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A GOVERNMENT OF JUDGES: A STORY OF THE PAKISTANI SUPREME COURT'S
STRATEGIC EXPANSION

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ASHER ASIF QAZI

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ABSTRACT

The recent experience of the Pakistani Supreme Court (“Court”) is puzzling for many; this dissertation focuses on three separate (but related) issues of judicial strategy which follow from the Court’s experience. The first chapter explores why the Court willingly and aggressively took on cases which predictably attracted disobedience. Among other things, I argue that disobedience in these cases did not damage the Court’s legitimacy and may have even allowed it to build supportive constituencies across the public. The second chapter seeks to discuss the Court’s implementation strategy by focusing on its attempt to capture the bureaucracy. The Court remarkably made civil servants more amenable to judicial (as opposed to political) control, by attempting to alter the cost and benefit structure of the bureaucracy. The third chapter examines the Court’s success in warding off attacks from the executive. I argue that while the Court’s public support and a fragmented political elite have certainly facilitated judicial power, these factors are not enough to completely explain the exceedingly immutable position of Pakistani judiciary. This chapter proposes civil-military imbalance as an explanatory variable and discusses, in particular, the Court’s treatment of military prerogatives between the years 2005-2015. This dissertation offers an empirical account of over 1545 orders passed by the Court between the years 2002-2016, primarily in its suo motu jurisdiction. The vast majority of these orders are not approved for reporting and have accordingly not been the subject of academic debate. I also share results from a recent (2017) nationally representative survey conducted by this author in collaboration with Gallup Pakistan. This dissertation provides important findings which go against current thought in the field of judicial behavior.

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Over the years, Justice Khawaja has supported both my intellectual development and curiosity. He was always available to answer questions and entertain my foolhardy ideas. Though we disagreed at times on the precise role for the Court, he always indulged me. His openness to new ideas and arguments (even where they came from a lowly fresh graduate of law), was indeed unheard of among his contemporaries at the Court. So was his commitment to empirical analysis. To be sure, much of the data that I have analyzed as part of this dissertation was made available to me only because he facilitated my access to it.¹ He was interested in data-driven answers as much as I was, if not more. Importantly, he guided me at times when I felt completely lost and that made all the difference. Here, I would also be remiss if I didn't acknowledge his family and *Harsukh*. I was welcomed into their home (*Harsukh*) during the time that I was collecting data in Lahore. I had much to learn and experience at *Harsukh*; and, with much delight, I enjoyed countless organic home-cooked (delicious) meals there.

¹ Asad Rahim Khan and his colleagues at the Attorney General's office, including Mirza Moiz Baig, also helped me in collecting some data which was critical for the last chapter.

On the subject of data analysis, let me next acknowledge Gallup Pakistan, which was certainly my most valuable resource. Gallup Pakistan provided its resources and even conducted a nation-wide survey on my behalf, all on a pro bono basis. I am extremely grateful to Bilal Ijaz Gilani for making this possible and for guiding me each step of the way during the survey. Umar Taj also helped me in analyzing the survey data.

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All errors are my own.

INTRODUCTION

The phrase “government of judges” has been used to describe judicial activism in various forms. Lambert, however, to whom this phrase is originally attributed, used it to denote a very specific form of judicial activism. Lambert, as Professor Davis notes, was afraid that “*through the techniques of common law judging, statutory construction, and a substantive jurisprudence . . . judicial review could and would extend to nullification of constitutional amendments designed to limit judicial review.*”¹ With the judiciary immune from control, common law countries would become judiciary governed societies – so predicted Lambert in 1921.

Lambert’s prediction appears to be spot-on – at least in South Asia. Pakistan, India, and Bangladesh share more than just a common colonial past. All three countries have a Supreme Court which has developed through precedent the power to strike down a constitutional amendment on substantive grounds.² They have also previously exercised this power. In Bangladesh, the Supreme Court first struck down the 8th Amendment which attempted to decentralize the judiciary.³ Recently, the country’s Constitution was unanimously amended to provide Parliament the power

¹ See Michael H. Davis, *A Government of Judges: A Historical Re-View*, 35 Am. J. Comp. L. 559 (1987), pp. 561-562

² All three countries have a written constitution which covers in detail the powers of the Supreme Court and the Parliament. These constitutions expressly provide the Parliament unfettered powers to amend the constitution. There are also clear provisions which bar the Supreme Court from questioning the validity of any constitutional amendment. Therefore, from a textual reading of the respective constitutions of these countries there is little room for the judiciary to challenge a constitutional amendment, except on procedural grounds. [See: Articles 26 (3) and 142 of the Constitution of Bangladesh, 1972; Article 368 of the Constitution of India, 1949; Article 239 of the Constitution of Pakistan, 1973.] The judiciary in each of these countries has, however, over the years interpreted the relevant constitutional provisions in a way which limits the Parliament’s power to amend the constitution. It has accomplished this by holding that the Constitution has a basic structure or *grundnorm*, which the Parliament cannot amend. See, for instance: *Miss Asma Jillani v. The Government of the Punjab and another* (PLD 1972 SC 139); *Mahmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 426); *Indira Gandhi Case* (AIR 1975 SC 2299); *Minerva Mills Ltd., v. Union of India* (1980 3 SCC 625)

³ See *Constitution (Eighth Amendment) case* (41 DLR AD 165)

to remove judges on allegations of incapability or misconduct. This amendment was also struck down.⁴ In Pakistan, similarly, the Supreme Court thwarted a constitutional amendment which sought to abridge the Chief Justice's power to appoint judges.⁵

These countries also appear to be “judicially governed”, as Lambert predicted. For instance, in writing about the expansive role of the Indian Supreme Court, Robinson notes that the Court has, among other things, “*ordered that taxis and buses be switched to natural gas in Delhi, regulated encroachment on and preservation of public forests, and implemented guidelines for school bus safety.*”⁶ Likewise, in Pakistan, at the moment there are hardly any areas of State policy that the judiciary does not exercise jurisdiction over. From price and market regulation, to political corruption and the management of Government agencies, the Supreme Court dictates executive action openly and, importantly, with great public support.⁷ The Court has even managed the remarkable feat of removing two serving Prime Ministers from office, while at the same time successfully defeating any action against it.⁸

⁴ See Ashir Islam Shao, *Busy year for judiciary: 16th amendment scrapped, chief justice quits*, The Dhaka Tribune (Dec 27, 2017), available at: <https://www.dhakatribune.com/bangladesh/court/2017/12/27/busy-year-judiciary-16th-amendment-scrapped-chief-justice-quits/>

⁵ See Jehanzeb Awan, *18th Amendment Case: Ball In Parliament's Court*, The Express Tribune (Oct 23, 2013) available at: <http://blogs.tribune.com.pk/story/2486/18-amendment-ball-in-parliaments-court/>

⁶ See Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash. Uni. Global Studies Law Rev. 1 (2009), pp. 21

⁷ See Asher A. Qazi, *Suo Motu: Choosing Not to Legislate*, in *Politics and Jurisprudence of the Chaudhry Court*, Moeen H. Cheema & Ijaz S. Gilani (Eds.), Islamabad: Oxford University Press (2015)

⁸ See Jon Boone, *Pakistan's prime minister Yousuf Raza Gilani disqualified by supreme court*, The Guardian (Jun 19 2012), available at: <https://www.theguardian.com/world/2012/jun/19/pakistan-prime-minister-yousuf-gilani-disqualified>; *This is nothing short of judicial martial law, says Nawaz Sharif*, Samaa News (Apr 23, 2018), available at: <https://www.samaa.tv/pakistan/2018/04/this-is-nothing-short-of-judicial-martial-law-says-nawaz-sharif/>

The experience of the Supreme Court of Pakistan (“Court”), which this dissertation focuses on, is particularly captivating for any student of judicial behavior. In a political climate where judicial independence was historically (and repeatedly) subverted,⁹ the Court has emerged to become one of the most powerful institutional actors in Pakistan. This is certainly not to say that the Court’s orders are always obeyed. In fact, despite its incredible power and public appeal, disobedience of the Court’s orders is still fairly common. Remarkably, however, even in the face of rampant disobedience and numerous attacks, the Court remains undeterred. In many ways, the Court defies various commonly held assumptions about judicial behavior and institutional dynamics.

