Shadow of the Raj: understanding rule of law and emergency in modern South Asia

DOI 10.1080/24730580.2018.1549865
ISSN 2473-0580
ESSN 2473-0599
Publisher: Taylor and Francis

SHADOW OF THE RAJ:
Understanding Rule of Law and Emergency in Modern South Asia

Amber Darr[†]

This article reviews Nasser Hussain's 2003 *The Jurisprudence of Emergency: Colonialism and the Rule of Law* and explores reasons for which it has come to be regarded as a contemporary classic. The article traces the narrative arc of the book and examines its core themes of 'sovereignty' and 'race' and their impact on the dynamic between 'rule of law' and 'emergency' in colonial India. It investigates the relevance of the book for understanding Pakistan and India's struggles with rule of law and their distinct experiences of 'emergency'. However, it argues, that despite being rooted in South Asia, the book speaks to the entire post-colonial experience. Finally, it suggests that the material in the book may be examined afresh and extended in comparative legal studies, in examining the role of rule in law in economic development, and the disparity in the relationship between the judiciary and executive in Pakistan and India.

colonialism, comparative law, emergency, legal theory, post-colonialism, rule of law, South Asian studies, sovereignty

Nasser Hussain *The Jurisprudence of Emergency: Colonialism and the Rule of Law* © University of Michigan Press, 2003. 144 pages.

Introduction

Nasser Hussain's *The Jurisprudence of Emergency: Colonialism and the Rule of Law* is an enduring book. Fifteen years after it was first published, it retains all the freshness, relevance and distinctiveness of a conversation—albeit a highly intellectual one! Like the best of conversations, it engages with seemingly familiar material and presents it with such new insight that the familiar is changed forever. Also like the best of conversations, it evokes ideas that continue to evolve in the mind long after the conversation has ended. It is a book to be appreciated, but more importantly, it is a book to be read.

Based on Hussain's PhD dissertation, *The Jurisprudence of Emergency* integrates strands from history and legal theory to explore the intimate yet complicated relationship between the 'rule of law' and 'emergency' in British India. It examines the manner in which the British concept of rule of law was transformed upon arrival in the colonies by the overriding preoccupation of the British with maintaining and asserting power, and by their notions of race. More importantly, it argues that long after their departure, the legacy of British colonial rule haunts both Pakistan and India and informs the manner in which the countries are governed today.

It is a testament to the breadth of Hussain's enquiry, that his book is relevant not only for South Asia, particularly for India and Pakistan, but also for the entire post-colonial world. By unraveling the complex legal elements of the rule of law in a historical context, and by drawing upon examples from a number of countries across the Empire, the book helps illuminate the shared history of post-colonial countries and the factors that hold them back today from maintaining the writ of law; realizing their dream of equality and progress of their citizens and, claiming their rightful place as productive and upstanding members of the global community.

[†] Amber Darr is a Barrister and an advocate of the Supreme Court of Pakistan. She also holds a PhD in Law from University College London and is currently a Senior Research Fellow at the Centre for Law, Economics & Society at University College London. Email: amber.darr@ucl.ac.uk, Twitter: @AmberMDarr). The author is grateful to Professor Faisal Devji, Professor of Indian History at St. Antony's College, University of Oxford, and a friend of Nasser Hussain's, for introducing her to this book.

There is, however, one factor that dampens the enthusiasm of the review: it is that Hussain is no longer with us either to receive our appreciation or to engage in debates about his work. Karachi-born Hussain, a Professor of Law, Jurisprudence and Social Thought at Amherst College, USA, passed away in November 2015 after an extended illness. He was only 50 years old at the time.[1] This review then aims to take a small step towards plugging the gap left by Hussain's absence and hopes that through it, Hussain's book will reach a new generation of scholars grappling with the very themes and issues that Hussain explores.

To this end, this review is organized as follows: section 1 discusses the book, its outline, narrative arc and key themes; section 2 explores the continued relevance of the book with reference to the emergencies imposed in Pakistan and India since their creation as independent states in 1947; section 3 traces the contribution of the book to legal and academic discourse in the post-colonial world and suggests ways in which themes explored in the book may be read and extended, particularly in the South Asian context. The final section concludes.

Reading 'The Jurisprudence of Emergency'

An outline of the book

Hussain opens the book with a scene from the Supreme Court of Pakistan. The year is 1955, the case being heard is the *Federation of Pakistan v. Maulvi Tamizuddin Khan*,[2] and the Supreme Court is moments away from invoking the 'doctrine of necessity' to hold that the Governor General of Pakistan is justified in declaring a state of emergency and, as a consequence of the emergency, in dissolving Pakistan's first Constituent Assembly. The invocation of this doctrine intrigues Hussain about the legal context which makes it possible. He, therefore, launches an enquiry into the legal nature of an 'emergency' and its 'intimate yet anxious' relationship with the rule of law.[3]

In the four compact chapters that follow, Hussain tells 'the story of the extension of English law and constitutionality of the colonies: the haphazard introduction of a rule of law, its colonial mutations, and its enduring consequences'.[4] In the course of this telling, Hussain also provides an account of the history of British colonialism in India, especially from the late 18th to the early 20th century. He examines not only how questions of law and emergency shaped the concept and practice of colonial rule but also, how the answers aimed for the colonies, in turn shaped the development of Western legality itself.

