this book critically evaluates the comparative successes and failures of the Courts in Pakistan and India in ensuring constitutionalism. The divergent approaches of the Courts in these countries on issues of safeguarding individual rights in times of emergency are explained in terms of differing views on the nature and functions of judicial review.

The book is an expanded and revised version of my thesis titled, *Emergency Personal Liberty and the Courts in India and Pakistan*, that was approved for the award of an LLM degree by the University of Saskatchewan, Canada, in 1986. Howard McConnell was supervisor of the project, and I profited from his distinguished expertise in Constitutional Law and Theory. His interest and sincerity towards my project is gratefully acknowledged. During that time, Alexander Dietz proved to be a true friend and comrade, and helped me in more ways than one. I found excellent holdings of materials related to my LLM research in the Law Libraries of the

Universities of Alberta and Calgary which greatly assisted in the preparation of the thesis.

For a number of reasons, it has taken me a considerable period of time to revisit the thesis and revise it for publication. A number of significant political and constitutional developments have taken place in India and Pakistan since the original study was concluded. These have been incorporated in this book. The basic conclusions regarding the problems encountered in the invocation and use of constitutional emergency powers however remain the same generally. The continuing relevance this study is evidenced by the Pakistan Supreme Court's reliance on the LLM thesis in its recent decision in *Farook Ahmad Khan Leghari v. Federation of Pakistan*, [1999] P.L.D. (S.C.) 57.

Work on the adaptation of the original study for publication of this book was substantially undertaken during my sabbatical leave last year. During that time I also travelled to India to collect recent research materials in connection with the preparation of the final manuscript for the book. My planned trip to Pakistan for the same purpose had to be cancelled for reasons beyond my control. The overseas travel was partly funded by the University of New England and the Law Foundation of New South Wales.

I owe debts of gratitude to a number of people who assisted in different ways while the manuscript for the book was being prepared. Sachin Sood of Delhi University Law School helped in accessing recent case-law of the Indian Supreme Court and other relevant materials. Mr Abdul Majid very kindly sent me copies of the latest decisions of the Pakistan Supreme Court from Islamabad. I am also grateful to Dr Abdul Latif in this regard. Mithu and Badal Bhai gladly helped in overcoming a bit of a crisis in connection with my overseas travel. Harry Geddes, Head of University of England's Law School, generously allowed time off work when needed, and facilitated the undertaking of several trips to Sydney for research in New South Wales University's Law Library. On a number of occasions during the quite intensive period of work on the final manuscript, Marc and Anne Deegan organised welcome evening tea respites.

Initial communications regarding publication of this book were made with Selma Hoedt of Kluwer Law International. Since then, I worked with Lindy Melman and Peter Buschman. They have been patient and understanding during the process of preparation of the manuscript. I would like to thank them for their interest in my project, and for their practical advice and professionalism.

The initial contact with the publishers was made on my behalf by our older boy, Ishtiaque. He also typed out the Appendices. Iftekhar, our younger boy, made it a point to pack me a snack (a lolly included) when I worked evening shifts in my office. Dalia, my wife, was generally supportive but sometimes felt it was taking too long for me to finish the project. This book is for her and the boys.

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June 2001



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# INTRODUCTION

## India & Pakistan: Independent Statehood & Adoption of Constitutions

India and Pakistan became independent States in August 1947 on the withdrawal of British colonial rule in the Indian sub-continent. The division of British India was based on religious grounds — Hindu majority areas became India while Muslim majority areas constituted Pakistan.<sup>1</sup> Independence was effected under the provisions of the *Indian Independence Act*, 1947 (UK).<sup>2</sup> Prior to Independence, the governing constitutional document in British India was the *Government of India Act*, 1935 (U.K.). The *Indian Independence Act*, 1947, provided that until the adoption of Constitutions by the respective Constituent Assemblies, India and Pakistan would be governed in accordance with the *Government of India Act*, 1935, with appropriate adaptations. India became a republic in 1950, with the coming into force of its autochthonous Constitution drawn up by an elected Constituent Assembly.<sup>3</sup> Political problems in Pakistan delayed the adoption of a Constitution until 1956, in which year it followed India to republican statehood.<sup>4</sup> Since then, Pakistan has had two other Constitutions, the 1962 Constitution<sup>5</sup> and the 1973 Constitution, the result of the abrogation of the

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<sup>1</sup> For political and historical accounts of the division of British India into India and Pakistan see, for example, H.V. Hodson, *The Great Divide*, London, Hutchinson & Co. (Publishers) Ltd., 1969; V.P. Menon, *The Transfer of Power in India*, London, Longmans, Green and Co., 1957; Maulana A.K. Azad, *India Wins Freedom*, New York, Longmans, Green and Co., 1960.

