

2010

## Exploring Power Politics and Constitutional Subversion in Pakistan: A Political and Constitutional Assessment of Instability in Pakistan

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### Recommended Citation

Furqan Mohammed *Exploring Power Politics and Constitutional Subversion in Pakistan: A Political and Constitutional Assessment of Instability in Pakistan*, 7 Loy. U. Chi. Int'l L. Rev. 229 (2010).  
Available at: <http://lawcommons.luc.edu/lucilr/vol7/iss2/7>

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# EXPLORING POWER POLITICS AND CONSTITUTIONAL SUBVERSIONS IN PAKISTAN: A POLITICAL AND CONSTITUTIONAL ASSESSMENT OF INSTABILITY IN PAKISTAN

Furqan Mohammed<sup>†</sup>

## Introduction

Pakistan's recent history can be labeled as anything but stable. From its very inception, Pakistan has had trouble agreeing on the nation's constitutional framework. Pakistan's first constitution was not instituted until nine years after the country gained independence from Britain and partitioned itself from India.<sup>1</sup> Even then, the debate as to what type of government Pakistan should have remained unsettled. In its short history, Pakistan has had three different constitutions (1956, 1962, and 1973) interspersed with periods of martial law.<sup>2</sup> The Constitution of 1973, although a significant step towards democratization, has become a battleground for presidents and prime ministers, who have added amendments solely to solidify their positions in office. The struggle between the two heads of state is apparent: the Constitution of 1973 has undergone thirty-six amendments, many of which pertain to the same few articles that delegate power to the heads of state.<sup>3</sup> The power struggle has made Pakistan an unstable nation. This instability is especially disconcerting since Pakistan has nuclear capabilities and is already engaged in a war within its boundaries to eradicate terrorism in accordance with the United States' war on terror. The consequences of Pakistan's instability could be disastrous not only for Pakistan but for the entire world.

The initial focus of this paper is to analyze the constitutional amendments which have caused instability in Pakistan. This paper will first examine the Eighth Amendment passed by President Zia ul-Haq in 1985, which allowed a president to dissolve Parliament and dismiss the prime minister. This power has been invoked by multiple presidents to overthrow elected prime ministers based on largely unsubstantiated claims. Next, this paper will address Prime Minister Nawaz Sharif's Thirteenth and Fourteenth Amendments, which were ratified in 1993. These amendments not only reduced the president's powers but also increased those of the prime minister. Finally, this paper will discuss former Presi-

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<sup>1</sup> See HAMID KHAN, *CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN* 102 (Oxford University Press 2001) (2005) (explaining that Pakistan gained independence in 1947, yet the first Constitution did not become effective until 1956).

<sup>2</sup> Omar Sial, *A Legal Research Guide to Pakistan*, GLOBALEX, Jan. 2009, [http://www.nyulawglobal.org/Globalex/Pakistan1.htm#\\_Legal\\_Research](http://www.nyulawglobal.org/Globalex/Pakistan1.htm#_Legal_Research).

<sup>3</sup> S.A. Rabbani, *List of Amendments in the Constitution of Pakistan*, <http://nationalassembly.tripod.com/am.htm>.

dent Pervez Musharraf's Seventeenth Amendment, which was ratified in 2003. This amendment once again restored the presidential powers created by the Eighth Amendment and reduced the prime minister's powers.

Pakistan's structural instability demands analysis of the underlying political and constitutional problems which prevent it from becoming a stable nation. First, Pakistan's presidents and prime ministers have adopted a form of "power politics" in which one office has exclusive decision-making power and does not share it with the other. Moreover, the presidents and prime ministers have not been willing to allow a checks-and-balances system on their authority. Second, the Pakistani Constitution is easily subverted and remains subject to the whims of Pakistan's leaders. Current President Asif Ali Zardari recognizes the damaging effects of these amendments and has promised to ratify an Eighteenth Amendment by March 30, 2010, which would restore the balance of powers between the heads of state as originally envisioned in the Constitution of 1973. However, his proposal only addresses the first cause of instability (*i.e.*, the political cause). Until the second cause (*i.e.*, the constitutional cause) is also addressed, Pakistan cannot ensure stability. Accordingly, this paper will argue that President Zardari's Eighteenth Amendment must address Article 239, the clause that governs how the Pakistani Constitution is amended. To this end, amendment formulas, as most recently adopted by the Canadian Constitution, are one possible route that Pakistan could take.