The Court’s role in Pakistani politics is truly extraordinary; yet for all the attention it has received in recent years, scholars have largely failed to present a coherent empirical account of the Court’s rise to power and its experience.¹⁰ As a result, our understanding of the Pakistani

⁹ See Aziz Huq, *Mechanisms of Political Capture in Pakistan’s Superior Courts*, 10 *Yearbook of Islamic & Middle Eastern Law* 1 (2006)

¹⁰ This are numerous works which seek to examine the role of the Supreme Court of Pakistan, especially under Chief Justice Iftikhar Muhammad Chaudhry’s leadership. See, for instance: Moeen H. Cheema & Ijaz S. Gilani (Eds.), *Politics and Jurisprudence of the Chaudhry Court*, Islamabad: Oxford University Press (2015); Hamid Khan, *Constitutional and Political History of Pakistan*, Karachi: Oxford University Press (2009); Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 *Law & Social Inquiry* 985 (2010); Moeen Cheema, *The ‘Chaudhry Court’: Deconstructing the ‘Judicialization of Politics’ in Pakistan*, 25 *Washington International Law Journal* 447 (2016); Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers’ Movement in Unstable Constitutionalism: Law and Politics in South Asia*, Mark Tushnet & Madhav Khosla (Eds.), New York: Cambridge University Press (2015), Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *Annual Review of Pol. Science* 93 (2008); Daud Munir, *Struggling for the Rule of Law: The Pakistani Lawyers’ Movement*, 251 *MIDDLE E. REPO.* 37 (2009), Tasneem Kausar, *Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court in Pakistan’s Stability Paradox: Domestic, Regional and International Dimensions*, Ashutosh Misra & Michael E. Clarke (Eds.), New York: Routledge (2011); Charles H. Kennedy, *Judicialization of Politics in Pakistan*, in *The Judicialization of Politics in Asia*, Björn Dressel (Ed.), New York: Routledge (2012); Waris Hussain, *The Judicialization of Politics in Pakistan*, New York:

Supreme Court is often incomplete or not sufficiently grounded. My dissertation aims to bridge this gap by quantitatively and qualitatively analyzing three issues in particular which are striking from the perspective of judicial strategy in Pakistan.¹¹

The first chapter seeks to explain the Court's resilience in the face of disobedience. It is generally argued that judges are likely to avoid ruling in a manner which attracts disobedience. This is so for a variety of reasons, including a belief that judges reap no benefits from judicial orders which are disobeyed and that disobedience can lower the court's legitimacy (which they care about). Paradoxically, the Court appears to have embraced disobedience. An analysis of 1545 orders passed by the Court between the years 2002-2016, shows that the Court repeatedly passed orders that carried a high likelihood of disobedience; it even publicly admitted such disobedience.

What explains the Court's strategy? Among other things, I argue that the cases in which the Court encountered disobedience were largely those involving executive inefficiency, abuse of power and corruption. These cases allowed the Court to realize its vision for an expanded role

Routledge (2018); Mohammad Waseem, *Judging Democracy in Pakistan: Conflict between the executive and judiciary*, 20 CONTEMPORARY SOUTH ASIA 19 (2012); Anil Kalhan, *Gray Zone Constitutionalism and the Dilemma of Judicial Independence in Pakistan*, 46 Vanderbilt Journal of Transnational Law 1 (2013); Maryam S. Khan, *Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*, 28 Temple Intl'l & Comp. L.J. 2. With the exception of the last work cited in this series, none of these articles use a quantitative methodology to analyze the Court's behavior. But even this piece fails to tell the complete story since it is largely relying upon the Court's published or reported opinions for data. Reported opinions, however, constitute a very small proportion of the Court's total output in terms of orders delivered.

¹¹ While the three issues this dissertation discusses are somewhat related, this dissertation is written in a manner whereby each chapter can be read as an independent piece. For this reason, readers may find that some of the information provided therein may, at times, be repetitive. This is indeed regretted, however, some degree of repetition was unavoidable if I was to tell a coherent story in each chapter.

within the State and also build supportive constituencies across the public. Many of these cases may have also helped judges in maintaining and building (rather than harming) their reputation, specifically after the Lawyers' Movement (which in a sense redefined public expectations from the judiciary). In fact, potential disobedience in these cases carried little risk for the Court's legitimacy. After all, if the public supported the underlying decision, resistance from the executive was likely to reflect poorly on the Government and not on the Court. To some extent the Court also attempted to project this narrative. As a consequence, perhaps, even as the Court was encountering extensive disobedience, its legitimacy remained high for the period studied. In this context, I also discuss results from a recent (2017) nationally representative public opinion study conducted by Gallup Pakistan. This study confirms that a perception of disobedience does not always to lower the Court's legitimacy.¹²

To be sure, the Court was interested in ensuring compliance, even if, as I noted earlier, disobedience did not deter it. The second chapter of this dissertation seeks to discuss the Court's implementation strategy by focusing on its attempt to capture the bureaucracy. Since civil servants are largely responsible for the implementation of any State directive, whether it's a law or a judicial order, by making them more amenable to judicial (as opposed to political) control the Court attempted to raise the probability of compliance. In this reference, I discuss two separate but related strategies used by the Court. The first centered on acquiring passive or indirect control. The Court attempted to eliminate political discretion (and in turn influence) in

¹² The study was designed by me with guidance from Gallup Pakistan. A treatment group was told that the Court's orders were being disobeyed and then asked various questions. Responses relating to the Court's legitimacy were compared to those given by a control group. Typically no statistically significant differences were noted in the responses relating the Court's legitimacy. And respondents in both groups reported high levels of respect for the Court. See Chapter I for complete details of the study, including the complete introduction which was read out to the treatment and control groups.

matters concerning the appointment, promotion, transfer and removal of civil servants. Civil servants were also barred from following illegal orders of their political masters, which in turn gave them more latitude to implement judicial directives. Essentially, the Court aimed to create a politically neutral bureaucracy that was somewhat inclined to implement judicial orders. The Court's second strategy (active control) was attempted by directly summoning and engaging civil servants, especially those who were sympathetic to (and crucial for achieving) the Court's objectives. By relying upon preferential wrinkles in the civil service, the Court attempted to maximize the probability of achieving compliance.

The second chapter discusses observational data from approximately 190 suo motu cases. I, for instance, find that the civil servants who appeared before the Court were often the most senior in the Pakistani bureaucracy. These civil servants were responsible for commanding their respective organizations, which in turn were tasked with implementing the Court's directives. To ensure implementation, the Court is reported to have given civil servants a variety of tasks to perform, including the submission of regular compliance reports. Civil servants who failed to satisfy the Court were often publically humiliated and, at times, even punished.

This chapter also examines the Court's success in achieving compliance by discussing three cases dealing with high-level political corruption where the Government was visibly at odds with the Court. In all three cases, despite initial and blatant disobedience, the Court appears to have been successful in achieving compliance using some of the very tools which have been discussed above. In this reference, I also discuss relevant data from Gallup Pakistan's public opinion survey (mentioned earlier). Despite claims that these tools infringe the separation of powers, there appears to be specific public support for their use. The public seems to be in favor of providing greater authority to the Court, especially in a context where disobedience of judicial

orders is prevalent. For instance, the majority of respondents supported a judicial order which authorized the Chief Justice to appoint all senior civil servants, instead of the Prime Minister.