In the first chapter, he outlines the theoretical, jurisprudential and historical foundations of the core concepts of the rule of law, emergency and colonialism. In the second chapter, he examines the manner in which the sources and limits of legal authority were conceptualized in the 18th and 19th century; in the third chapter, he focuses largely on the 19th century and the lines along which concept of emergency had developed in Britain and then compares it with the way in which it was subsequently integrated into the governance of the colonial state. In the fourth and final chapter, he investigates emergency powers as they were deployed by

[1] Beena Sarwar 'Pakistani scholar Nasser Hussain laid to rest' November 2015 (https://beenasarwar.com/2015/11/15/pakistani-scholar-nasser-hussain-laid-to-rest/ accessed 14 July 2018).

[2] *Federation of Pakistan and others v. Maulvi Tamizuddin Khan* PLD 1955 FC 240.

[3] Nasser Hussain *The Jurisprudence of Emergency: Colonialism and the Rule of Law* © University of Michigan Press, 2003, 32.

[4] Hussain, 2.

colonial rulers in the 19th century and examines the justifications for martial law put forward by the British not only in India but throughout the colonies.

Rule of law and Emergencies: an entangled history

Early in his text, Hussain establishes that the story of emergencies, particularly in South Asia, is the story of the rule of law in the colonies. His rationale for making this claim is not so much that emergency is the conceptual opposite of rule of law (in that it suspends the rule of law) but because both are part of the integrated whole of rule of law (in that the very notion of an emergency and the mechanism through which it may be invoked is envisaged in the concept of rule of law). He urges a careful approach towards the concept of colonial 'rule of law' and warns against the easy pitfall of imagining that the rule of law envisaged by the British for their colonies was the same as considered suitable for and practiced in the metropole.

Hussain posits several reasons for this distance between the colonial and the metropolitan version of the rule of law. For instance, he argues that it may be due to the fact that the British found the overlapping and complex patchwork of legal rules that had been introduced in the Indian sub-continent by the numerous invader-kings that had arrived prior to them, to be conflicting, reflecting the 'despotic' and discretionary whims of the conquerors, and lacking in the internal logic and congruity, necessary for a system of law. Or he argues that it may be due to tensions that existed between different schools of legal and moral thought in Britain itself that called, on the one hand, for the need to impose English Law in the colonies and on the other, for India to continue to be governed by the 'despotic' law it was accustomed to.[5]

In Hussain's view, however, the primary factor that drove a wedge between the metropolitan and the colonial version of rule of law was the underlying belief held first by the administrators of the East India Company and later by colonial officers who replaced them, that a conquered territory could only be governed by a special system of law especially if the inhabitants of the territory were of a race and religion different from that of the conquerors. Hussain also notes that in holding this belief both the Company administrators and colonial rulers drew support from the highest echelons of English judiciary such as Lord Coke,[6] whose decision in the 1608 *Calvin's Case* allowed a 'king' to instantly abrogate all laws of an 'infidel kingdom' acquired by conquest and to supplant these with the superior laws of England.[7]

Hussain notes that this inherent distance between rule of law as conceived for England and as practiced in the colonies, was made explicit by the 'repugnance and allegiance clauses' of the earliest legislation made in the United Kingdom, for British India. The aim of these clauses was two-fold: to ensure that laws enacted locally in India would remain faithful to the basic principles of English law as well as the unwritten Constitution of the United Kingdom or Great Britain, and to create a hierarchy in which laws of the colonies would be ranked below those of the metropole.[8] Hussain, however, also notes that ironically, such 'repugnance and allegiance clauses' did not prevent the British from expanding the scope of local laws beyond British legislation when they considered it necessary to do so for disciplining or subjugating their colonial subjects.[9]

[5] Hussain, 57.

[6] Sir Edward Coke (1552–1634) was an English barrister, judge, and politician who is considered to be the greatest jurist of the Elizabethan and Jacobean eras.

[7] Hussain, 45.

[8] Hussain, 42-43.

[9] An example of such repugnance may be found in the Indian Councils Act 1861 which allowed broad

Hussain argues, therefore, that English law, as introduced in the colonies was English in procedure but not in substance and whilst it offered procedural certainty to the colony, in the enforcement of the law, it did not transfer English legal values to it.[10] Hussain demonstrates this assertion by reference to two distinct examples. The first is that of the writ of *habeas corpus*: he argues that as the colonial regime became more authoritarian, the scope of this writ grew severely constricted and came to reflect the fragility of colonial sovereignty rather than its avowed core values. [11] The second is that of the 1919 massacre at Jallianwala Bagh which demonstrated how the concept of 'necessary' use of force in face of a violation of martial law could be interpreted differently in the metropole and the colonies.