## I. Pakistan's Modern History

### A. The Constitution of 1973 and the Ratification of the Eighth Amendment

Pakistan's modern history began in 1971 after the civil war between East and West Pakistan.<sup>4</sup> East Pakistan seceded to become Bangladesh while West Pakistan became Pakistan.<sup>5</sup> After this war, Zulfikar Ali Bhutto ("Z. Bhutto") was elected president of Pakistan and he ratified the Constitution of 1973.<sup>6</sup> This Constitution was different than its predecessors (*e.g.*, the Constitutions of 1956 and 1962) because it adopted a parliamentary system in which the prime minister was to retain most of the power while the president was more of a ceremonial head.<sup>7</sup> Immediately after ratification, Z. Bhutto assumed the office of prime minister.<sup>8</sup> The Constitution of 1973 contained numerous clauses that reflected the prime minister's powers in relation to the president. For example, Article 48(1) stated, "In the performance of his functions, the President shall act on and in accordance

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<sup>4</sup> Robert LaPorte, Jr., *Another Try at Democracy*, in CONTEMPORARY PROBLEMS OF PAKISTAN 171, 176 (J. Henry Korson ed., Westview Press 1993) (explaining how civil war broke out between East and West Pakistan over issues related to how the states would be governed, and climaxed when the Awami League, a political party from East Pakistan, won a majority of seats in the National Assembly).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 176-77.

<sup>7</sup> IAN TALBOT, PAKISTAN: A MODERN HISTORY 229 (St. Martin's Press 1998) (explaining how unlike the newly-enacted Constitution of 1973, the Constitutions of 1956 and 1962 vested most of the decision-making power in the president).

<sup>8</sup> La Porte, Jr., *supra* note 4, at 177.

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with the advice of the Prime Minister and such advice shall be binding on him.”<sup>9</sup> In addition, Article 48(3) stated, in relevant part, “the orders of the President shall require for their validity the counter-signature of the Prime Minister.”<sup>10</sup> But the President did have some authority. For example, Article 101(1) provided: “There shall be a Governor for each Province, who shall be appointed by the President.”

Z. Bhutto’s government lasted until 1977, when nation-wide allegations of rigged elections and corruption prompted Chief of Army Staff Mohammed Zia ul-Haq (“Zia”) to arrest political party leaders, suspend the Constitution, and declare martial law.<sup>11</sup>

Zia eventually appointed himself president and elected Mohammad Khan Junejo as prime minister.<sup>12</sup> However, before lifting martial law, he ratified the Eighth Amendment.<sup>13</sup> The purpose of the Eighth Amendment was threefold: First, it legalized all of Zia’s actions in regards to martial law.<sup>14</sup> Second, it restored the powers of the president which had been taken away by Z. Bhutto. For example, Article 48(1) stated: “In the exercise of his functions, the President shall act in accordance with the advice of the Cabinet *or* the Prime Minister.”<sup>15</sup> This essentially allowed the president to make decisions without input from the prime minister. Article 48(3), which required the counter-signature of the prime minister, was omitted.<sup>16</sup> Finally, Article 101(1) stated: “There shall be a Governor for each Province, who shall be appointed by the President [*in his discretion*] [after consultation with the Prime Minister.]”<sup>17</sup> While Zia allowed some input from the Prime Minister, he still gave himself unilateral authority to appoint the Governor for each of the provinces. Third, it bestowed several new powers upon the President. For example, Article 112(2)(b) allowed the president to dissolve the Provincial Assembly if “[a] situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”<sup>18</sup> Similarly, Article 58(2)(b) allows the president to dismiss the prime minister and dissolve the National Assembly if “[a] situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.”<sup>19</sup>

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<sup>9</sup> THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN art. 48(1) n.24, [hereinafter CONSTITUTION OF PAKISTAN], available at <http://www.pakistani.org/pakistan/constitution/>.

<sup>10</sup> *Id.* art. 48(3) n.26.B.

<sup>11</sup> LaPorte, Jr., *supra* note 4, at 177.

<sup>12</sup> *Id.* at 179-80.

