# Introduction

## Objectives and structure of the book

This book is about the fascinating evolution of the contemporary Pakistani legal and court system through Pakistan's colonial and post-colonial history, the nature of its relationship with the society it sets out to regulate during these eras, its impact on ordinary citizens, the various attempts at its reform as well as their successes and failures, and its possible future shape and form. The book has three distinct but inter-related parts. It endeavors to determine: (i) background historical factors that have led to the current nature of the Pakistani legal and court system; (ii) its contemporary features and characteristics; and (iii) officially expressed and implemented intent for its reform as well as a critical evaluation of such reform endeavors. The analysis conducted in these parts then leads to certain projections about the possible future of the Pakistani legal and court system.

In the first part, Chapter 1 places the Pakistani legal and court system in its larger historical and sociological contexts. It explores the significance of such contexts for both understanding and reforming it. It evaluates its colonial antecedents and their continuing impact on the post-colonial polity. It traces, draws on and, hopefully, adds to the rich genealogy of sociology of law literature.

In the second part, the book maps and assesses the various distinctive features, constraints, and manifestations of the Pakistani legal and court system as "law in practice," and attempts to capture a variety of popular experiences with the same. Given the paucity of academic understanding of how this system actually works, it endeavors to adduce certain "facts" from its actual end-users. For this reason, it deviates from a conventional textual analysis of the laws and legal system. Instead, it employs modern social science research techniques of large individual and household surveys and detailed interviews with randomly selected respondents in order to understand the differential "in practice" impact of the Pakistani

legal and court system on diverse sections of Pakistani society in terms of their access to legal rights and remedies. In presenting a grassroots perspective as opposed to a top-down evaluation of the practice of law in Pakistani society, this section also proposes some approaches for future inter-disciplinary research in this area. Chapters 2 and 3 focus on these various themes.

The third part of the book then explores the phenomenon of law reform in general and reform of the Pakistani legal and court system in particular. In the Pakistani context, it maps and assesses the various institutional players who undertake reform, their internal perceptions and perspectives as to the state of the system, as well as major historical and representative recent attempts at reform. The book evaluates whether there is any correlation between what various sections of Pakistani society want, especially its more vulnerable groups, and whether the reforms respond to those needs; and, if so, whether the reforms have actually worked. It also analyzes whether what the people want can actually be delivered by legal/judicial reforms as currently visualized and designed and through those who control the reform process, or whether there are other vital political and economic avenues that are consistently ignored. The analysis marshals extensive evidence to propose how both the past and current "reformers" have perpetuated a fantasy that the system is being reformed – in the sense both of an illusion created by these reformers to detract attention from the real underlying issues which their reforms are never meant to address, and of their false and ill-guided belief that meaningful change can be effected through such superficial reform efforts.

This part of the book further endeavors to determine how the reform or "unreform" that is actually delivered is a function of the political economy and sociology of the reformers; as also of the growing role played by International Financial Institutions (IFIs) in funding and steering such reform. This in turn necessitates an analysis of the current directions of the international law and development discourse on "rule of law" reforms. Pakistan's experience with IFI-funded reform has tremendous relevance for this larger debate, as also for other post-colonial developing countries facing similar reform challenges. The book also conducts a comparative review with India in order to determine commonalities and differences in the reform approaches and outcomes. Chapters 4, 5 and 6 engage with these various important themes.

Juxtaposing the historical and sociological review of the Pakistani legal system as well as the overall findings from the first six chapters, Chapter 7

then offers some suggestions for future ways of thinking. It underlines the need to identify and pursue new and more promising directions for reform in order to bridge existing and ever-widening gaps between societal aspirations and expectations and the actual output of the Pakistani legal and court system.

Because of the relative unfamiliarity of the general international audience with Pakistan's scale, diversity, and complexity, the following introductory sections are intended to provide the larger politico-economic and sociological context of the country's legal and court system. These sections also underscore the value of a better appreciation of the Pakistani legal and court system, its impact on Pakistani society, and experiments at its reform, to a wide range of scholars, policy-makers, and policy practitioners in the area of law reform who look at other post-colonial polities in particular and developing countries in general.