With regard to the writ of *habeas corpus*, Hussain cites the example of the 'act of 1781', in terms of which, landowners and farmers of land rent were excluded from the jurisdiction of the Supreme Court, and the Supreme Court was directed to accept 'the written order of the governor general' as sufficient justification for any of their acts including the act of holding people for late payment. Hussain argues that this effectively strengthened the executive and authoritarianism at the expense of the judiciary and set the precedent for treating as non-justiciable certain aspects of the exercise of power by the executive. More damagingly, Hussain argues that that this practice persisted through to the colonial era, [12] so that even when the scope of the writ of *habeas corpus* was enlarged by the Indian High Courts Act 1861, the Indian Governor General was empowered under the Indian Councils Act 1861 to override the high courts.[13]

To discuss the 1919 Jallianwala Bagh massacre, Hussain first recounts its history: on 13 April 1919, General Dyer opened fire on a crowd of civilians holding a meeting in an enclosed ground in Amritsar. Although the firing lasted a mere fifteen minutes, it killed 379 people and injured thousands more. General Dyer, however, simply stated that he considered the firing to be 'least amount of firing' to 'produce…the necessary effect…it was [his] duty to produce'[14] in face of a violation of martial law. Hussain argues that whilst the concept of martial law was derived from the common law of England, it was proclaimed only in the colonies,[15] where the concepts of 'necessity' and 'proportionality' were adjusted to fulfil the need of the colonials to assert their authority and to establish their writ for all times rather than merely to restore order. Hussain further argues that, built into this calculus, was the notion of race which the colonials offered as a justification for the differential treatment of their colonial subjects.[16]

The relationship between emergency, sovereignty and race

Underpinning Hussain's enquiry into the nature of emergency and its relationship with the more well-rehearsed concept of rule of law, is the question of sovereignty and particularly the form it takes in colonial landscapes. With regard to the general question of sovereignty, Hussain argues that emergency is … 'like the "but for" clause by which the otherwise continuous supremacy of regular law is interrupted in the interests of state sovereignty'.[17]

legislative powers to the governor general, including passing laws inherently repugnant to laws in force in Britain, provided that repugnance was in favour of subjugating the colonial. Hussain, 88.

[10] Hussain, 82.
[11] ibid.
[12] Hussain, 83.
[13] Hussain, 89.
[14] Hussain, 100.
[15] Hussain, 107.
[16] Hussain, 111.
[17] Hussain, 16.

According to Hussain, therefore, emergency, along with rule of law, plays a constitutive role in the conception of modern sovereignty and it is this role that he explores.[18]

To develop his argument, Hussain draws upon C.L. Rossiter's 1948 study of emergency, *Constitutional Dictatorship*,[19] which demonstrates that this form of dictatorship, disturbing as it may be, 'has been with us exactly as long as constitutional government, and has been used at all times, in all free countries, and by all free men.'[20] Hussain further cites Rossiter to state that there are only three types of crises—war, rebellion and economic depression—that justify the invocation of emergency powers which usually entail, 'assumption of martial rule, the delegation of legislative powers to the executive, and the large-scale intervention in economic and/or political liberties. However, he disagrees with Rossiter's conclusion that the goal of constitutional dictatorship is nothing more than to 'end the crisis and restore normal times.' [21]

Hussain is of the view, that whilst the declaration of emergency purports to end a crisis and thereby to restore normal times, this return to the normal does not, indeed cannot, remain unaffected by the crises that interrupt it. In this way the emergency ends up transforming the very notion of normalcy in a state, because after all, as he asks, 'what happens to the qualities of certainty and finality, if they can and must operate under the presumption of their suspension?'[22] Hussain, therefore, suggests, with reference to Carl Schmitt,[23] that it is the ability to impose an emergency—to define the 'exception' to the rule of law—that determines the power of the sovereign. He further argues that this power is rendered more arbitrary, and indeed more ominous, by the fact that the circumstances in which the sovereign may elect to impose an emergency can never be 'exhaustively anticipated or codified in advance'.[24]

The theme of 'race' is threaded alongside 'sovereignty', throughout Hussain's narrative. Hussain argues that race had a considerable impact on the nature of sovereignty exercised by the British in their colonies. He notes that as Britain established its supremacy over non-white populations, it set up political systems that were segregated along racial lines and in which there was 'no question' for the British to obtain consent of their non-white subjects through an electoral process. [25] Whilst the primary effect of such racialized political systems was to render 'legality' rather than justice and fairness the 'pre-eminent signifier of state legitimacy,[26] Hussain alludes to another more sinister impact: he argues that a state organized along racial lines, was prevented by its very inherent logic from achieving 'rationalization of administration and the normalization of the objects of rule'[27] and was doomed to remain in a legal limbo where legal values though spoken of were not practised.

---

[18] Hussain, 17.

[19] Clinton Lawrence Rossiter (1917-1970), was an American historian and political scientist at Cornell University (1947-1970).