<sup>13</sup> IFTIKHAR H. MALIK, THE HISTORY OF PAKISTAN 171 (Greenwood Press 2008).

<sup>14</sup> CONSTITUTION OF PAKISTAN art. 270(a).

<sup>15</sup> *Id.* art. 48(1) (emphasis added).

<sup>16</sup> *Id.* art. 48(3) n.24.

<sup>17</sup> *Id.* art. 101(1) (emphasis added).

<sup>18</sup> *Id.* art. 112(2)(b).

<sup>19</sup> *Id.* art. 58(2)(b).

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Prior to the passage of the Eighth Amendment, the only way for a prime minister to be ousted was by a vote of no confidence by the National Assembly.<sup>20</sup> However, Articles 112(2)(b) and 58(2)(b) allowed a president to dissolve Parliament and the prime minister on a subjective basis—specifically, if the president felt “a situation had arisen.”<sup>21</sup> Missing from this clause was an evidentiary requirement; instead, entire elected governments could be dismissed on nothing more than unsubstantiated claims or mere whims.<sup>22</sup> These powers were invoked on four occasions – 1988, 1990, 1993, and 1996 – and generally involved allegations of ineffectiveness, corruption, and nepotism.<sup>23</sup>

However, the underlying reasons why these Articles were invoked were markedly different. For example, Zia had initially picked Mohammed Khan Junejo as prime minister because they shared similar views.<sup>24</sup> However, Junejo began to assert himself shortly after becoming prime minister.<sup>25</sup> He first revived the political-party system of politics, which Zia had banned.<sup>26</sup> He also tried to control military promotions, a power Zia had reserved for himself.<sup>27</sup> Not surprisingly, Junejo was removed from office shortly after taking power.<sup>28</sup>

Similar discord existed between later presidents and prime ministers, which led to the removal of Benazir Bhutto (“B. Bhutto”) in 1990,<sup>29</sup> Nawaz Sharif in 1993,<sup>30</sup> and B. Bhutto again in 1996.<sup>31</sup>

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<sup>20</sup> *Id.* art. 58(1).

<sup>21</sup> See KHAN, *supra* note 1, at 382 (Zia initially stated that these powers would only be invoked if the people seemed to lose faith in the government, the prime minister, and the National Assembly).

<sup>22</sup> See, e.g., M.M. Ali, *In Pakistan Benazir Bhutto's Dismissal is Deja Vu All over Again*, WASH. REP. ON MIDDLE E. AFF., Jan.-Feb. 1997, 11, available at <http://www.wrmea.com/backissues/0197/9701011.htm> (Benazir Bhutto was dismissed because the “public faith in the integrity and honesty of the government has disappeared.”).

<sup>23</sup> See KHAN, *supra* note 1, at 394 (dismissal of PM Mohammed Khan Junejo by President Zia ul-Haq in 1988 on charges of ineffectiveness, corruption, and patronization), 412-413 (dismissal of PM Benazir Bhutto by President Ghulam Ishaq Khan in 1990 on charges of ineffectiveness, corruption, and nepotism), 429 (dismissal of PM Nawaz Sharif by President Ghulam Ishaq Khan in 1993 on charges of corruption and maladministration), 452 (dismissal of Benazir Bhutto in her second term by President Leghari in 1996 on charges of ineffectiveness, corruption, and attempts to undermine the Supreme Court of Pakistan).

<sup>24</sup> LaPorte, Jr., *supra* note 4, at 180.

<sup>25</sup> TALBOT, *supra* note 7, at 263.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> KHAN, *supra* note 1, at 394.

<sup>29</sup> See TALBOT, *supra* note 7, at 310-11 (disagreements over whether President Khan or Prime Minister B. Bhutto had the authority to appoint the Chief of Staff, and B. Bhutto's refusal to allow the army to quell ethnic riots in the province of Sindh, alienated her from President Khan).

<sup>30</sup> Samina Yasmeen, *Democracy in Pakistan: The Third Dismissal*, 34 *ASIAN SURVEY* 572, 577 (1994) (Sharif's independent initiatives on issues such as Kashmir and Afghanistan, and his attempt to decrease presidential powers, alienated him from President Khan).

<sup>31</sup> See KHAN, *supra* note 1, at 450 (disagreement about which of them had the authority to make judicial appointments alienated her from President Leghari).