Given what has been noted above, it should come as no surprise that the Pakistani executive has been gravely affected by the Court's activism. And not surprisingly, this has given it cause to attack the Court. Some may remember General Musharraf's declaration of Emergency in 2007, which led to the forced removal of numerous judges of the superior courts. This was just one instance. Even after the return of "democracy" and the restoration of judges, there have been attempts to curb the Court's authority, and especially the influence of the Chief Justice. But none of these measures have fully worked (for more details read Chapter I). The Court has jealously guarded its independence and, as mentioned earlier, has even claimed the authority to strike down constitutional amendments. The question is why has the executive accepted defeat?

The third chapter of this dissertation seeks to solve this puzzle. While the Court's public support and a fragmented political elite have certainly facilitated judicial power, these factors are not enough to completely explain the exceedingly immutable position of the judiciary in Pakistan. Chapter III proposes the civil-military imbalance in Pakistan as an explanatory variable. I argue that the powerful military establishment has both directly and indirectly weakened the Government's ability in dealing with any constitutional crisis, especially one involving the Court. Since the military is largely not subject to executive control, the judiciary can rely upon the army to protect its institutional independence. The military as an institution has also had no cause to be threatened by the Court's activism. In this reference, this chapter analyses all of the Court's suo motu cases (N=190) and reported judgments (N=698) from the 2005-2015 period. From this analysis, it is clear that the Court never seriously damaged the

military's core prerogatives, despite having been provided several opportunities to do so. Indeed, the Court may have propelled the military's interests in some ways.

This chapter also explores the strategic reasons for the judicial-military alliance. I argue that this alliance was attractive for the Court since: (i) the public has consistently held the military in high esteem as compared to the elected Government (making the latter an easy target); (ii) the Court and the military shared a number of institutional characteristics, which made cooperation between them easier; (iii) attacking the Government allowed the Court to influence state policy on a broader scale, in turn enabling the Court to develop supportive constituencies; and (iv) the Court could effectively contain any threat of retaliation from the Government.

It is a no-brainer that the judicial-military alliance in Pakistan has undermined (and continues to undermine) the elected civilian leadership. However, I do not claim (or disclaim) that this is undesirable. In fact, I do not take a position on the Court's activism in any way. There are certainly a number of arguments which can and have been made in this reference. Scholars may argue that apart from the concerns the Pakistani judiciary raises from the perspective of democratic theory, there is a serious question of competence. Pakistani judges have been bestowed with this incredible authority, but can they even be trusted to make the right decisions? With no specific training to adjudicate upon particular policy issues or any measure to assess public opinion, why should we assume that judges will automatically make better decisions than their political counterparts? This is more so because judges seem to have done an abysmal job managing their own house i.e., the judicial system. Over 1.87 million cases are pending decision

before various Pakistani courts.¹³ According to some accounts, it can take over twenty years for a case to make its way through the appellate system and be finally resolved.¹⁴ Perhaps the Supreme Court should then fix its own failing system, before criticizing others. The extent of judicial authority in Pakistan can also make any observer slightly uneasy. Unlike any other State institution, the Supreme Court appears to operate with complete immunity. Judges control the system for appointment and removal of judges, they are financially independent, and their jurisdiction is also all-encompassing. It should not take long for one to be reminded that power corrupts and absolute power corrupts absolutely.

Conversely, one can also vigorously defend judicial activism in Pakistan, especially if its alternate is a docile judiciary operating in the backdrop of a corrupt and ineffective Government. For starters, the idea that judicial activism in Pakistan is anti-democratic or contra-majoritarian can be seriously debated. As I have noted earlier, the Court was typically not using its exceptional suo motu jurisdiction for making new rules (whether by way of legal interpretation or outright declaration).¹⁵ On the contrary, the Court's suo motu jurisdiction was primarily used to deal with instances of the executive's failure to enforce certain laws or its outright refusal to do the same. In this sense, the Court's intervention was perhaps acutely democratic. The Court it should be noted was also tying its activism to public opinion; its actions were, therefore, arguably majoritarian and populist, not the other way round. In addition, it can be argued that the

¹³ See Malik Asad, *Over 1.8 million cases pending in Pakistan's courts*, Dawn News (Jan 21, 2018), available at: <https://www.dawn.com/news/1384319>

¹⁴ See *There is a need to revamp judicial system: CJP*, The Express Tribune (Feb 20, 2018), available at: <https://tribune.com.pk/story/1639327/1-need-revamp-judicial-system-cjp/>

¹⁵ See Qazi, *supra* note 7. To be clear the Court was quite busy setting aside executive action and even legislation on grounds of being unconstitutional. See Maryam S. Khan, *supra* note 10, at 343

strategic choices made by the judiciary have averted an all-out military coup, as discussed in Chapter III. While the Court's activism may have weakened the Government, it did not drive civilians out of power altogether (as a military coup often does).

Furthermore, there's no clear evidence that the Court's intervention in the various areas of social governance has on a macro scale done more harm than good. Judges may not be specifically trained to decide specific policy issues, but so aren't politicians. Politicians too rely on the expertise and training of civil servants for guidance and, as I argue in Chapter II, judges can do the same. Given the public nature of judicial proceedings, judges perhaps have the additional advantage of obtaining advice from a broader pool of experts than is typical in the executive policy-making process.¹⁶ More so, judicial action can remove uncertainty and provide the relevant institutional actors with critical information, which may be otherwise absent (given especially Pakistan's environment of executive inaction).

We should perhaps also be less scared of a creating an omnipotent judiciary in Pakistan since judges of the Supreme Court retire at the age of sixty-five. Unlike politicians or military dictators, judges cannot cling to power. There is also cause to believe that if a civilian Government is popularly elected, and is effective, the Supreme Court would step back or tone down its interventionist approach. The Court, after all, is trying to fix something which is broken; there would less cause for it to intervene if the system was working. The Court would also be disinclined to intervene against a popular Government as this would threaten its

¹⁶ See, generally: Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harvard Law Review 1281 (1976)

legitimacy and may even invite public back clash. The military, it should be noted, may not be inclined to protect the Court if it means risking its own reputation.

Furthermore, in the coming years, the Court may also face challenges from within. The Lawyers' Movement and the leadership of Justice Chaudhry, united the judiciary and provided judges a coherent voice; however, as we move further away from this experience, there may be room for dissent within the Supreme Court as well as the judiciary at large.¹⁷ The greater the force of this dissent, the more difficult it will become for the Court to maintain its image as an impartial and apolitical adjudicatory forum.¹⁸

In a manner the demand for speedy justice has also put the Court on a collision course with District and High Court judges.¹⁹ Recently, Chief Justice Saqib Nisar paid a "surprise visit"

¹⁷ There are already some signs of this. Recently, for instance, Justice Qazi Faez Isa publicly questioned the Chief Justice's authority to initiate suo motu actions. He has previously also questioned the Chief Justice's discretionary powers to assign cases to particular judges of the Court. See Hasnaat Malik, *CJP's nod no substitute for SC order: Justice Isa*, The Express Tribune (May 12, 2018), available at: <https://tribune.com.pk/story/1708423/1-justice-qazi-isa-questions-cjps-decision-reconstitution-bench/>

¹⁸ In India, for instance, four senior judges of the Supreme Court held an unprecedented press conference which publicly highlighted the political role and powers of the Chief Justice. See *Supreme Court judges' press conference: 'Let nation decide about CJI's impeachment'*, The Times of India (Jan 12, 2018), available at: <https://timesofindia.indiatimes.com/india/shock-sc-judges-press-conference-let-nation-decide-about-cjis-impeachment/articleshow/62471142.cms>

