Pakistan's Reluctant Constitutionalism

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Not too long ago, a middle-aged Pashtun guava seller in one of Lahore's upscale markets, dressed in what cosmopolitan fashionistas will eventually appropriate as Taliban street-chic, whispered to me in confidence that the only thing that could torpedo Pakistan's phenomenally corrupt prime minister Mian Nawaz Sharif was the Supreme Court. This was surprising. Even at the turn of the century, only a handful of Pakistanis would have betted on the emergence of the Supreme Court as a serious institutional player against the executive branch, in one of these theatrical stand-offs Carl Schmitt feverishly anticipated with the captivating German compound word *Ausnahmezustand*.

Traditionally, institutional opposition to the government has been the forte of the armed forces. In the decades since Pakistan's rushed inception in 1947, the military establishment repeatedly cut short her democratic pretensions. For once, however, the government's fear was not sparked by such predictable military interventionist lust. It was ignited by the Supreme Court. On 20 April 2017, the court ruled in one of the greatest cases in its turbulent history: the impeachment of the prime minister for involvements in shady financial dealings that bubbled up after the Panama Papers. Nothing happened; the court only showed Nawaz the yellow card. But while Pakistan narrowly missed her constitutional moment by a single judge's vote, the court's ruling displayed a democratic maturity that would have left Hans Kelsen breathlessly write to Schmitt about: *Geehrter Herr Professor Schmitt*, the court performed as the guardian of the constitution!

The Panama Papers, leaked in 2015 by the mysterious whistle-blower 'John Doe', who some conspiracy theorists contend is just one of Banksy's latest prank projects, stirred up third world countries more deeply than developed ones. In Pakistan, the papers reverberated as the single most important issue in public debate, right after the Cricket Super League, the Coke Studio discovery Momina Mustehsan, the ageing Bollywood hero Shah Ruhk Khan, and, you guessed it, the surge in onion prices. The prime minister's 43-year old daughter, Mariam Safdar, was implicated directly in dodgy money transfers from Swiss bank account to off-shore companies. With exotic names like 'Nielson' and 'Nescoll', Safdar's off-shore empire was clearly the bureaucratic wet-dream of a colourless Caribbean legal clerk at Mossack-Fonseca.

After intense media scrutiny, Safdar acknowledged that she owned a few cosy apartments in London's prime location––Park Lane overlooking Hyde Park––but she fiercely maintained that the money was sourced legally from the explosive success of her family's business ventures in Saudi Arabia. The excuse for going off-shore that Safdar presented to the Pakistani public was the same the icon of white feminism Emma Watson sought refuge under when confronted with her entanglements in Panamagate: privacy––a novel catch-all legal sledgehammer. Both women would agree that off-shore companies are complicated and messy, but ultimately argue that they open legitimate paths to protect one's privacy. As a satirical headline in *The Onion* inflated brilliantly: to safeguard privacy concerns, the public should just trust the world's most powerful leaders to punish themselves accordingly.

The Sharif clan's financial success coincided with Nawaz's first victory in the 1993 general elections. There are barely any dots left connecting. But since a substantial part of the money was distributed democratically amongst far-flung *baraderi* networks, the many beneficiaries of the corruption pie have repeatedly secured the MLN vote from Pakistan's economic and cultural backbone, the Punjab province.

The swagger with which the senior judge Asif Saeed Khan Khosa, a mediocre textualist with book

titles like 'Judging with Passion', poked into Nawaz Sharif's financial infidelity has been the stuff of much media chirping. Citing Puzo's Godfather in his resort to the quantity-over-quality novelist Balzac, that behind every great fortune lurks a greater crime, Asif Khosa, put his own cook-book advice to legal writing into practice. But despite these references to middle-brow popular culture, leftovers of Khosa's late 70s Cambridge education, it was a breath of fresh air, that two judges in diverging opinions articulated what many Pakistanis had in mind: how some of that sweet off-shore money could be activated to bring down onion prices, or more generally be used for the greater public good.

While the court's high standard of vetting evidence left Nawaz Sharif temporarily untarnished, the diverging-opinion-holders vented that Nawaz had lost the constitutional backing for his mandate. More than just a bruised eye, the ruling may open a clay pot of poisonous scorpions for Nawaz Sharif. After tedious reconstructions of who-said-what-when, the court concluded that there was evidently something fishy in Nawaz's financial operations; alas, they were lacking the final piece of the puzzle to knock him out of his position.

Pretty much like Donald Trump, Nawaz brazenly puts family members into high administrative positions. Unlike Trump, however, much of Nawaz's continuation to rule rests on the legally verifiable uprightness of his moral character. As a constitutional amendment, the character suitability clause for Pakistan's highest office holder is enshrined in Article 62 (1) (f), added during the great Islamisation chess game of the long 1980s, under the vague term '*ameen*' (honest or upright). Anthony Weiner would have had a much harder time canvassing for a political comeback in Islamabad, even with the support of Huma Abedin.

But how did semi-Islamic categories like *ameen* find such a prominent place in Pakistan's constitution? Those who bemoan the golden days of Pakistan, when it was possible for her English-speaking elite to slurp mango-lassis in the lush gardens of Lahore's five-stars unburdened from the nagging fear of party-pooping suicide bombers, will be surprised to learn that much of the constituent assembly debates to produce the first (liberal) constitution centred on other-worldly matters.

On 4 December 1949, for instance, Ishtiaq Husain Qureshi, one of many culturally anglophile Oxbridge lawyers, rose to address the political science conference in Lahore's imposing town hall with some notes on the constitution. At the time, the nation building process, like the mood of the gathered political scientists and historians, was caught in a paralysing deadlock between radical hope for a blooming national future and a deep-rooted fear of collapsing public order. As a member of the constituent assembly, Muhammad Ali Jinnah's handpicked group of public men in charge of drafting the constitution, Qureshi had been key in rallying support for the recently adopted preamble to Pakistan's legal embodiment, the so-called Objective Resolutions.

In the absence of any meaningful historical foundations, attempts to fuse universally applicable Islamic principles––consider the dramatic opening statement: sovereignty over the entire universe belongs to Allah Almighty alone––with more tangible materialist concerns for economic uplift and minority protection had clouded the Resolution in a mythical dust; oscillating between moments of existential brilliance and collective incompetence. Well aware of Pakistan's cultural specificities, Qureshi's short speech redoubled efforts to embrace the lack of her historical anchoring by arguing instead that the 'dynamic force of Islam' was in any case averse to squarely fixing any legal code on the unstable grounds of precedent alone. Not the past but the future was in need of appropriation. And just as people in modern times favoured the pilgrimage to Mecca on modern transport vehicles over 'camels and horses', political systems too had to abide to the spirit not the form of Islam, Qureshi concluded strongly.

Qureshi was certainly not alone in making sense of Pakistan's first constitution as an instrument for achieving specific ends, which for him ranged from shielding an Islamic lifestyle, developing a new moral language around it, to participating in the burgeoning global order of nation-states towards 'international

peace and happiness of humanity.' And while such high ideals and self-consciously cosmopolitan aspirations may appear laughable to Schmittian realists today, Qureshi's scathing towards conservative reactionaries and modernists alike underscores his determination––even integrity––to reorient public life towards 'new moral principles and values.' Thus, the framers intrinsically merged the cultural survival of Islamic norms with the constitution. To conclude in Qureshi's words: for a Muslim population to discard its innermost convictions in framing its constitution was to ask it to commit suicide.

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