B. Nawaz Sharif's Thirteenth and Fourteenth Amendments to the Constitution

After the dismissal of B. Bhutto in 1996, Nawaz Sharif returned as prime minister.<sup>32</sup> He took advantage of the strong majority he held in the Parliament and passed the Thirteenth Amendment, which curtailed the president's power under the Eighth Amendment.<sup>33</sup> For example, Articles 112(2)(b) and 58(2)(b), which had allowed the president to dissolve the Parliament and dismiss the prime minister, respectively, were omitted from the Constitution.<sup>34</sup> In addition, the words "after consultation with" were replaced by the words "on the advice of" in Article 101(1).<sup>35</sup> This latter change allowed the prime minister to indirectly appoint a governor, rather than merely playing a supporting role which may or may not have influenced the president's appointment.

Rather than restoring the balance of power, Sharif added the Fourteenth Amendment, which increased the prime minister's power.<sup>36</sup> For example, Article 58(1) governed the process of securing a vote of no-confidence, which was the only way a prime minister was to be removed from office.<sup>37</sup> However, the Fourteenth Amendment made this nearly impossible.<sup>38</sup> The newly enacted Article 63(A) states:

If a member of a Parliamentary Party defects, he may by means of a notice in writing addressed to him by the Head of the Political Party, be called upon [to] show cause, . . . as to why a Declaration under clause (2) should not be made against him.<sup>39</sup>

The Fourteenth Amendment goes further to explain what constitutes a defect:

- (a) . . . [A] breach of party discipline which means a violation of the party constitution, code of conduct and declared policies, or
- (b) . . . [A] vote contrary to any direction issued by the Parliamentary Party to which he belongs, or
- (c) . . . [A]bstain from voting in the House against party policy in relation to any bill.<sup>40</sup>

This allowed party leaders to dismiss party members if they failed to vote as they were told. This made it nearly impossible to dismiss a prime minister by a motion of no-confidence since any dissenters within the majority party could be dismissed for voting against the party to which they belonged. In effect, this

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<sup>32</sup> *Id.* at 464.

<sup>33</sup> Pakistan Muslim League Website, Biography of Nawaz Sharif, <http://www.pmln.org.pk/profile.php> (last visited May 19, 2010).

<sup>34</sup> CONSTITUTION OF PAKISTAN amend. 13 (amended 1997).

<sup>35</sup> *Id.* art. 101(1).

<sup>36</sup> CONSTITUTION OF PAKISTAN amend. 14 (amended 1997).

<sup>37</sup> *Id.* art. 58(1).

<sup>38</sup> *Id.* amend. 14.2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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amendment removed the checks-and-balances on the prime minister's power, since they could not legally be dismissed once elected.

### C. The Rise of Pervez Musharraf and the Seventeenth Amendment

Prime Minister Sharif initially appointed Pervez Musharraf for Chief of Army Staff in 1998.<sup>41</sup> Sharif picked Musharraf because he felt Musharraf could be controlled and was not a threat to his power.<sup>42</sup> However, when the country seemed beyond control, Musharraf led a bloodless coup in October 1999 and declared martial law.<sup>43</sup> Eventually, he was voted into the presidency by an emergency national referendum.<sup>44</sup> Realizing that he could be removed from office because of the illegal manner in which he attained power, Musharraf moved quickly to pass the Seventeenth Amendment.<sup>45</sup> The purpose of the Seventeenth Amendment was threefold. First, Musharraf legalized his ascent to power and his actions during the period of martial law, as Zia had done before him.<sup>46</sup> Second, it limited the application of Article 63(A) so that the prime minister was not invulnerable to a vote of no confidence.<sup>47</sup> Finally, it restored the presidential powers that had been taken away by the Thirteenth Amendment. It re-inserted presidential discretion as the means of appointing governors under Article 101(1).<sup>48</sup> More importantly, Articles 58(2)(b) and 112(2)(b) were reinserted into the Constitution.<sup>49</sup> However, although these Articles were not invoked by President Musharraf, they remained in the Constitution because he felt they ensured a "unity of command."<sup>50</sup>

### D. Asif Ali Zardari and the Proposed Eighteenth Amendment

After Musharraf's resignation in August, 2008, Asif Ali Zardari was elected into office and proposed the Eighteenth Amendment.<sup>51</sup> This new amendment is aimed at repealing the Seventeenth Amendment and assigning power to the prime minister and president as was originally envisioned in the Constitution of 1973.<sup>52</sup> President Zardari promised to institute this amendment no later than

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<sup>41</sup> SARA LOUISE KRAS, MAJOR WORLD LEADERS: PERVEZ MUSHARRAF 50 (Chelsea House Publishers 2004).