¹⁹ The Court has certainly attempted to deflect this demand and deny responsibility for the faltering justice system (often by blaming the Parliament). However, as of late, more and more judges have increasingly accepted problems with the justice system. In 2015, Chief Justice Khawaja called for the establishment of an alternate justice system and even publicly identified lawyers and judges as being part of the problem which contributes to judicial delay. More recently, Chief Justice Nisar openly admitted that he had been unable to put his "house in order." See Nasir Iqbal & Naeem Sahoutara, *CJP Nisar admits failure to put his house in order*, Dawn News (Jun 29, 2018), available at: <https://www.dawn.com/news/1416785/cjp-nisar-admits-failure-to-put-his-house-in-order>; Hasnaat Malik, *Outgoing CJP calls for alternative judicial system*, The Express Tribune (Sep 10, 2015), available at: <https://tribune.com.pk/story/954115/full-court-reference-outgoing-cjp-calls-for-alternative->

to the District Courts in Sind. He is reported to have publicly (in full view of the media) chided several junior judges for performing poorly, one of whom also resigned in protest over the “humiliating treatment.”²⁰ It should be noted that direct oversight and control of the District Courts is not even the province of the Chief Justice – the Provincial High Courts have the constitutional responsibility to do this.²¹ A jurisdictional conflict with the High Courts can be disastrous for the Supreme Court’s authority. High Court judges are, after all, responsible for both enforcing and shaping precedent. And they cannot be easily removed from office.²² A judge of the Islamabad High Court has also publicly reminded that CJ that he may have the “*right to set aside, modify or uphold the verdicts of other judges, [but] he does not have the right to humiliate them.*”²³ Judges, it appears, will not swallow public humiliation as easily as civil servants.

The legal community at large may also provide an important check on the Court’s authority. The street power of lawyers was critical for the restoration of judges and their

judicial-system/; *CJP says committed 'one year to my country', 'won't cross limits' of judiciary*, Geo News (Jun 24, 2018), available at: <https://www.geo.tv/latest/200441-cjp-says-committed-one-year-to-my-country-wont-cross-limits-of-judiciary>

²⁰ See *CJP expresses anger at Larkana sessions judge, throws mobile phone on desk*, Geo News (Jun 20, 2018), available at: <https://www.geo.tv/latest/200364-cjp-expresses-anger-at-larkana-sessions-judge-throws-his-mobile-phone-on-desk>

²¹ See Article 203 of the Constitution of 1973

²² The Supreme Judicial Council is a five-member body, which includes two senior most Chief Justices of the High Courts. The Chief Justice is just another member of the body. Even otherwise it should be noted that in recent history no judge has ever been removed from office by the Supreme Judicial Council.

²³ Justice Shaukat Siddiqui gave these remarks in response to a negative observation by Chief Justice Saqib Nisar’s in relation to one of his decisions. It should be noted that Siddiqui was appointed to the Islamabad High Court by Chief Justice Chaudhry. And that multiple references are also currently pending decision against him before the Supreme Judicial Council. See Malik Asad, *'CJP does not have the right to humiliate judges,' says IHC's Justice Shaukat Aziz*, Dawn News (Jun 29, 2018), available at: <https://www.dawn.com/news/1416835/cjp-does-not-have-the-right-to-humiliate-judges-says-ihcs-justice-shaukat-aziz>

subsequent claim to authority.²⁴ The Court returned the favor by protecting and as such advancing their interests.²⁵ The changing political context and institutional demands of the judiciary have, however, strained this relationship and may continue to do so.

Given the political importance of lawyers, politicians have attempted to capture the Bar Associations, in turn creating deep divisions within the legal community.²⁶ Many lawyers have also reacted strongly to the Court's attempt to control and oversee of the legal profession (and the conduct of lawyers in particular).²⁷ There are a number of lawyers now, more than ever, who are critical of the Court's activism.²⁸

²⁴ See Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 *Law & Social Inquiry* 985 (2010)

²⁵ *Ibid.*

²⁶ Elections for key posts within various bar associations now often see campaigns which are directed on party lines. See, for instance: DBA elections turn into PPP-PML-N contest, Dawn News (Jan 14, 2009), available at: <https://www.dawn.com/news/338626>; *PML-N, PPP join hands against PTI in SCBA polls*, The News (Oct 30, 2012), available at: <https://www.thenews.com.pk/archive/print/626157-pml-n,-ppp-join-hands-against-pti-in-scba-polls>; *Lawyers' bodies: PPP-backed candidates win LHC, IHC bar polls*, The Express Tribune (Mar 02, 2015), available at: <https://tribune.com.pk/story/846303/lawyers-bodies-ppp-backed-candidates-win-lhc-ihc-bar-polls/>; *PPP man wins high court bar election*, Dawn News (Feb 29, 2016), available at: <https://www.dawn.com/news/1242585/ppp-man-wins-high-court-bar-election>

²⁷ In 2015, for instance, Justice Jawwad S. Khawaja initiated a number of actions against prominent lawyers and also spearheaded a suo motu case directed at streamlining disciplinary proceedings against lawyers. The legal responded by boycotting his retirement dinner and reference proceedings. See *Judges praise Khawaja as lawyers boycott farewell*, The Pakistan Today (Sep 09, 2015), available at: <https://www.pakistantoday.com.pk/2015/09/09/judges-praise-khawaja-as-lawyers-boycott-farewell-2/>

²⁸ Both the Pakistan Bar Council and the Lahore High Court Bar Association have passed resolutions urging the Supreme Court to develop rules concerning the use of its suo motu jurisdiction. Raheel Karman Sheikh, a prominent lawyer and office holder of the Supreme Court Bar Association, also filed a petition before the Court requesting it to *inter alia* transparently disclose data concerning proceedings of the Supreme Judicial Council (SJC) and make the body functional. The SJC (manned entirely by judges) is responsible for handling complaints and disciplinary actions against judges of the superior courts; however, it has been barely active since its creation. See Hasnaat Malik, *PBC urges SC to regulate suo motu powers*, The Express Tribune (Apr 21, 2018), available at: <https://tribune.com.pk/story/1691766/1-pakistan-bar-council-passes-unanimous-resolution-regarding-suo-motu/>; *LHCBA resolution demands rules on*

There is, thus, cause to believe that the Court may in future face serious challenges from the legal community itself. With that said, let me also briefly highlight an issue with the data set which this dissertation relies upon for its empirical claims. The state of record keeping is quite poor.²⁹ Various orders and case files relevant to my sample could not be located. The picture that I paint using my data is, therefore, admittedly incomplete in some respects. Be that as it may, this dissertation still offers a comprehensive account of the workings of the Court. Specifically, my analysis draws upon data from the Court's orders which are not approved for reporting and generally outside the public purview.

Until the date of this study, empirical analysis (if any) of the Supreme Court of Pakistan has been limited to an examination of its reported judgments, which are published in law journals. In doing so, however, scholars have ignored the numerous unpublished orders of the Court. These orders are an overwhelming majority of the Court's output (if measured in terms of judicial orders), so without studying them we will simply fail at developing an accurate understanding of the Court's day-to-day workings. In this reference, at least, I anticipate that this work makes a valuable contribution.

suo motu powers, The News (Jun 08, 2018), available at: <https://www.thenews.com.pk/print/327002-lhcba-resolution-demands-rules-on-suo-motu-powers> [this resolution was reportedly passed after the intervention of a senior lawyer whose son was implicated in a murder case. The Supreme Court had taken suo notice of the case after the lawyer's son had been acquitted (somewhat questionably) by a High Court.]; Syed Sabeeh, *SC asked to direct SJC to dispose of complaints against judges*, Daily Times (May 01, 2016), available at: <https://dailytimes.com.pk/85124/sc-asked-to-direct-sjc-to-dispose-of-complaints-against-judges/>

²⁹ Needless to say, the Court has to do a much better job at maintaining its records and making them publicly accessible, if it seeks to genuinely pursue transparency and accountability in Government matters.