## Pakistan: a broad snapshot

Pakistan is an Islamic federal republic with a parliamentary form of government. Emerging from British colonialism in 1947, the world's sixth most populous nation, the second most populous Muslim country, the thirty-sixth largest sovereign state, and the seventh global nuclear power, has had a tumultuous experience with constitutionalism and democracy. Constitutions promulgated in 1956, 1963, and, most recently, in 1973 have been frequently abrogated or put in abeyance by military coups. The military has directly ruled Pakistan for almost half of its existence. As a result, elected governments have seldom managed to successfully see through their 5-year terms in office and deliver on their manifestos and reform programs.[1] Repeated failures to formulate and entrench a constitutional ethos have made it highly onerous for a new polity to address the various grievances of vast and diverse sections of society, and of the smaller provinces in the federation.[2] The consequent

[1] Pakistan's present government will actually be its first democratically elected political government to complete a constitutionally ordained 5-year term.

[2] Very interesting in this context is M. Khan, "Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity & Group Conflict" (June 1, 2012), http://ssrn.com/abstract=2185435. The article analyzes the phenomenon of ethnicization of politics and ethnic conflict in Pakistan through a distinct federal design approach to show how the coincidence of political power and ethnic identity within a federal structure may, in certain historical and socio-political conditions, exacerbate ethnicity-based conflict by disenfranchising sub-national minority groups in the political process.

dominance by a strong centralized executive; an extensive and elaborate colonial model of bureaucracy; and the fragility of political and societal institutions, structures, and processes, has perpetuated the continuation and domination of structures, imperatives, and modes of governance from the colonial era.[3]

At the same time, acute external challenges stemming from acerbic relations with neighboring countries and worsening geo-political instability in what is a highly turbulent region, have further taxed Pakistan's resources. They have contributed to a "security state" mentality propagated by a dominant military (the eighth largest standing army in the world) at the cost of uninterrupted pursuit of development goals and civilian institution building. Pakistan has fought three major wars with India in 1948, 1965 and 1971, over the disputed territory of Jammu and Kashmir (the last resulting in the separation of East Pakistan and its emergence as Bangladesh), and has been acutely strained due to the world's largest modern influx of refugees from the war, instability and the continuing anarchy that has plagued neighboring Afghanistan since the Soviet invasion.

Despite these enormous challenges, Pakistan cannot be categorized among the various African and Asian nations that have been witnessing the "Arab Spring" after decades of uninterrupted despotic rule. Though jolted by various dictatorial regimes that have undermined state institutions, political ethos, and social glue, and currently facing the brunt of the global challenge posed by violent radical movements, the Pakistani nation – whenever allowed any breathing space by its various endogenous and exogenous challenges – has shown tremendous promise and initiative. During such various brief "springs," nation-building has resumed through vibrant politics, economic growth, a vocal and growing civil society, a free media, business and social entrepreneurship, and various episodes demonstrating tremendous popular spirit in the face of national crises – most recently on display in the wake of the devastating 2005 earthquake in Pakistan's

[3] See O. Siddique, "The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents," *Ariz. J. Int'l. & Comp. L.*, 23 (2006), 624–36. Apart from describing and discussing Pakistan's various experiences with martial laws, it focuses on the tussles between various political governments and a strong president bestowed with extraordinary powers to dissolve elected assemblies through constitutional amendments under a martial law. These tussles led to the dissolution of four elected governments from 1988 to 1996 and consequent political battles in the courts that led to several politicized and controversial decisions.

northern areas, and the popularly supported and sustained "Lawyers' Movement" to restore several appellate court judges illegally ousted in 2007 by General Pervez Musharraf.

Like other postcolonial states, Pakistan inherited several institutions, frameworks, and modes of governance. At the time of independence, two acts of British Parliament governed its new political framework: the Government of India Act 1935, an imperial holdover acting as provisional de facto constitution, which carried over the office and powers of the Governor-General, who represented the British Crown for purposes of the Government of the Federation; and the forward-looking Indian Independence Act 1947 that created a Constituent Assembly to perform legislative functions and, more crucially, to frame the country's first Constitution. Also inherited were several substantive and procedural laws from the colonial era, including, inter alia, its penal code, its contract act, its code of criminal procedure and its code of civil procedure, dating from 1860, 1872, 1898 and 1908 respectively. Over the years and during periods of democratic rule, sporadic legislation has been undertaken to update various inherited laws, rules, procedures and legal/administrative frameworks. However, in many significant ways, Pakistan's colonial past and its post-colonial present are contiguous eras that seamlessly flow into each other in the historical continuum. The aforementioned codes and many other laws continue to hold sway with minimal amendments and up-gradations. At the same time, the blue prints and building blocks employed by post-colonial reformers and policy-makers, as they attempt to develop and refine the Pakistani legal and judicial system, are essentially the ones left behind by the colonists.