<sup>42</sup> *Id.* at 50-51.

<sup>43</sup> KHAN, *supra* note 1, at 486.

<sup>44</sup> *Id.* at 495.

<sup>45</sup> *Musharraf Plan to Bolster His Power*, CNN.COM, June 27, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/south/06/26/pakistan.presidency/index.html> [hereinafter *Musharraf Plan*].

<sup>46</sup> CONSTITUTION OF PAKISTAN arts. 270A-270AA.

<sup>47</sup> KHAN, *supra* note 1, at 497-98.

<sup>48</sup> CONSTITUTION OF PAKISTAN art. 101(1).

<sup>49</sup> *Id.* amend. 17.3.A-4.A (amended 2003).

<sup>50</sup> See *Musharraf Plan*, *supra* note 46.

<sup>51</sup> *17th Amendment to go in Dec: Zardari*, DAILY TIMES (Pak.), Nov. 28, 2009, available at LEXIS (Zardari had initially planned to pass the Eighteenth Amendment in December, but this date was postponed).

<sup>52</sup> *Id.*

March 30, 2010.<sup>53</sup> However, merely repealing the Seventeenth Amendment does not adequately address Pakistan's current instability, and is, therefore, only a temporary fix.

## II. The Political and Constitutional Root Causes of Pakistan's Instability

There are two root causes of instability which can be extracted from Pakistan's recent history: the first political, and the second, constitutional.

### A. Addressing the Political Root Cause of Instability in Pakistan

First, political leaders in Pakistan have adopted a type of "power politics" in which power cannot be balanced between presidents and prime ministers. Moreover, neither office has been willing to accept any type of checks-and-balances on their power by the other office. These conflicts are evident in light of the number of times Articles 48, 58(2)(b), 63A, 101(1), and 112(2)(b), have been changed in the Constitution. It also seems Pakistan's leaders are not interested in merely restoring the status quo. For example, Sharif could have restored the balance of powers by passing the Thirteenth Amendment only, but he used his majority in Parliament to pass the Fourteenth Amendment as well.<sup>54</sup> Similarly, Musharraf could have only repealed the Fourteenth Amendment but took a step further by ratifying the Seventeenth Amendment.<sup>55</sup> These leaders were not interested in long-term solutions for Pakistan's political instability, but rather, wanted to assure their terms in office.

Moreover, this concept of "power politics" also extends to current and prospective prime ministers. Even when a prime minister is in office, prospective prime ministers from the opposition parties do not have to accept defeat. They are fully aware that a president will dismiss the current prime minister if there is a disagreement between the two. These prospective ministers stir resentment for the current prime minister and side with the president whenever a dispute arises between the heads of state. For example, B. Bhutto had been dismissed as prime minister after a bitter disagreement with President Ghulam Khan in 1990.<sup>56</sup> After the dismissal, she denounced Khan's dismissal of her government as "undemocratic."<sup>57</sup> However, she enthusiastically endorsed Khan's dismissal of Nawaz Sharif in 1993, opining that the move was a "democratic" solution.<sup>58</sup> A similar scenario existed in 1996, when B. Bhutto was prime minister. The relationship between her and President Leghari eventually deteriorated, and led to

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<sup>53</sup> Zardari Ready to Shed Grabbed Powers, Conveys Plan to Gilani, THAIANDIAN NEWS (Bangkok), Nov. 16, 2009, [http://www.thaindian.com/newsportal/south-asia/zardari-ready-to-shed-grabbed-powers-conveys-plan-to-gilani\\_100275356.html](http://www.thaindian.com/newsportal/south-asia/zardari-ready-to-shed-grabbed-powers-conveys-plan-to-gilani_100275356.html).

<sup>54</sup> See discussion *supra* Part I.B.

<sup>55</sup> See discussion *supra* Part I.C.