<sup>2</sup> 10 & 11 Geo. VI, c. 30.

<sup>3</sup> For an account of the Constitution-making process in India see, for example, B. Shiva Rao, *The Framing of India's Constitution: A Study*, New Delhi, Indian Institute of Public Administration, 1968; G. Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford, Clarendon Press, 1966.

<sup>4</sup> For an account of the constitutional problems besetting the new nation see Sir Ivor Jennings, *Constitutional Problems in Pakistan*, Cambridge, Cambridge University Press, 1957. Among the few commentaries on the short-lived 1956 Constitution are, H. Feldman, *A Constitution for Pakistan*, Karachi, Oxford University Press, 1956; A. Gledhill, *Pakistan: The Development of its Laws and Constitution*, London, Stevens & Sons, 1957; and K.J. Newman, *Essays on the Constitution of Pakistan*, Dacca, Co-operative Book Society Ltd., 1956.

<sup>5</sup> For a detailed account of the adoption of the 1962 Constitution and an analysis of its contents, see G.W. Choudhury, *Constitutional Development in Pakistan*, Vancouver,

1956 and 1962 Constitutions respectively.<sup>6</sup> There was also the short-lived Interim Constitution of 1972.<sup>7</sup> Since the separation of the eastern half of Pakistan, East Pakistan, in 1971, and the creation of Bangladesh on the conclusion of a civil war, the territory of Pakistan comprises only of the former West Pakistan.<sup>8</sup> The present Constitution of Pakistan was adopted in 1973.

## Some Characteristics of the Constitutions of India and Pakistan

### PARLIAMENTARY DEMOCRACY

At Independence, both India and Pakistan were governed by the *Government of India Act*, 1935.<sup>9</sup> It is therefore not surprising to find that the colonial Act in many respects determined the general pattern of the Constitutions of both countries. Both Constitutions were based on the Westminster model of parliamentary democracy, each with a President who was to assume many of the functions of the British monarch. The assumption was that the President, although vested with extensive powers would, like the Monarchy in the United Kingdom, discharge his or her functions on the advice of a Cabinet directly responsible to Parliament.<sup>10</sup> The *Constitution of Pakistan*, 1962, sought to introduce a presidential system of government, with a separation of

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University of British Columbia Publications Centre, 1969. See also M Munir, *Constitution of the Islamic Republic of Pakistan, 1962*, Lahore, All Pakistan Legal Decisions, 1965; S. Mahmood, *The Constitution of Pakistan, 1962*, Lahore, Pakistan Law Times Publications (no date).

<sup>6</sup> The circumstances in which the 1956 and 1962 Constitutions were abrogated, and the aftermath, are discussed in Chapter III *infra*.

<sup>7</sup> As the name suggests, this Constitution provided the basis for the interim functioning of government between the downfall of a military regime and the adoption of a new Constitution by an elected Constituent Assembly.

<sup>8</sup> For political and historical studies of the reasons for the dismemberment of Pakistan and the emergence of Bangladesh see, for example, R. Jahan, *Pakistan: Failure in National Integration*, New York, Columbia University Press, 1972; M. Ahmed, *Bangladesh: Constitutional Quest for Autonomy 1950-1971*, Dacca, University Press Ltd., 1979.

<sup>9</sup> As modified by the *India (Provisional Constitution) Order*, 1947, and the *India (Provisional Constitution) Order*, 1947.

<sup>10</sup> C.H. Alexandrowicz, *Constitutional Developments in India*, London, Oxford University Press, 1957, chapter 7; G. Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford, Clarendon Press, 1966, chapter 5, G. W. Choudhury, *Constitutional Development in Pakistan*, Vancouver, University of British Columbia Publications Centre, 2nd ed., 1969.

powers between the Executive and the Legislature.<sup>11</sup> The experiment was not regarded as successful and, with the 1973 Constitution, the system of Cabinet government was fully restored. By the 8<sup>th</sup> Amendment to the 1973 Constitution, however, the President was given some extraordinary powers which could be in effect be used to dismiss the Prime Minister of the day. These included broad-ranging discretion of the President in the exercise of his or her constitutional functions, including the power to dissolve the National Assembly in certain situations.<sup>12</sup> Some of these changes were superseded in 1997 by the 13<sup>th</sup> Amendment by which the President's discretionary powers to dissolve the National Assembly were substantially curtailed.<sup>13</sup>