[20] C L Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton University Press, 1948), vii, as cited in Hussain, 18.

[21] ibid.

[22] ibid

[23] Carl Schmitt (1888-1985) was a conservative German jurist and political theorist who wrote extensively about the effective wielding of political power. He was closely associated with Nazism and is known as the 'crown jurist of the Third Reich'.

[24] Hussain, 19.

[25] Hussain, 4.

[26] ibid.

[27] Hussain, 29.

The significance of '*The Jurisprudence of Emergency'* for our times

Interesting and erudite as Hussain's narrative may be, it is entirely pertinent to ask why it may be relevant today. It may after all be argued that it has been more than seventy years since India and Pakistan have been created as independent states through which they have not only reclaimed sovereignty over their citizens but have also eliminated the factor of race from the structure of their political institutions.

Fortunately, Hussain' himself supplies the reasons for the continued relevance of his work: his narrative continues to matter because it helps explain the often-draconian emergency measures adopted by the Indian and Pakistani executive to suppress their own citizens, as well as the response of the courts to these measures. And because, even though both India and Pakistan have, ostensibly, removed the race factor from their Constitutions, their societies remain deeply segregated and stratified along lines not dissimilar to those introduced by the British, albeit now on the basis of religion, caste and class rather than of race.[28]

Formal Emergencies in India and Pakistan

The Indian Constitution 1950 and the Pakistan Constitution 1973 are appropriate starting points for an examination of the dynamic between rule of law and emergency in India and Pakistan. Both Constitutions, despite being framed more than twenty years apart,[29] are modelled after the Government of India Act 1935 and contain comparable 'emergency' provisions.[30] The Constitutions of both countries empower their respective Presidents to declare an emergency in case of external aggression or war and in response to internal disturbances (in Pakistan)[31] and armed rebellion (in India).[32] Further, both Constitutions allow for the suspension of fundamental rights in pursuance of an emergency, and[33] both stipulate that declarations of emergency be issued with the prior approval of the Parliament, and where it is not possible to obtain such approval, be subsequently ratified by the Parliament.[34]

In the seventy years since independence, both Indian and Pakistani governments have invoked their respective emergency provisions on more than one occasion. However, the extent, duration and nature of emergencies in the two countries have been remarkably different. Whilst, in Pakistan the declarations of emergency have brought in their wake a complete suspension of fundamental rights, imposition of martial law throughout the country, the co-option of the judiciary for the cause of the executive, and postponement—at times indefinite—of general elections, the impact of similar declarations in India has been more contained and less pervasive. Regardless, however, emergencies in both countries have not only impacted the

[28] In Pakistan this segregation is at least partially stipulated in the Constitution itself which in India it operates primarily as a cultural practice.

[29] Despite being declared independent in 1947, Pakistan remained without a Constitution until 1956 when it framed its first Constitution broadly along the lines of the 1935 Act. However, this Constitution was abrogated in October 1958 in the wake of a military takeover. Pakistani remained without a Constitution until 1962, when, led by the Military government, Pakistan framed a second Constitution. However, in 1969, this Constitution was also abrogated pursuant to a second military takeover and Pakistani once again found itself without a Constitution until 1973 when it framed its third and final Constitution.

[30] PART XVIII (Articles 352-370) of the Indian Constitution and Part X (Articles 232 to 237) of the Pakistani Constitution 1973.

[31] Article 232 of the Pakistani Constitution.

[32] Article 352 of the Indian Constitution was amended in 1979 to replace 'internal disturbance' by 'armed rebellion.'

[33] Articles 233 of the Pakistani and Article 359 of the Indian Constitution.

[34] Articles 232 of the Pakistani and Article 352 of the Indian Constitution.

relationship between their judiciary, legislature and the executive, but in Hussain's words, have also re-defined rule of law and the notion of post-crisis normal in these countries.

Given the extensive similarities between the emergency provisions of the Indian and Pakistani Constitutions, it is interesting to consider reasons for the considerable difference in the manner in which the two countries have invoked these provisions and the effect of these invocations. One critical factor in this regard may be the response of the Indian and Pakistani courts to the declarations of emergencies by the governments. Even a cursory reading of Pakistani legal history suggests that, historically, the Pakistani Supreme Court has justified and enlarged the scope of an 'emergency' by invoking the 'doctrine of necessity'. The Supreme Court's judgment in the *Tamizuddin Khan case*[35] was only the first of several in which it applied this doctrine to approve the consequent imposition of martial law and the indefinite suspension of fundamental rights.[36] It was only in 2009, after the Supreme Court had itself directly clashed with the military-led government of the time, that it claimed to bury the doctrine of necessity.[37]

In contrast to the Pakistani Supreme Court, the response of the Supreme Court of India to declarations of emergency, has been more measured. In *Sree Mohan Chowdhury v. Chief Commissioner*,[38] which challenged the 1962 declaration of emergency and sought a writ of *habeas corpus*,[39] the court recognized that there may be limits to the scope of an emergency[40] and held that it was permissible to call the legality of an emergency into question. However,

[35] See n. 2.