<sup>56</sup> See TALBOT, *supra* note 7, at 310.

<sup>57</sup> Edward Gargan, *President of Pakistan Dismisses Premier and Dissolves Parliament*, N.Y. TIMES, Apr. 19, 1993, at A3.

<sup>58</sup> *Id.*

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President Leghari making a secret pact with Nawaz Sharif.<sup>59</sup> Not surprisingly, B. Bhutto was eventually dismissed, and Sharif was made prime minister.<sup>60</sup>

The passage of the Eighteenth Amendment will likely address this political instability. First, by restoring the articles that have caused a power struggle between the prime minister and the president, such as Article 101(1), there is an assumption that the two heads of state will work together to resolve issues.<sup>61</sup> Second, with the repeal of Articles 58(2)(b) and 112(2)(b), there is hope that persons vying for the position of prime minister will not try to stir resentment between the heads of state since the president will not be able to unilaterally dismiss a prime minister. Therefore, the Eighteenth Amendment may be successful in addressing this political cause of instability in Pakistan.

### B. Addressing the Constitutional Root Cause of Instability in Pakistan

However, repeal of the Seventeenth Amendment does not address the constitutional cause of instability: namely, the ease with which a leader can subvert the Constitution. All that is required is a two-thirds majority in both Houses of Parliament – the Senate and the National Assembly.<sup>62</sup> For example, when Nawaz Sharif returned to the office of prime minister in 1996, he was able to pass the Thirteenth Amendment *within a matter of minutes* on April 4, 1997.<sup>63</sup> This is a very easy threshold to attain and creates a constitution subject to the whims of Pakistan's political leaders.

The ease with which Pakistan's Constitution can be subverted is especially disconcerting considering approximately twenty years since the ratification of the Constitution of 1973 have been dominated by military personnel.<sup>64</sup> These leaders can pass amendments by threats rather than political sway. For example, when Zia assumed power, he threatened to dissolve both houses of Parliament if he was not given blanket authority over the nation.<sup>65</sup> This threat led to the ratification of the Eighth Amendment.<sup>66</sup>

Even if the Seventeenth Amendment is repealed, it does not prevent a future military dictator or leader with a strong majority in Parliament from simply ratifying a Nineteenth Amendment that would restore those powers. In order to stabilize Pakistan, the Eighteenth Amendment must address Article 239, which governs how the Constitution can be amended.<sup>67</sup> Until this occurs, Pakistan's leaders will always have the option of subverting the Constitution in order to

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<sup>59</sup> KHAN, *supra* note 1, at 458.

<sup>60</sup> MALIK, *supra* note 14, at 189.

<sup>61</sup> See discussion *infra* Part II.B.

<sup>62</sup> CONSTITUTION OF PAKISTAN art. 239.

<sup>63</sup> KHAN, *supra* note 1, at 464.

<sup>64</sup> CBC News, In Depth: Pakistan Timeline, <http://www.cbc.ca/news/background/pakistan/> (last visited May 19, 2010) (Zia retained office from 1977 to 1988, and Musharraf retained office from 1999 to 2008).

<sup>65</sup> Malik, *supra* note 14, at 171.

<sup>66</sup> *Id.*

<sup>67</sup> CONSTITUTION OF PAKISTAN art. 239.

maintain their term in office. Thus, the Eighteenth Amendment, as currently proposed by President Zardari, is only a temporary fix for Pakistan's instability.

### III. Amending Article 239 of the Pakistani Constitution

#### A. Current Procedure of Ratifying the Pakistani Constitution

Article 239 of the Pakistan Constitution states:

(1) A Bill to amend the Constitution may originate in either House and, when the Bill has been passed by the votes of not less than two-thirds of the total membership of the House, it shall be transmitted to the other House.

(2) If the Bill is passed without amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall, subject to the provisions of clause (4), be presented to the President for assent.