In terms of a very broad structural snapshot – not dissimilar to court structures elsewhere – the Pakistani court system has two basic tiers. The constitutional and appellate courts that include the Supreme Court of Pakistan and four provincial High Courts are creatures of the Constitution. They are also referred to as the "superior courts."[4] The other tier, inherited from the colonial era, constitutes the "subordinate courts" or the "lower courts." These are established by ordinary legislation and operate as courts of first instance in the administrative districts of the

[4] See Constitution of the Islamic Republic of Pakistan, Zain Shaikh (1973), 4th edn. (Pakistan Law House, 2012), Art. 175(1). The Pakistani Constitution provides for the establishment of the Supreme Court of Pakistan at the federal level, and the High Courts at the provincial level (ibid.). A Federal Shariat Court was also set up in 1980 to deal with cases based on Islamic law (Art. 203C).

country.[5] The Constitution also allows for the establishment of additional courts, and over the years many special courts and administrative tribunals have been set up to provide avenues for adjudicating both regulatory and non-regulatory offences.[6] Quite apart from their jurisdiction in matters of constitutional interpretation, the decisions of the "constitutional courts" on questions of law and their enunciation of legal principles are, like in any common law system, binding and incrementally develop the law of the country.[7] Furthermore, the "constitutional courts" are empowered to undertake the overall judicial and administrative supervision and control of the "subordinate courts."[8] The other distinction, apart from their legal genesis and their placement in the judicial hierarchy, lies in the appointment and removal mechanisms, incentive structures, service rules, perceived social status, and operational autonomy for the appellate court judges, which is at a very different and elevated pedestal in comparison to the "subordinate courts." As a result,

[5] The "subordinate judiciary" or the district courts are established by and operate under frameworks provided by the Civil Courts Ordinance 1962 (CCO) and the Criminal Procedure Code 1898 (CrPC). The operation of District Courts under the administrative control of the District and Sessions Judge (DSJ) is governed through the provisions of the CCO and CrPC, rules thereunder and High Court Rules and Notifications. The District and Sessions Court is judicially and administratively the apex court for the district judiciary. The DSJ heads the District and Sessions Court, supported by a number of Additional District and Sessions Courts and judges. A Senior Civil Judge (SCJ) is administratively responsible for the Civil Judges-cum-Judicial Magistrates – who have both civil and criminal jurisdictions – and is answerable to the DSJ. In civil matters, the District Courts generally have original jurisdiction (as per the pecuniary limits) and also form the first tier of appeals in civil cases. In criminal cases, the Sessions Courts have original jurisdiction in serious criminal cases and hear appeals from the Magistrates' Courts. There are some differences in the structure, rules and pecuniary jurisdiction of the district courts across the provinces. See Dr. Faqir Hussain, "The Judicial System of Pakistan" (February 15, 2011), www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemof-Pakistan.pdf. Dr. Faqir Hussian is the current Registrar of the Supreme Court of Pakistan and this report was presented at the Annual Judicial Conference in Islamabad in 2011.

[6] See Pakistan Constitution, Art. 175(1). These include, inter alia, the following courts and tribunals under federal and provincial jurisdictions: Accountability Courts; Banking Courts (Recovery of Loans); Special Courts for Banking Offences; Services Tribunals; Income Tax Tribunals; Anti Corruption Courts; Anti Narcotics Courts; Anti Terrorism Courts; Labor Relations Courts; Board of Revenue; Special Magistrate Courts; Consumer Protection Courts; Juvenile Courts; Family Courts; Drug Courts; Special Courts for Emigration Offences; Court of Special Judge (Customs); Revenue Courts; Rent Courts; Special Courts (Customs, Taxation and Anti-Smuggling); Environment Appellate Tribunal; Insurance Appellate Tribunal; Customs, Excise and Sales Tax Appellate Tribunal; Special Judges (Central); and offices of federal and provincial ombudsmen.

[7] Pakistani Constitution, Art. 201.

[8] Pakistani Constitution, Art. 203.

the "superior courts" attract a very different pedigree of aspirants in terms of education, quality of legal training and economic background, as compared to the talent pool available to the much less empowered and traditionally low-paid careers in the "subordinate judiciary."[9] The latter was also under direct executive control in the colonial era, though in recent years various steps have been taken to exclusively bring it under the judicial ambit. The Code of Criminal Procedure and the Code of Civil Procedure provide the basic procedural law for criminal and civil cases respectively, set out the judicial and administrative court processes and procedures, and empower High Courts to amend and augment them, quite apart from the avenue of legislative amendments of the same.