CHAPTER I: THE STRATEGIC ROAD TO CONTEMPT OF COURT

This chapter seeks to explain why judges may be driven to give orders that are likely to be disobeyed. I specifically examine the experience of the Pakistani Supreme Court, which has in recent years aggressively churned out orders without being deterred by disobedience. Among other things, I argue that the strategic utility of judicial orders may not be confined to cases where they are obeyed. In the case of Supreme Court of Pakistan, even orders which were disobeyed by the Government frequently provided the Court an opportunity for building supportive constituencies across the public. Many of these orders may have also helped individual judges in maintaining and building their reputation, specifically after the Lawyers' Movement (which in a sense redefined public expectations from the judiciary). In addition, I find that disobedience may not threaten the legitimacy of a court if: (i) the public supports the underlying decision; and (ii) the decision has been rendered in an environment of low public trust for the Government, as is the case in Pakistan. The chapter analyses data from roughly 209 matters taken up by the Supreme Court of Pakistan between the years 2002-2016. Additionally, public opinion data generated from Gallup Pakistan's recent (2017) study is analyzed to test the effects of disobedience on the legitimacy of the Supreme Court of Pakistan as well as the Court's expected compliance rates. This chapter records important findings which go against current thought in the field of judicial behavior.

INTRODUCTION

On December 16th 2009, the Supreme Court of Pakistan (“SCP” or “Court”) declared as unconstitutional the National Reconciliation Ordinance, 2007 (“NRO”).¹ The NRO was not just any legislative instrument: it provided immunity from criminal prosecution to over 6000 bureaucrats and politicians from all political parties, including the then incumbent President Asif Ali Zardari.² As a result of the Court’s ruling, the Government had to reopen and pursue all the corruption cases that stood abated under the NRO. Implementation of the Court’s directives would naturally not have been simple. After all, it required the executive machinery to go after the President himself, among other influential politicians and civil servants. What ensued, therefore, was a heated struggle between the Court and the Government. In the face of persistent disobedience, the Court, however, remained steadfast. Public support for the Court’s drive for accountability and the Court itself was at an all-time high;³ it was not going to back down. And

¹ See Jane Perlez, *Pakistan Strikes Down Amnesty For Politicians*, The New York Times (Dec 16, 2009) available at: <http://www.nytimes.com/2009/12/17/world/asia/17pstan.html>

² Ibid.

³ For instance, in 2012, the year in which the Court infamously convicted a sitting Prime Minister of contempt of court, Gallup Pakistan asked respondents to respond to the following statement: *some people think that Supreme Court is taking action by over stepping its mandate and it should not do this. In your opinion, is the Supreme Court taking actions that are in its mandate or is it overstepping its mandate?* Nearly two-third (62%) of the respondents felt that it was not overstepping its mandate, whereas only 14% felt that it was. See *62% say the Supreme Court is not overstepping its mandate; 14% disagree, 24% do not give a view*, Gallup Pakistan (Jan 12, 2012) available at: <http://www.gallup.com.pk/pollsshow.php?id=2012-01-12>
In another Gallup Pakistan survey, a nationally representative sample of men and women from across the four provinces was asked: *“If Prime Minister Raja Pervez Ashraf does not obey the Supreme Court’s order to write a letter to the Swiss Officials, what do you think should the Supreme Court do, remove the Prime Minister, further reprimand the Prime Minister but do not remove or court should revise its orders?”* 51% of the respondents favored the Prime Minister’s removal; 12% recommended further reprimand; 18% favored revising court orders and 19% were unable to answer. See *51% favor Prime Minister’s Removal if he disobeys court orders; 12% recommend further reprimand; 18% favor revising court orders; 19% unable to answer*, Gallup Pakistan (July 31, 2012) available at: <http://www.gallup.com.pk/pollsshow.php?id=2012-07-31>

so it did the unthinkable: a sitting Prime Minister was convicted for contempt of court.⁴ With the loss of one Prime Minister and the threat of losing another, the Government finally succumbed, but only after almost three years of persistent disobedience.⁵

The NRO saga narrated above raises many interesting issues, but one issue, in particular, stands out. The strategic model of judicial decision making predicts that judges will tend to avoid decisions that are likely to be disobeyed: why is it then that the SCP choose to pursue the NRO case with such vigor when any reasonable person could have predicted that it would face disobedience?

There are a number of reasons why judges would typically care about potential disobedience. It can be argued that disobedience: (i) may lower the legitimacy⁶ of the court, which judges care about; (ii) implies wasted time and effort on the part of judges who reap no benefit from a disobeyed order; (iii) can lead to decision override and the adoption of extreme policy positions by the executive which could have been avoided, if judges found negotiated solutions; and (iv) may even invite court curbing measures, since the court is taking positions which are not necessarily in line with the preferences of other state institutions. Yet despite this seemingly impressive list of reasons, we would find that the NRO case is not unique. There are

⁴ See Jon Boone, *Pakistan's prime minister Yousuf Raza Gilani disqualified by supreme court*, The Guardian (Jun 19 2012), available at: <https://www.theguardian.com/world/2012/jun/19/pakistan-prime-minister-yousuf-gilani-disqualified>

⁵ See Amir Wasim, *Letter sent at last to Swiss authorities*, Dawn News (Nov 08, 2012), available at: <https://www.dawn.com/news/762421>

⁶ This chapter uses the term “legitimacy” to identify the attitudes (supportive/unsupportive, positive/negative, respect/disrespect, approval/disproval, etc.) that people in the relevant social space have towards the institutions which govern them. Legitimacy is therefore shorthand for institutional legitimacy and in the case of the Supreme Court it is simply representative of how the people view the Court and respond to its decisions.

numerous instances of judicial orders being disobeyed in Pakistan, among other countries. Every case of disobedience cannot also be dismissed as a mere failure of judicial strategy. There is, therefore, a genuine need to account for this behavior within the realm of judicial strategy. This chapter attempts to do that.

The first section of this chapter will propose a strategic framework for understanding judicial orders which are disobeyed and were predictably prone to be disobeyed. Two key hypotheses are discussed. Firstly, I argue that *potential disobedience will not always be an active deterrent for judges*. In other words, even orders which are disobeyed (or have the potential of being disobeyed) may be strategically beneficial for judges. Secondly, it is argued that *disobedience is likely not to lower the legitimacy of a court where the underlying decision is popular with the public, especially in countries where the public distrusts the government*.

The second section of this chapter will provide evidence for the proposed strategic framework by examining the recent experience of the Pakistani Supreme Court. First, I provide some background on the SCP. The SCP, it is argued, is particularly attentive towards maintaining its legitimacy both from the perspective of repelling attacks from the executive (which appears to be perpetually inclined towards undermining judicial independence) and also for building support for its activism. The SCP, it is noted, can also easily avoid admitting issues (and giving orders) which carry a likelihood of disobedience. However, the SCP appears to have not done this. An analysis of 1545 orders passed by the SCP between the years 2002-2016, shows that the NRO case is clearly not an anomaly. The SCP publicly admitted disobedience in an overwhelming number of the orders studied. Moreover, such disobedience could have both been predicted and avoided by the Court, but it wasn't. This section also discusses the results of a public opinion survey conducted by Gallup Pakistan in collaboration with the author. This

nationally representative and recent (2017) survey finds that there were no statistically significant differences in the SCP's legitimacy as reported by a control group and an experimental group which had been primed on disobedience. It appears, thus, that the widespread (and reported) disobedience of judicial orders may not have been a real threat to the Court's legitimacy.