[36] See, for instance, judgments of the Supreme Court of Pakistan in *Begum Nusrat Bhutto v. Chief of Army Staff PLD 1977 SC 657*, which validated the declaration of emergency and imposition of martial law by General Zia-ul-Haq; in *Syed Zafar Ali Shah v. General Pervez Musharraf PLD 2000 SC 869*, which validated the military takeover by General Pervez Musharraf and required him to hold elections within three years, and most recently, in *Tikka Iqbal Muhammad Khan v. General Pervez Musharraf, PLD 2008 SC 615* in which a divided Supreme Court upheld the declaration of emergency by President General Musharraf.

[37] In March 2007 President General Musharraf removed Chief Justice Iftikhar Muhammad Chaudhary from office and filed a reference against him before the Supreme Judicial Council. Justice Chaudhary filed CP No. 21 of 2007, *Justice Iftikhar Muhammad Chaudhary v. President of Pakistan*, challenging his removal. On 20 July 2007, the Supreme Court, allowed this petition and reinstated the Chief Justice. This led to an unprecedent stand-off between the executive and the judiciary, which along with political demands for a general election, created considerable tension amongst institutions in the country. In November 2007 General Musharraf declared an emergency and, as per tradition, required all judges to take an oath of the Provisional Constitutional Order. However, the majority of judges of the superior courts of Pakistan refused to take this oath and, therefore, stood dismissed from office and a small group of 'loyal' judges that remained, validated the emergency (*Tikka Iqbal Muhammad Khan v. Pervez Musharraf PLD 2008 Supreme Court 178*). It was only after the general elections of March 2008 and considerable political pressure from the opposition, that President Zardari finally restored to office the judges dismissed for refusal to take the oath. On 31 July 2009, the restored Supreme Court by its order in *Sindh High Court Bar Association v. The Federation of Pakistan PLD 2009 SC 879*, set aside the judgment in the *Tikka Khan Case*, declared the emergency to be illegal and stated that to 'defend, protect and uphold the Constitution is the sacred function of the Supreme Court'.

[38] AIR 1964 SC 173.

[39] Imposed in 1962 following India going to war with China.

[40] In *Makhan Singh Tarsikha v. State of Punjab AIR 1964 SC 381* the Indian Supreme Court declined to issue an order under the Indian Criminal Procedure Code on the ground that doing so would violate the spirit of the emergency or to comment on the constitutionality of the emergency. However, the court voluntarily noted that petitioners may seek writs to enforce fundamental rights not suspended by the Defence of India Act, or challenge an order of detention on the ground that it had been issued with *mala fide* intention or challenge the Defence of India Act on the ground that it constituted an excessive delegation of powers to the executive. In *Ananda Nambiar v Chief Secretary AIR 1966 SC 657* the court further stated that an order of detention could be challenged if it was issued by a person or in circumstances not authorised by the Defence of India Act. In *Ram Manohar Lohia v. State of Bihar AIR 1966 SC 740* the court overturned a detention order on the basis that it appeared to have been issued to uphold 'law and order' when the Act specified maintenance of 'public order' as the only valid ground in this regard.

refused to issue writs of *habeas corpus* on the ground that the person seeking the writ did not have the *locus standi* to do so.[41] In subsequent decisions, the Indian Supreme Court seemed to retreat from this nuanced position and refused to interfere with the declaration of emergency.[42] However, in *Minerva Mills v. Union of India* the court held once again that a Presidential Order declaring an emergency was justiciable, however, it did not grant relief due to lack of evidence.[43] More importantly, the court jealously guarded the 'basic structure' of the Indian Constitution[44] at all times, and did not allow the emergency to be used as an excuse for a constitutional amendment.

Relevance beyond formal emergencies

India, since 1975, and Pakistan, since 2007, have not declared any formal emergencies. Regardless, however, both countries continue to struggle with upholding the rule of law and remain dogged by the very questions—of when, how and to what extent may the rule of law be validly suspended –that had preoccupied their colonial rulers.

In recent history, this inherent tension in the rule of law has manifested itself in several forms. Most prominent amongst these has been the question of permissible use of force by the Indian and Pakistani state against its own citizens. In India this question has arisen in relation to the government's handling of the Sikh crisis in 1984 and more recently, its interventions in Kashmir, whilst in Pakistan, it has assumed centre stage in 2006, when the government deployed the army to quell unrest in Baluchistan and then again from 2014 onwards when it launched an operation against militants in the Federally Administered Tribal Areas which have now been integrated into Khyber Pakhtunkhwa.

Other areas in which the tension inherent in the rule of law remains evident are freedom of speech and expression and freedom of religion. Although the freedom of speech and expression is guaranteed under the Constitutions of both India and Pakistan,[45] it has increasingly come under pressure from the executive. Further, the response of the courts, or lack thereof, to restrictions on free speech suggests that the limits of this freedom are likely to remain the subject of debate in both countries for some time.[46] Freedom of religion is more complicated.