From afar, the Pakistani courts, like courts almost anywhere in the world, present a rich spectrum of litigation. The mode of litigation is adversarial. Court contestations range from disputes on multi-million dollar joint venture agreements or minority shareholder actions against proposed corporate mergers, to civil litigation over the rent of a small urban property or criminal trials for the theft of a herd of cattle. In theory, a variety of courts and tribunals are in place to address the multiplicity of disputes and issues that may emerge in a large, diverse, complex and vibrant society, and are legally accessible to all Pakistanis.

[9] The "constitutional court" judges are appointed by the President of Pakistan through processes laid out in the Constitution. Recent amendments have changed the process of appointment. This will be discussed in greater detail in the "Judging democracy" section below. See Pakistani Constitution, Pt. VII. Recently, in addition to the four provincial High Courts, a High Court has also been established in Islamabad. The District Courts exist in each administrative district of every province. Each town and city also has a court of Additional District and Sessions judge, which when hearing criminal cases, is called the Sessions Court, and when hearing civil cases, the District Court. The "subordinate judiciary" is appointed by the provincial governments under the Civil Servants Act 1973 and judicial service rules, thus constituting a special group of the provincial civil service. However, it is under the administrative control of the High Courts. Recruitment, promotions, discipline, removal, and other terms and conditions of service are dealt with under provincial civil service acts and rules, and candidates (both joining the service at the bottom of the tier and lateral candidates from the legal bar for higher positions) have to pass an examination. Whereas the "constitutional court" judges can only be removed through the Constitutional mechanism of the Supreme Judicial Council that comprises senior appellate court judges (and that has been very rarely utilized), the subordinate judiciary does not have the same security of tenure and can be removed by the supervising High Courts under standard civil service disciplinary rules. Also, the Supreme Court judges retire at the age of 65, and High Court judges at 62, unlike other jurisdictions where they hold office for life, until they voluntarily step down or become infirm. The retirement age for district court judges, however, is 60. There are no trials by jury in Pakistan, nor are judges elected to their positions.

For many Pakistanis, however, the appellate courts, in particular, are a vague and distant concept. Their legal battles are largely fought, if at all, in the district courts or the many special statutory courts and tribunals. In this regard as well, the situation is no different from any other modern legal jurisdiction where only a select number of meritorious cases of special significance make it all the way up to the appellate courts. This should, however, not lead to the assumption that real access to even the "subordinate courts" can be taken for granted for a vast majority of Pakistanis. Furthermore, many cases are appealed, the legal process is long and time-consuming and, quite frequently, civil or criminal litigation battles can extend for decades and go all the way up to the Supreme Court. This brief overview of the structure and nature of the Pakistani legal/court system presents many points of similarity with legal/court systems elsewhere. However, as one extends closer examination to Pakistani court battles, their venues, their culture and sociology, and their diverse cast members, certain striking features emerge. Though common to other post-colonial societies, they would be deemed novel elsewhere. The next section provides such a closer snapshot.

## The post-colonial spectacle

If Jeremy Bentham's preserved, albeit headless, body at University College London – the so-called "Auto-icon" – was to be miraculously resurrected and induced to visit a contemporary Pakistani court, he would be well within his rights to feel a certain sense of déjà vu. After all, he famously prophesied acting as the "dead legislative" of British India, with James Mill acting as its "living executive."[10] If his brilliant disciple Thomas Babington Macaulay were persuaded to undertake a similar escapade, he would be somewhat taken aback. He would discover that his great handiwork, the Indian Penal Code of 1860, is still *en vogue*, its original spirit intact beneath the veneer of periodic piecemeal amendments. Both time travelers could be excused for thinking that they had not traveled at all. Both would immediately notice that in many respects,

[10] Quoted after the title page of E. Stokes, *The English Utilitarians and India* (Oxford University Press, 1982). At the very end of his ground-breaking work, Eric Stokes refers to Sir Alfred Lyall, who saw the colonial government in India approaching most nearly Thomas Hobbes's ideal of the Leviathan. The last sentence of Eric Stoke's book is: "A scrutiny of this Indian Leviathan, if depicted in the manner of Hobbes's frontispiece, would reveal Bentham's calm philosophic brow and James Mill's stern eyes of authority" (p. 322).

the Pakistani judges are at the center of an elaborate post-colonial judicial pantomime – a pantomime that is reminiscent of the colorful, intricate and complex colonial judicial spectacle in India.