Finally, I will attempt to unravel the SCP's strategy. Among other things, I argue that the Court sought to build supportive constituencies across the public and many of the orders which recorded disobedience facilitated this strategy, despite the absence of compliance. Many of these orders may have also helped judges in maintaining and building (rather than harming) their individual and collective reputation, especially after the Lawyers' Movement (which in a sense redefined public expectations from the judiciary). Furthermore, irrespective of the potential for disobedience, the Court succeeded in achieving compliance in some of these cases, which provided the ultimate payoff for judges. Importantly, following the restoration of Chief Justice Chaudhry and the deposed judges, the Court appears to have successfully repelled every constitutional attack against it (though admittedly the Court's newfound legitimacy is not the only reason for this success). Thus, the low risk of a court curbing attack succeeding may have also provided judges the confidence to continue battling the executive without fear of sanction.

This chapter concludes by noting that the SCP's strategy of embracing disobedience can be mimicked in countries where the Government is fractured, dysfunctional or widely regarded to be incompetent. In this environment, courts can, in particular, be less concerned about the effects of disobedience on their legitimacy if the public widely supports the orders being passed (and disobeyed).

I. EMBRACING DISOBEDIENCE: THE STRATEGIC FRAMEWORK

According to the strategic school of judicial behavior, judges are rational actors with complex utility functions: they want to decide cases according to their preferences, but they want to do it in a way which ensures that their policy preferences are entrenched effectively in the long-run.⁷ This requires them to be forward thinking and to also account for factors which may undermine the effectiveness of their judgments.⁸ For instance, judges, it is argued, are concerned about public opinion and the policy position of other state actors such as the legislature since, among other things, they don't want to be overruled or invite institutional backlash.⁹ Being overruled can be particularly dangerous, as it may lead to the adoption of a policy position that is significantly worse than what judges could get away with if they are more attentive to the

⁷ This chapter proceeds from the basic premise that judges do not act mechanically in deciding cases i.e., there are considerations other than the applicable law, facts and controlling precedent which influences their decision making.

There is ample empirical evidence to support this view (See for instance: Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am. Pol. Sci. Rev. 557 (1989), pp. 557-65; Cass R. Sunstein, David Schkade, & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301 (2004), pp. 301-54). For an overview of the strategic school of judicial behavior which this chapter takes its lead from see: Lee Epstein and Jack Knight, *The Choices Justices Make*, Washington, D.C.: CQ Press (1998)

⁸ *Ibid.*, at 79-81

⁹ See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York: Farrar, Straus & Giroux (2009) (Friedman makes a forceful case for establishing how public opinion both empowers and constrains the U.S. Supreme Court). See also: Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 293 (1957) (Among other things Dahl argues that even if the Supreme Court invalidates legislation, a persistent law making majority can usually overcome the court's veto)

preferences of key decision makers such as the President and the Congress. In fact, as Eskridge argues, judges approaching the task of statutory interpretation will typically change their positions to accommodate the preferences of the incumbent legislature.¹⁰ In doing so, while they don't render a judgment on their ideal preference point, they attempt to get as close to it as possible.¹¹

There are a number of other reasons which are also advanced to explain why judges should care about disobedience and decision override. First, there is an idea that disobedience may threaten the legitimacy of the court. If people continue to disobey the decisions of a court, then its status as an effective forum for dispute resolution is threatened.¹² After all, why would people choose a court for dispute resolution, if its orders are not obeyed? Similarly, why would a person follow the orders of a court to his or her detriment, if others are not following them? The latter question is perhaps closely tied to the 'broken windows' theory which essentially asserts that disorder in urban environments breeds more disorder (so we should make every attempt to prevent even the smallest of crimes).¹³ In the context of judicial behavior, this theory may be

¹⁰ Eskridge builds his theory around a sequential political game which is played between the U.S Supreme Court, the Judiciary Committee, Congress and the President; each actor strategically responding to the preferences and moves of the other. He notes, for instance, "*the fluidity of the Court's preferences, in response to current legislative preferences, on issues of substantive criminal law*"; noting further that "*although the Court's opinion was very probably more liberal than were the raw preferences of Congress on this issue, its open accommodation of such views was enough to discourage an override effort.*" See William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale Law Journal 331 (1991), pp. 352-387

¹¹ Ibid.

¹² This relationship between compliance and legitimacy is perhaps most pronounced in the case of international courts, which have no real powers to implement their verdicts. As a result, they need to ensure compliance by at least a majority of states to maintain their status as a legitimate authority. Andreas Follesdal, *The Legitimate Authority of International Courts and Its Limits: A Challenge to Raz's Service Conception?* in *Legal Authority Beyond the State*, P. Capps, H. Palmer Olsen & S. Toddington (eds.), Cambridge: Cambridge University Press (2017)

¹³ See generally: George L. Kelling & Catherine M. Coles, *Fixing Broken Windows: Restoring Order And Reducing Crime In Our Communities*, New York: Touchstone (1998)

extended to imply that disobedience leads to more disobedience, whereas compliance creates legitimacy and leads to more obedience.

Secondly, it can be argued that disobedience carries with it the threat of sanction by the other branches of the State. If court orders are being disobeyed, then this implies that the court is doing something which other State actors do not support. A fight with the executive or the legislature can be costly and can lead to several countermeasures such as altering the composition of the court (e.g., by way of appointing new justices or through mandatory retirement),¹⁴ limiting the court's budget, and restricting the court's jurisdiction (including by way of placing limits on the exercise of judicial review itself).¹⁵ And since the judiciary has no control over the "sword and the purse," it is not always in the best position to defend itself from such court curbing attempts. In fact, as some scholars find, the court is heavily motivated by

¹⁴ President Roosevelt's "court packing" plan is often quoted as an example. Following a series of decisions which struck down several features of Roosevelt's "New Deal", a number of proposals were considered which would effectively curb the Supreme Court's will to battle the executive of these issues. One of the proposals would have effectively allowed the President to appoint six new judges to the Supreme Court. See Gregory A. Caldeira, *Public Opinion and The U.S Supreme Court: FDR's Court-Packing Plan*, 81 *The American P. Sci. Rev.* 4 (1987), 1139-1141

¹⁵ A good example of a jurisdiction curbing measure is the Defense of Marriage Act which sought to "eliminate federal jurisdiction over any question involving the interpretation or constitutionality of the federal Defense of Marriage Act (which provides that no state shall be required to give effect to a law of any other state with respect to same-sex marriage)." See Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 *Wake Forest L. Rev.* 1003 (2006), pp. 1003-1004, available at: <http://scholar.law.colorado.edu/articles/377>

Gerald Rosenberg identifies the following additional court curbing measures: "(1) [U]sing the Senate's confirmation power to select certain types of judges; (2) enacting constitutional amendments to reverse decisions or change Court structure or procedure; (3) impeachment; (4) withdrawing Court jurisdiction over certain subjects; (5) altering the selection and removal process; (6) requiring extraordinary majorities for declarations of unconstitutionality; (7) allowing appeal from the Supreme Court to a more "representative" tribunal; (8) removing the power of judicial review; (9) slashing the budget; (10) altering the size of the Court." Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 *REV. POL.* 369 (1992), at 377

“institutional maintenance” and will be less likely to strike down legislation when it is ideologically distant from the legislature and is, as a result, vulnerable to institutional attack.¹⁶

Finally, disobedience implies wasted time and effort; strategic thinkers would consequently argue that by rendering a ruling that will be disobeyed, the relevant judges have not only incurred costs (in the form of time spent on opinion writing and hearing the case) but have also not received any payoffs.¹⁷ Judges should, therefore, always be disinclined to give orders which carry a high probability of disobedience.