---

[41] In *Ghulam Sarwar v. Union of India AIR 1967 SC 1335* the Indian Supreme Court accepted that it was possible to examine whether the continuation of emergency for four years after cessation of hostilities may be deemed an abuse of power by the executive, however it refused to address this question for lack of evidence.

[42] *Additional District Magistrate Jabalpur v. Shivakant Shukla 1976 2 SCC 521*.

[43] 1980 3 SCC 625.

[44] It was during the 1962 emergency that the Indian Supreme Court first referred to the 'basic structure' of the Indian Constitution (*Sajjan Singh v. State of Rajasthan 1965 AIR 845*) and when it declared that the Parliament did not have the power to amend fundamental rights stipulated in the Constitution (*I.C Golaknath and others v. State of Punjab & others v. State of Punjab and others 1967 AIR 1643*). However, it was not until 1973 that the Court fully set out the 'basic structure doctrine' in *His Holiness Kesavananda Bharati Sripadagalvaru and others v. State of Kerala and Another (1973) 4 SCC 225* which allowed the Indian judiciary to review and strike down any amendments to the Indian Constitution that conflicted with or sought to alter its basic structure. This decision and the doctrine set out in it, formed the basis of striking down the 39th amendment to the Constitution in *Indira Nehru Gandhi v. Raj Narain 1975 AIR 1590*, and for the restoration of democracy in the country.

[45] Article 19 of the Pakistani and the Indian Constitution. This freedom is subject to reasonable restrictions that may be imposed in the national interest which in the case of Pakistani includes restrictions 'in the interest of the glory of Islam'.

[46] Both the Indian and Pakistani Supreme Courts have affirmed the fundamental right of free speech in a number of cases: for India, see *Shreya Singhal v. Union of India AIR 2015 SC 1523* which aimed to protect online free speech; order of the Bombay High Court dated 13 June 2016 in *Phantom Films (Pvt.) Ltd. and another v. The Central Board of Certification* and the refusal of the Supreme Court to grant a restraining order 'Supreme Court

Whilst a certain degree of religious discrimination is built into the Pakistani Constitution, which explains, at least to some extent, the differential treatment of the diverse religious groups in the country, the Indian Constitution is decidedly secular in its outlook and does not explain the rise in religious sentiment in India and the government's tolerance for it. Indeed, the similarity in the heightened religious tensions in the two countries indicates that merely adopting English style rule of law is perhaps not sufficient to overcome the religious stratification in the country.

The view through Hussain's lens

Hussain may argue that it is not that the English style rule of law is not sufficient to overcome the religious stratification in the countries but that, in fact, it allows this stratification to become entrenched because it recognizes, and has set the precedent for, the differential treatment of different social groups. Hussain would most likely further develop this argument by saying that India and Pakistan's continued struggle with the rule of law is not merely due to their inability to manage their respective populations or their lack of preparedness for democracy but, in large part, due to the institutions inherited by the two countries from their colonial rulers.

Hussain demonstrates through his discussion that the continuation of colonial style institutions in Pakistan and India means that not only do these states have at their disposal an arsenal of emergency powers, but when confronted with threats to their supremacy or survival (whether through strikes, insurgencies or separatist movements), also have the permission to deploy this arsenal against their own citizens, with at least as much vigour as their colonial predecessors.[47] It also means that the courts responding to these emergencies, whether formal or non-formal, have at their disposal jurisprudence developed for another time when the subjugation of subjects was more paramount than ensuring the freedoms of citizens.[48]

Avenues for further research

Since its publication in 2003, Hussain's *The Jurisprudence of Emergency* has become somewhat of a contemporary classic of colonial legal history and has been cited widely in

---

refuses to stay release of Udta Punjab' Indian Express 17 June 2016 https://indianexpress.com/article/entertainment/bollywood/sc-refuses-to-stay-release-of-udta-punjab/ (accessed 25 July 2018), and order of the Supreme Court in WP (Crl) 558/2016 *Kanhaiya Kumar v. State of Delhi* in which bail was granted to the petitioner accused of sedition. For Pakistan see, *Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others PLD 2016 Supreme Court 692; Leo Communications (Pvt) Limited v. The Federation of Pakistan WP No. 2581 of 2017* which address restrictions on print and television media respectively; *Suo Motu Case No. 7 of 2017 (Action regarding Islamabad, Rawalpindi Sit-in [Dharna]) PLD 2018 Supreme Court 72* which addresses hate speech.

However, both the Indian and the Pakistani Supreme Courts have shied away from affirming this right when the speech in question relates to perceived serious threats to the security of the country or involves the military (as evident from the silence of the Pakistani Supreme Court in respect of disappeared journalists. See Kiran Nazish 'Pakistan's military is waging a quiet war on journalists' 3rd May 2018 https://www.vox.com/2018/3/27/17053776/pakistan-military-isi-journalists-abductions (accessed 24 July 2018)) and in India, in respect of restrictions on the freedom of expression in Kashmir. See '*Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan*' OHCHR June 2018 https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf (accessed 24 July 2018).