Macaulay, while propounding the cause of establishing English as India's *lingua franca*, once declaimed: "In India, English is the language spoken by the ruling class. It is spoken by the higher class of natives at the seats of Government."[11] More than a century-and-a-half later, the official language of the Pakistani State, its higher classes, its courts (especially the appellate courts), its legislation, its administrative regulations, its law reports, and its cadres of successful lawyers, powerful bureaucrats and prominent NGOs, is English. However, that is not the language of the predominant majority of the clients, disputants, winners, losers, victims, beneficiaries and audiences in Pakistani courtroom dramas. They do not understand the language due to their very differential access to educational opportunities. Consequently, they have little or no comprehension of Pakistani laws and legal procedures. Like in a pantomime, they only have the benefit of looking at the judges' and lawyers' gestures and expressions, in order to decipher the unfolding stories that directly or indirectly impact and transform their lives. However, unlike a pantomime, there is no helpful background narrator's voice to explain to the audience what is going on. This is not surprising in a country where roughly a mere 3 percent of the population has a college graduate or higher qualification.[12]

[11] Minute by the Hon'ble T. B. Macaulay, February 2, 1835 (hereinafter, the *Macaulay Minute*). See www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html.

[12] Interestingly, the Supreme Court of Pakistan recently struck down the requirement of a bachelor's degree or equivalent qualification as a prerequisite for contesting elections in Pakistan. This requirement was introduced by General Pervez Musharraf through an amendment to the Pakistani electoral laws. Musharraf also attempted to introduce a similar requirement for becoming a member of a political party in Pakistan. Certain lawyers, including the author, in pro bono representations of certain veteran workers of political parties as well as labor unionists, with many years of political experience but no bachelor's degree, challenged the latter step in the Lahore High Court. The petitioners pleaded that political awareness and activism is not necessarily a function of holding a bachelor's degree. Furthermore, they argued that in a country with disparate and discriminatory access to education based on region, class and gender, such a restriction would disenfranchise almost 97 percent of the population from participation in politics. It would thus be violative of their constitutional rights to engage in political activity. While these challenges were *sub judice*, the Musharraf Government withdrew its proposed legal amendment. The bachelor's degree requirement for contesting elections, however, held sway until a recent Supreme Court judgment. It was often and widely criticized in public for the same reasons as the aforementioned reasons for the challenge to the proposed

Against the backdrop of this mute drama for the predominant majority of Pakistanis, I recall being a witness to an appellate court judge haranguing some junior police officers over certain due process violations. While berating them in English he repeatedly challenged them to explain the meaning of the words "*audi alteram partem*." All they could offer were some muffled words of apology in Urdu, while they nervously conferred with each other in hushed Punjabi. The moment was quintessential and far from being rare in Pakistani courtroom dramas. In his noble zeal to reform some policemen and his fond familiarity with English terms and Latin usages, the worthy judge seemed oblivious to the incomprehension writ large on the majority of faces in the courtroom – other than those with knowing smiles and an English legal education in their portfolios. It was like those quaint caricature drawings of judicial stereotypes that adorn the offices of well-heeled lawyers almost everywhere that display a fastidiously wigged and elaborately robed, red-faced and goggle-eyed judge, spouting fury at some befuddled wretches shuddering in their shoes. It would have been comic if it were not so tragic.

The above anecdotal foray merely illustrates the operational and everyday intimidatory and confounding dimensions posed by complex legal concepts and procedures in an unfamiliar language to average Pakistanis.[13] A glance back at India's colonial past further reveals that for the architects of the empire, choice of language was cardinal to the substantive contents of what it expected to impart. In post-colonial critiques of colonial Indian history, it is now almost clichéd to refer to Macaulay's famous 1835 Minute on Education. In this brief document, Macaulay roundly denounced the "admirers of the oriental system of education." He declared that:

bachelor's degree requirement for joining a political party. It faced further criticism as a tactic by Musharraf to exclude some veteran politicians from electoral politics.

[13] At a deeper level, languages draw their ethos, form, purposes, and continuing sustenance from civilizations, cultures, ideologies, value systems, and politico-economic models and their dialectics, as indeed they act as a mode of communication for the same. It is hard, therefore, to decouple a language from the sociology, culture, and imperatives of the legal and judicial system that employs it. Languages can obfuscate as much as they can clarify and communicate, which in itself can be a matter of political choice. When various Pakistani military dictators chose Marcus Tullius Cicero's "*Salus populi suprema lex esto*" or Hans Kelsen's "Doctrine of Revolutionary Legality" as doctrinal pretexts for regime justification at the price of constitutional abrogations, the deception was not just in the unfamiliar terminology. The larger conundrum lay in the cunning co-option of ethical and legal ideas from a very different context, both historical as well as conceptual, in order to serve a political agenda.