These arguments do present a convincing case for avoiding disobedience. And while they have been formulated in the context of judicial behavior as observed in the United States, there is no reason to believe (at first at least) why their underlying logic should not extend to other constitutional courts. There is just one problem: we can see disobedience of court orders everywhere. The NRO case is only one example. There are numerous examples of blatant disregard of judicial orders in countries as far apart as Kenya and India.¹⁸ Even in the U.S, recently, for instance, on several occasions we have seen President Trump’s administration go

¹⁶ See Jeffrey Segal, Chad Westerland and Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 2nd Annual Conference on Empirical Legal Studies Paper (2007), available at SSRN: <https://ssrn.com/abstract=998164>

¹⁷ See Judith Rensik, *Managerial Judges*, 96 Harvard Law Review 374 (1982) (Rensik *inter alia* considers several judicial innovations in the legal process which have been motivated by a deep desire of judges to manage case workload)

¹⁸ See Sam Kiplagat, *Irony of Senior State Officers Who Defy State Orders*, The Daily Nation (Dec 31, 2017) available at: <http://www.nation.co.ke/news/Irony-of-senior-State-officers-who-defy-court-orders/1056-4246680-5nfavn/index.html> (Noting several instances of disobedience of court orders in Kenya)

See also: Pramod Madhav, *Jallikattu organised at Ramanathapuram despite Supreme Court ban*, India Today (Jan 16, 2017) available at: <http://indiatoday.intoday.in/story/jallikattu-organised-ramanathapuram-despite-ban/1/858661.html> (nothing how the sport for Jalilkattu – a bull wrestling sport – was held in protest despite a ban by the Supreme Court)

head-to-head with the Federal judiciary.¹⁹ From verbal assaults against judges to blatant disobedience, examples of executive defiance are in abundance.²⁰ If judges were thinking strategically then shouldn't have we seen less of this behavior. After all, the ideal decision from a strategic perspective would be one which is respected by all state actors and the public.

One can anticipate what the response of anyone defending the strategic school would be: at times, strategies simply fail. In a world of imperfect information, calculating the preferences of complex decision-making institutions such as the legislature is a tricky process.²¹ And understandably, one will make mistakes.²² However, can this explanation really account for every instance of disobedience? I, for one, find it hard to accept that supposedly rational (and highly skilled) judges are getting their strategy wrong so frequently.

Could it be that judges are voting sincerely by taking positions which are in accordance with their conscience? Or for that matter, are these judges simply swayed by the weight of precedent and the law? While the simplicity of these explanations is undoubtedly appealing, they also take us back to the pitfalls of the legal model of understanding judicial behavior. Thanks to the strategic school of thought we have enough empirical evidence to conclude that judges do not

¹⁹ See Jeremy Stahl, *Is Trump Defying the Court Order Staying His Immigrant Travel Ban*, Slate.com (Feb 02, 2017), available at: http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/is_trump_defying_the_court_order_staying_his_immigrant_travel_ban_a_legal.html

²⁰ See John Cassidy, *Why Does Donald Trump Lash Out at Everybody, Even Judges?*, The New Yorker (Feb 09, 2017) available at: <https://www.newyorker.com/news/john-cassidy/why-does-donald-trump-lash-out-at-everybody>

²¹ It is exceedingly difficult to determine the intent of multimember bodies with any coherence. For this reason, many scholars have long argued against using legislative intent or purpose as a means of statutory interpretation. See for instance: Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994)

²² This is one of the arguments Eskridge makes to explain Congressional overrides of decisions rendered by the Supreme Court of the United States. See Eskridge, *supra* note 10, at 388

behave like robots or politicians in robes.²³ Judges are rational actors, and if they frequently choose to follow a course which takes them down the path of disobedience, then an attempt should be made to understand these actions from a strategic perspective.

Given the narrative considered earlier, how do we account for disobedience in the realm of judicial strategy? We can do this by both dismantling and enriching this narrative; particularly, as it relates to courts functioning in the context of dysfunctional governments.

Firstly, it must be understood that for a judge having his or her edict implemented may only be one of the many objectives. A judicial decision, particularly one by the Supreme Court, can do more than merely resolving a conflict or a question of social policy. A court order is a powerful tool of communication both for judges and the court as a whole.²⁴ In this sense, it can be handy for building alliances and favorable opinions within specific communities or even the public at large, regardless of whether it is obeyed or not. For instance, one can well envisage that for a particular interest group, a court order upholding its preferred policy position is a better outcome over no order at all, even if this order is likely to be disobeyed by the executive. Indeed, an adverse order from a court or an avoidance of the decision would be looked upon unfavorably and may decrease the legitimacy of the court within this community. Therefore, a judge who is

²³ See, for instance: Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice*, Cambridge: Harvard University Press (2013) (Epstein, Landes and Posner provide extensive evidence in support of the notion that judges don't act mechanically while interpreting the law nor do they act in a manner which only serves fulfills their ideological preferences. They credibly show that judges are concerned about a variety of factors including effort aversion, workload, and conformity.)

²⁴ Garoupa and Ginsburg, for instance, argue that through judicial decisions, judges and courts can build their reputation with specific audiences like the media, politicians, lawyers and law professors, as well as with the public itself. In their view, the institutional configuration of the court determines to a large extent the target audience of its decisions. See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation*, Chicago and London: The University of Chicago Press (2015)

actively seeking to build a relationship with a specific community will actively proceed to rule in favor of this community, even if he or she can predict that the relevant order will likely be disobeyed.

In addition, if we expect judges to be strategic than we should expect them to be thinking about the long-run. This is more so in the case of the appellate court judges who can mold precedent. For these judges, immediate compliance of decisions may be less critical. Society is continuously evolving, and judges who like to think of themselves as social reformers often function ahead of the curve. They are likely to be more content with a decision that allows them to attain their ideal policy preferences in the long-run, even if it comes at the cost of disobedience in the short-run. This type of thinking will be more so in cases involving issues of constitutional interpretation, which are typically hard to overrule (allowing the precedent to remain in place). For instance, there is at least some evidence to suggest that the judges deciding *Brown v. Board of Education* were themselves skeptical of its potential compliance, but they went ahead and made the ruling to establish a different normative standard.²⁵

It should also be noted that Eskridge's strategic calculus is perhaps only relevant to cases of statutory or constitutional interpretation where the court's ruling typically serves to establish a new rule, standard or policy. The danger in these cases is that the legislature can overrule and establish a different rule, standard or policy which is worse off than what the judges could have attained had they accommodated the preferences of the legislature. This danger would, however, be less pronounced in cases where a court is not establishing new rules or changing policies. Not

²⁵ Justices Frankfurter and Jackson in particular worried that a decision to end segregation would be unenforceable by Federal courts. See Cass R. Sunstein, *Did Brown Matter?* The New Yorker (May 3, 2004)

every decision concerning executive action leads to the development of new precedent; certain judgments for that matter are specifically “not approved for reporting” and cannot be cited as precedent. Judges can also emphasize the non-precedential character of the judgment in their opinions themselves. For instance, in the controversial *Bush v. Gore* case, the Supreme Court of the United States clearly stated that its decision was “*limited to the present circumstances.*”²⁶ By making such a determination, judges can reduce the risk of override by the legislature in matters of policy.