In Pakistan, the Supreme Court has also remained hesitant to rule on freedom of speech when the case involves perceived affronts to Islam (see 'Blasphemy: What you need to know about Asia Bibi's trial' DAWN 13 October 2016 https://www.dawn.com/news/1289700 (accessed 24 July 2018)).

[47] Hussain, 137.

[48] ibid.

academia as well as in judicial opinions. It has been cited more than three hundred times, in works ranging from those focusing on South Asia to those more broadly interested in the legal legacy of the British Empire.[49] It was also relied upon by petitioners asserting their right to a writ of *habeas corpus* in United States Supreme Court case of *Lakhdar Boumediene et al v. George w. Bush et al* and by Supreme Court Justices writing the majority decision, in allowing the writ. [50] In this section, I highlight three areas in which Hussain's work may be further extended particularly in the South Asian context.

Comparative Constitutional Studies

Traditionally, comparative legal studies had not only failed to venture beyond the western world to examine legal rules in their procedural and institutional contexts but had also rarely been able to generate a deep insight into the structure and development of legal systems.[51] In recent years, this trend appears to be shifting and there has been an increase in comparative legal studies, particularly comparative constitutional studies, in several non-western regions, including South Asia.[52]

Whilst Hussain himself does not explicitly hold out his work as a comparative constitutional study, *The Jurisprudence of Emergency* is sufficiently couched in comparative law literature to form the basis of an analysis of 'rule of law' as a legal transplant. For instance, Hussain refers extensively to Montesquieu throughout his work. However, he focuses on Montesquieu's delineation of different types of governments and how each of these are related to a specific climate, commerce, religion, status of women and so on,[53] rather than engaging with Montesquieu's idea that laws should be suited to the context in which they are introduced and be compatible with the legal and political institutions operating in it.[54]

---

[49] *See* for instance, Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' Law and History Review, (2005). 23(3), 631-683; Oren Gross and Fionnuala Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (University of North Carolina Press 2006); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (CUP 2009); Anil Kalhan 'Constitution and 'extraconstitution': colonial emergency regimes in postcolonial India and Pakistan', Vasuki Nesiah, 'The princely impostor: stories of law and pathology in the exercise of emergency powers' and Arun K. Thiruvengadam 'Asian judiciaries and emergency powers: reasons for optimism?' in Victor V. Ramraj and Arun K. Thiruvengadam (eds) Emergency Powers in Asia: Exploring the Limits of Legality (CUP 2010); and Uday Singh Mehta *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (University of Chicago Press 2018).

[50] *Boumediene v. Bush*, 553 U.S. 723 (2008). Decision https://supreme.justia.com/cases/federal/us/553/723/(accessed 18 September 2018); Brief for the Boumediene Petitioners, In the Supreme Court of the United States, August 2007 https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_06_1195_Petitionernew.authcheckdam.pdf (accessed 15 September 2018).

[51] Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 504 American Journal of Comparative Law 671, 685.

[52] *See* for instance, Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengdam (eds) *Comparative Constitutionalism in South Asia* (OUP India 2013), and Mark Tushnet and Madhav Khosla (eds) *Unstable Constitutionalism: Law and Politics in South Asia* (CUP 2015).

[53] Hussain, 47.

[54] Charles de Secondat Montesquieu and others, *The Spirit of the Laws* (Cambridge University Press 1989) 8, 610. For more modern versions of this idea, see, among others, Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law*' (1974) 37 The Modern Law Review 1; Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J. Eur. & Comp. L. 111, 114; Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' The Modern Law Review, vol. 61, no. 1, 1998.

Given his particular focus, Hussain utilises Montesquieu merely to elucidate his discussion about the nature of and justification for 'despotism', especially in the 'orient',[55] rather than to discover whether and to what extent the laws introduced by the British, particularly their foundational notion of rule of law, was suited for the South Asian context. Re-examining Hussain's research through the comparative law lens, is likely to provide an insight not only into the original suitability of the laws transferred by the British to the colonies (particularly India), but also the extent to and manner in which these have been indigenised over time. It may also help address the question of whether it is still permissible to trace South Asia's difficulty with law enforcement to the colonial antecedents of its legal institutions.

Institutional analysis for South Asia's developmental ambitions

Hussain makes a rather an important observation in the final chapter of *The Jurisprudence of Emergency*. He notes that it is 'important to emphasize the continuity between …the colonial state and the national state.'[56] Also, with reference to Partha Chatterjee,[57] he traces the intensification of the 'problem of emergency' with the end of colonialism,[58] to the fact that the post-colonial state inherits the 'institutional and constitutional framework of the colonial state'[59]

Whilst Hussain's interest in the institutional and constitutional framework of Pakistan and India is primarily for the purpose of understanding its impact on the 'problem of emergency', his detailed account of this framework provides an excellent base for examining its role in the economic development of modern South Asian states. For instance, Hussain argues that the notion of rule of law that has been inherited by the former colonies focuses on the procedures and institutions of law and deliberately suppresses the development of concepts of self-determination and consent so critical to forging a democratic state. He also argues that the framework is aimed at entrenching legal distinctions between persons rather than on removing them.[60] This suggests that South Asian institutions are not designed to be participatory, bottom-up or inclusive.