(3) If the Bill is passed with amendment by the votes of not less than two-thirds of the total membership of the House to which it is transmitted under clause (1), it shall be reconsidered by the House in which it had originated, and if the Bill as amended by the former House is passed by the latter by the votes of not less than two-thirds of its total membership it shall . . . be presented to the President for assent.<sup>68</sup>

In accordance with Article 239, amending the Pakistani Constitution is a three-step process. First, it must be presented and passed by two-thirds of either the Senate or the National Assembly.<sup>69</sup> Next, it will be transmitted to the other House, where it must also pass by two-thirds majority.<sup>70</sup> Finally, the amendment will be proposed to the President who can assent or refuse to sign the proposed amendment.<sup>71</sup>

However, as Pakistan's modern history has already shown, this allows leaders who have a strong majority in both Houses to pass amendments that serve no other purpose but to secure their terms in office.

#### B. Adopting Canada's Amendment Formulas

In order to prevent leaders from subverting the Constitution, Pakistan should adopt an amending formula that would analyze the subject matter of the proposed amendment to determine the requirements of ratification.<sup>72</sup> Numerous countries

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<sup>68</sup> *Id.* art. 239(1)-(3).

<sup>69</sup> *Id.* art. 239(1).

<sup>70</sup> *Id.* art. 239(2).

<sup>71</sup> *Id.* art. 239(3).

<sup>72</sup> Currently, Pakistan has an amendment formula; however, it is only limited to situations where the territorial limits of the province would be affected. In such cases, the affected province would have to approve the amendment by two-thirds majority before the president can assent to the change. *Id.* art. 239(4). However, this was not at issue in any of the amendments discussed above.

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have adopted this method, such as Paraguay,<sup>73</sup> Switzerland,<sup>74</sup> Spain,<sup>75</sup> and most recently, Canada.<sup>76</sup> Canada's establishment of different thresholds for different types of amendments serves as one model which Pakistan could adopt.<sup>77</sup> Canada's Constitution Act of 1982 provides five ways in which the Constitution of Canada can be amended, depending on the subject matter of the proposal.<sup>78</sup> First, Section 38 lays out the general procedure for amending the Constitution of Canada, which requires a majority in both Houses (the Senate and the House of Commons), as well as majorities in legislative assemblies of at least two-thirds of the provinces which represent at least fifty per cent of the total population.<sup>79</sup> The general procedure is the default procedure and is also specifically applied to certain subject matter, such as representation issues in the House of Commons and the powers of the Senate.<sup>80</sup> Second, the Constitution of Canada can be amended by unanimous consent, this requires a majority in both Houses, as well as in the legislative assembly of *each* individual province.<sup>81</sup> Most notably, unanimous consent is required when the amendment relates to the powers of a particular office, such as the Queen or the Governor General of Canada.<sup>82</sup> Third, if the proposed amendment applies to only one or a few provinces, it must be passed by both Houses, as well as any and all provinces which would be affected by the amendment.<sup>83</sup> Fourth, either House may amend the Constitution where the subject matter relates to the executive government or the Senate and the House of Commons.<sup>84</sup> However, this method applies only to a narrow class of changes<sup>85</sup> which are not at issue here. Finally, a province can amend its own constitution by having a majority in its province.<sup>86</sup>

If Pakistan were to adopt a similar amendment formula, then the heads of the Pakistani Government could no longer adjust Articles 48, 63A, 101, 58(2)(b), and 112(2)(b) by simply possessing a majority in both Houses. Instead, a Pakistani leader wanting to amend Articles 101(1) and 112(2)(b) would have to meet the requirements of the third amendment method in Canada since Article 101(1)

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<sup>73</sup> Constitución de la República de Paraguay [Constitution] arts. 289-90.

<sup>74</sup> Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, RO 101., arts. 138-40 (Switz.).

<sup>75</sup> Constitución arts. 166-68 (Spain).

<sup>76</sup> Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch.11, §§ 38-49 (U.K.) [hereinafter Constitution Act].

<sup>77</sup> See William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585 (1985) for a discussion of Canada's adoption of the amending formulas within the Constitution Act of 1982.

<sup>78</sup> Constitution Act §§ 38, 41, 43-45.

<sup>79</sup> *Id.* § 38.

<sup>80</sup> *Id.* § 42.

<sup>81</sup> *Id.* § 41.

<sup>82</sup> *Id.* § 41(a).

<sup>83</sup> *Id.* § 43.

<sup>84</sup> *Id.* § 44.

<sup>85</sup> Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JURIS. 5, 15 (2009).