## FEDERALISM

The *Government of India Act*, 1935, had introduced a federal system in India. In doing so, the Act merely entrenched in rigid constitutional rules the product of a long period of constitutional development beginning with the middle of the 19<sup>th</sup> century, whereby provincial governments had gradually achieved a greater degree of freedom from central control in the legislative, financial, and administrative spheres.<sup>14</sup> After Independence, the principle of federalism was retained in both India and Pakistan but, due to concerns

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<sup>11</sup> See G. W. Choudhury, *Constitutional Development in Pakistan*, Vancouver, University of British Columbia Publications Centre, 2nd ed., 1969, chapters 10 and 11. For a summation of the various considerations which led to the adoption of a presidential system, see the *Report of the Constitution Commission*, Karachi, Manager of Publications, Government of Pakistan, 1962 (reprinted in G.W. Choudhury, *Documents and Speeches on The Constitution of Pakistan*, Dacca, Green Book House, 1967, at 564-704).

<sup>12</sup> These changes brought about by the *Constitution (Eighth Amendment) Act*, 1985, were reflected in Articles 48(2) and 58(2) of the *Constitution of Pakistan*, 1973. These provisions were relied upon by the President in 1990 and 1993 to dissolve the National Assembly and dismiss Prime Minister Benazir Bhutto and Prime Minister Nawaz Sharif respectively. For the Supreme Court challenges in respect of these actions see, *Ahmad Tariq Rahim v. Federation of Pakistan*, [1992] P.L.D. (S.C.) 646, and *Muhammad Nawaz Sharif v. President of Pakistan*, [1993] P.L.D. (S.C.) 473.

<sup>13</sup> The *Constitution (Thirteenth Amendment) Act*, 1997. The Statement and Objects of Reasons for adopting the *Constitution (Thirteenth Amendment) Act*, 1997 states:

In order to strengthen parliamentary democracy, it has become necessary to restore some of the powers of the Prime Minister which were taken away by the Constitution (Eighth Amendment) Act, 1985.

<sup>14</sup> Although the innovations introduced by the *Government of India (Amendment) Act*, 1919, established the preliminary stage of provincial autonomy, it was the Act of 1935 which, for the first time, vested the provinces with a separate legal personality.



regarding centrifugal political forces, a dominant position was given to the Centre.<sup>15</sup>

## FUNDAMENTAL RIGHTS AND SAFEGUARDS TO PREVENTIVE DETENTION

A distinctive feature of the Constitutions adopted at Independence by India and Pakistan is the inclusion of a catalogue of constitutionally guaranteed, and judicially enforceable, individual rights designated as 'Fundamental Rights'. The incorporation of a bill of rights was a feature which the British authorities had rejected when the idea was put forward by Indian leaders, during the deliberations which prepared the *Government of India Act, 1935*. Although the idea was inspired by the example of the United States Constitution, the Fundamental Rights in the Constitutions of India and Pakistan are not described in absolute terms (such as is the case with the American model), but are carefully circumscribed with express limitations and reservations.

The articulation of the individual rights in the Constitutions of both countries is preceded by a declaration that all laws inconsistent with the Fundamental Rights shall be void to the extent of the inconsistency.<sup>16</sup> Among the rights entrenched in the Constitutions of India and Pakistan are the following:

- (a) right to equality;<sup>17</sup>
- (b) rights to freedom of speech, assembly, association, and movement;<sup>18</sup>
- (c) right to life and personal liberty;<sup>19</sup>
- (d) right to freedom of religion;<sup>20</sup> and

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<sup>15</sup> The predominance of the Centre is so marked that doubts have frequently been expressed as to whether India or Pakistan are in fact federal systems. This is particularly the case with respect to the 1962 Constitution of Pakistan. See, for example, A. Gledhill, 'The Constitution of the Republic of Pakistan, 1962', (1963) 12 *Indian Year Book of International Affairs* 192-204, at 202.

<sup>16</sup> *Constitution of India*, Article 13; *Constitution of Pakistan*, 1973, Article 8.

<sup>17</sup> *Constitution of India*, Articles 14-18; *Constitution of Pakistan*, 1973, Articles 25-27.

<sup>18</sup> *Constitution of India*, Article 19; *Constitution of Pakistan*, 1973, Articles 15, 16, 17, and 19.

<sup>19</sup> *Constitution of India*, Article 21; *Constitution of Pakistan*, 1973, Article 9.

<sup>20</sup> *Constitution of India*, Articles 25-28; *Constitution of Pakistan*, 1973, Article 20.