Institutions occupy a central role in economic development literature in the Post-Washington Consensus era. Some economists argue that institutions (by which they mean both formal and informal rules along which society is organised), imposed through conquest (and, therefore, not organic to a country)[61] or institutions that are not participatory, inclusive and bottom-up, are not conducive to economic growth.[62] Others have attributed the failure of the law and development movement to the incompatibility between local contexts and legal transplants, and have argued that this incompatibility is due to laws being imposed in a country without regard for the local context.[63] It may be interesting, to study the implications of the

[55] Hussain, 44.

[56] Hussain, 136-137.

57 Partha Chaterjee is an Indian political scientist and anthropologist. Partha Chatterjee, Nation and Its Fragments: Colonial and Postcolonial Histories (Princeton University Press, 1993), as cited in Hussain, 137.

[58] Hussain, 137.

[59] ibid.

[60] Hussain, 134.

[61] *See* in particular, Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), ch 1 and D Berkowitz, K Pistor and JF Richard, 'Economic Development, Legality, and the Transplant Effect', European Economic Review, 2003, Vol.47(1)165' 174.

[62] Dani Rodrik, One Economics, Many Recipes: Globalization, Institutions and Economic Growth (Princeton University Press 2007), ch 5; Daron Acemoglu and James A Robinson, Why Nations Fail: The Origins of Power, Prosperity, and Poverty (Crown Publishers 2012).

[63] David M Trubek and Alvaro Santos, *The New Law and Economic Development a Critical Appraisal*

transplanted, indeed imposed, institution of rule of law on the ability of South Asian states to achieve their economic agenda.

The dynamic between the executive and the judiciary

Alongside his argument that rather than disappearing, the problem of emergency has intensified in post-colonial India and Pakistan because they have inherited the institutional and constitutional framework of the colonial state, Hussain also argues that this institutional framework has been supported by the colonial jurisprudence of emergency.[64]

However, in the course of his discussion in the book, Hussain demonstrates that there are two clear strands in the inherited institutional frameworks of post-colonial states: one of these has conferred upon India and Pakistan the ability to use force against their citizens, whilst the other bestows upon them the judicial tradition of checking the excesses of the executive. Hussain's careful analysis of judicial precedents in relation to writs of *habeas corpus* and martial law throughout the British Empire demonstrates that even during the colonial period, the response of the courts to emergency was neither uniform nor always deferential to the executive. In fact, he cites interesting instances of the court rationalising, if not limiting, the power of the executive for the benefit of the citizen.[65]

Given this legacy, it is interesting to consider reasons for which India and Pakistan may have interpreted their inherited framework to such different effects. However, given that Hussain is primarily focused on the nature of emergency and the use of the doctrine of necessity in Pakistan, he does not offer an explanation in this regard. It may be interesting, therefore, to combine comparative legal methods and institutional analysis to investigate and compare the interaction between the judiciary and the executive in present day India and Pakistan in order to understand institutional factors that have contributed to the very different approaches adopted by the Indian and Pakistani Supreme Courts in responding to declarations of emergency.

Conclusion

In writing *The Jurisprudence of Emergency* Hussain sets himself an ambitious and essentially twofold aim: to produce a treatise that is 'neither the work of colonial history nor of legal theory, but, in a deeply symbiotic way and continuous way, of both,'[66] and to initiate a discussion of the colonial history of emergency and the rule of law which is not 'simply affirmative or oppositional'[67] but focuses 'on the constitutive role of the colonial in the articulation of the modern.'[68]

There is no doubt that Hussain succeeds in achieving his objective, and in doing so, makes a pioneering, deeply-felt and memorable contribution to South Asian and colonial legal theory. However, the result is a text that is not always easily accessible to a reader unfamiliar with the context in which it is located. For me, therefore, the most accurate critique of *The Jurisprudence of Emergency* is, that it is ultimately too concise and does not fully address the

(Cambridge University Press 2006).

[64] Hussain, 137.

[65] *See* in particular, discussion regarding *In the matter of Ameer Khan (1870)* Hussain 92-95.

[66] Hussain 33.

[67] ibid. 32.

[68] ibid.

sheer enormity of issues that it raises. I recognize, however, that it is perhaps this very fact that makes the book capable of generating further research.

Most importantly for me, *The Jurisprudence of Emergency* is a reminder that a number of developmental issues and crises of democracy experienced in modern South Asia, recur throughout the post-colonial world; that these issues are not entirely of the making of these states but a legacy of an Empire that was intent primarily on the preservation of power rather than the progress of its citizens. Ultimately, it is a reminder of the shared history of the colonies and a call to learn from each other's experiences.