<sup>86</sup> Constitution Act § 45.

relates to the appointment of the Governor of the provinces<sup>87</sup> and Article 112(2)(b) relates to the ability of the president to dissolve the Provincial Assemblies.<sup>88</sup> Accordingly, amending these Articles would require not only a majority in the Senate and the National Assembly but also a majority in each individual province.<sup>89</sup> This would provide a much higher threshold since very few, if any, provincial assemblies would be obliged to allow a president to directly control the appointment of their governor or dissolve their elected assembly.<sup>90</sup>

In addition, a president or prime minister of Pakistan could not change Articles 63A,<sup>91</sup> 48,<sup>92</sup> and 58(2)(b)<sup>93</sup> if Pakistan adopted these amendment formulas. All three of these Articles concern the powers of the prime minister and the president, which would fall under the second amendment method. Accordingly, ratification of these amendments would require unanimous consent; both Houses would need to pass this amendment as well as all four provinces of Pakistan. This would be an even more difficult threshold to reach for a head of state hoping to subvert the Constitution.

Moreover, while dictators could still threaten the Houses to pass their amendments, such tactics would likely be ineffective at the provincial level because the provinces are largely autonomous and governed by internal mechanisms.<sup>94</sup> Thus, the Eighteenth Amendment will only address both causes of instability in Pakistan if it amends Article 239 to include amendment formulas.

#### IV. Conclusion

Pakistan's recent history has been characterized by instability. Pakistan's presidents and prime ministers have been unwilling to share power and, accordingly, have taken turns subverting the Constitution to accomplish their short-term goals. Recognizing the instability these subversions have created, President Zardari has proposed an Eighteenth Amendment to be instituted by March 2010. This amendment would restore the balance of powers between the president and prime minister as originally envisioned in the Constitution of 1973. However, in its current state, the proposal only addresses one of the causes of Pakistan's insta-

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<sup>87</sup> See discussion and text of Article 101(1) *supra* Part I.A, B, & C.

<sup>88</sup> See discussion and text of Article 58(2)(b) *supra* Part I.A, B, & C.

<sup>89</sup> Pakistan Ministry of Information and Broadcasting, Government Structure [http://www.pak.gov.pk/structure\\_government.aspx](http://www.pak.gov.pk/structure_government.aspx) (last visited May 19, 2010) [hereinafter Government Structure] (Pakistan has four separate provinces: Balochistan, North-West Frontier Province, Punjab, and Sindh).

<sup>90</sup> Attempts by the federal government to exert control over provincial governments have always been met with strong opposition. See, e.g., TALBOT, *supra* note 7, at 299 (the federal government's appointment of General Tikka Khan as the new governor of the Province of Punjab increased hostility between the federal and provincial governments).

<sup>91</sup> See discussion and text of Article 63A *supra* Part I.B & C.

<sup>92</sup> See discussion and text of Article 48 *supra* Part I.A.

<sup>93</sup> See discussion and text of Article 58(2)(b) *supra* Part I.A, B, & C.

<sup>94</sup> See KHAN, *supra* note 1, at 284-85 (the provincial legislatures were designed to be "small replicas" of the federal government, and a province was obliged only to exercise its executive authority in such a way as to ensure consistency with the Acts of Parliament, and comply with federal direction in a narrow class of issues); see also Government Structure, *supra* note 90 (explaining that most of the services in areas such as health, education, agriculture, and roads, are provided by the provincial governments).

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bility. Zardari's Eighteenth Amendment does not address the constitutional cause of instability since Pakistan's Constitution can still easily be subverted. Accordingly, there is nothing to stop a future president or prime minister of Pakistan from simply ratifying a Nineteenth Amendment to reinsert those amendments which have caused instability in Pakistan. To address this concern, Pakistan should adopt amendment formulas similar to the ones utilized by Canada. Specifically, Pakistan should assess the subject matter of the proposed amendment to determine what the requirements should be for that amendment to be ratified. Therefore, unless President Zardari addresses the constitutional cause of instability, his Eighteenth Amendment will be unsuccessful in the long run because Pakistan's Constitution has been, and will continue to be, subject to the whims of its leaders.

The old saying that "those who do not learn from history are doomed to repeat it" is especially pertinent to Pakistan. In light of Pakistan's nuclear capabilities and prominence on the global scene, its instability may not fit so neatly within its borders in the future.