This still leaves the question of the legitimacy costs associated with making a decision that is likely to be disobeyed. Now there is extensive evidence which links the legitimacy of institutions to obedience.²⁷ However, what contributes to a court’s legitimacy is widely contested.²⁸ Specifically, there is no empirical evidence which establishes that disobedience of court orders will lead to lower levels of legitimacy for the court.²⁹ While this relationship may seem intuitive at first, there are reasons which should lead us to question this link. Firstly, if the

²⁶ See *Bush v. Gore*, 531 U.S. 98, 109 (2000)

²⁷ See Tom R. Tyler, *Why People Obey the Law?*, New York and London: Yale University Press (1990) (Tyler argues, among other things, that people obey the law not because of the fear of punishment but because of the legitimacy they accord to the law giving institution)

²⁸ There are various competing theories for what contributes to the legitimacy of courts and ultimately compliance. Tyler and Ransink argue that the extent to which people consider the court’s process to be procedurally fair will directly affect its legitimacy and compliance rates. See Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 *Law Society Rev.* 621 (1991). Gibson, on the other hand, questions the causal link between perceptions of procedural justice and institutional legitimacy; he finds that other factors (such as general attitudes about the court) provide a better explanation for institutional legitimacy. See James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 *Law & Society Rev.* 469 (1989)

²⁹ For instance, Epstein, Knight and Martin note that “[e]very override of the Court’s interpretation will chip away at its legitimacy even if only marginally.” However, they provide no empirical evidence or public study to support this position. See Lee Epstein, Jack Knight and Andrew D. Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 *Emory Law Journal* (2001), pp. 598

public, by and large, supports the policy underlying the court's decision, then we shouldn't expect the legitimacy of the court to suffer on account of disobedience. Secondly, the public may not even become aware of the disobedience to reassess the court's legitimacy. Various studies have shown that the public is acutely unaware of judicial decisions.³⁰ And this lack of awareness can be manipulated to some extent by the court as well. If the court realizes that the disobedience of a particular order will be damaging to its legitimacy, then it may, for instance, decide to avoid the issue by forestalling contempt proceedings. Lastly, political context is important. People living in countries with dysfunctional governments are likely to be more distrustful of executive action. They may, therefore, view disobedience as merely another expression of the Government's incompetence or insincerity in complying with judicial orders that seemingly serve the public's interest; if anything, such an impression may increase the court's legitimacy, not decrease it. Judges can for their part also reinforce this narrative by emphasizing their helplessness (and the executive's incompetence and resistance) in matters of implementation.

There is also reason to suspect the "disobedience begets disobedience" line of thinking. A Government official disobeying a court's order is very different from a private party engaging in such behavior. Indeed, the two can attract very different consequences.³¹ For instance,

³⁰ Pew Research Center, for instance, found not only low public awareness in the U.S. about the Supreme Court's members, but also some of its major rulings. In 2012, it conducted a survey to test public knowledge about court's ruling on the Affordable Care Act. It noted that "*despite a lengthy buildup to the court's ruling and high public interest in the case, just 55% knew that the court had upheld most provisions of the ACA; 15% said the court had rejected most parts of the law, while 30% said they didn't know.*" See Meridith Dost, *Dim public awareness of Supreme Court as major rulings loom*, Pew Research Center (May 14, 2015) available at: <http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/>

³¹ If, for instance, an agency member is fined personally, this fine will likely come out of the government's pocket as he or she would likely be indemnified by the Agency. In any event, as Parrillo finds, fines against members of the Federal Government in their personal capacity are rare and even where agency officials have been fined, these fines were modest in size (never

government officials, are rarely (if ever) sent to jail for contempt of court. As Nicholas Parrillo notes, in the United States imprisonment of Federal Government officials for contempt of court “has occurred only twice, never for more than a few hours, and in both instances, the biggest losers proved to be the imprisoning judges, one of whom was thrown off the case for bias, while the other recused himself to avoid a similar fate.”³² Even in the context of Pakistan, such punishment is exceptional. In the NRO case, for instance, despite persistent disobedience, the Pakistani Supreme Court only symbolically punished the Prime Minister (PM) for contempt of court. PM Gilani was to stay in Court until the judges rose – a sentence which lasted roughly 30 seconds.³³ The Court may not be this lenient with ordinary contemnors who can face up to six months in jail for committing contempt of court.

We should not, therefore, assume that private parties in civil matters will somehow be inspired by executive defiance and refuse to follow court orders as well. Even in so far as the government is concerned, disobedience by them in one case will not automatically lead to disobedience in other cases. Some orders of the court will inevitably be favorable for the government, and this will be sufficient for their endorsement and implementation.³⁴

more than \$6500 in 2017 dollars). See Nicholas Parrillo, *Holding the Federal Government in Contempt of Court: What Powers Do Judges Have Over an Administration?*, (Mar 02, 2017) available at: <https://www.justsecurity.org/38268/holding-federal-government-contempt-court-powers-judges-administration/>

³² Ibid.

³³ See *PM Convicted of Contempt of Court*, Dawn News (Apr 26 2012), available at: <https://www.dawn.com/news/713548>

³⁴ One study, for instance, found that during the Rehnquist Court era, the Office of Solicitor General won over 62% of all cases in which the U.S. was a direct party and over 66% of cases in which it participated as amicus curiae. See Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments*, Washington, D.C.: CQ Press (2007)

Finally, court curbing actions may not always follow disobedience of judicial orders by the government. For a court curbing attempt to be successful, a number of conditions may need to be satisfied and these, in part, will vary based on the political and constitutional context of the relevant country. Certain constitutional documents may, for instance, provide for a highly insulated judiciary; judges in these countries, therefore, may feel more confident in ruling against the executive without immediate concern for their independence. In Pakistan, for instance, judges of the superior courts can only be appointed and removed with the consent of judges.³⁵ A constitutional amendment, it should be noted, is also not always possible: it may, for instance, require a supermajority vote in Parliament, which the government of the day may not be able to carry. The presence of other institutional actors, such as the army in countries with a severe civil-military balance, can also forestall attacks on the judiciary. Networks of unelected institutions

can cooperate with each other to protect their institutional autonomy and constrain the government.³⁶ Lastly, adverse actions against the court are also in part dependent on the legitimacy of the court. If the court's legitimacy is high, any curbing action against it would be difficult irrespective of the preferences of other state actors.³⁷ And if, as I argue, judicial orders can be useful for building supportive alliances across the public, irrespective of disobedience, then the likelihood of court curbing attacks being successful may fall even further. It should also be noted that in the context of dysfunctional and unpopular governments, the legitimacy of a

³⁵ See Articles 175A and 209 of the Constitution of Pakistan, 1973

³⁶ This argument is explored in greater detail in chapter III of this dissertation.

³⁷ Clark, for instance, notes a positive correlation between the number of court curbing bills introduced and negative public opinions about the U.S. Supreme Court. According to him, "*attacking a popular Court or refusing to do something about an unpopular Court may have significant electoral consequences for a legislator.*"

See Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 *American Journal of Political Science* 4 (2009), pp. 971–985

court may itself not be threatened by disobedience; indeed, one may expect to rise following executive defiance.

Therefore, accounting for the cost and benefit analysis considered above, one can understand why under certain conditions judges would not be deterred by potential disobedience. This is more so because at the time of making the ruling, disobedience is not certain – it is merely a possibility, however high its probability might be.

The unpredictability associated with how judicial decisions would be treated discounts the effects of potential disobedience on judicial strategy. The executive may, for instance, publicly declare that a proposed direction taken by a court would be illegitimate and unconstitutional, making disobedience a near certainty. However, seeing a wave of public opinion in support of the decision, it may be forced to withdraw and implement the court's order.

The path of disobedience, thus, appears to provide judges the possibility of receiving additional payoffs in the form of implementation. This is also a path which offers more strategic choices. For instance, if the government decides to disobey, the court has the option to initiate contempt proceedings. Initiation of contempt proceedings (or a threat thereof) may influence the behavior of executive officials and even prompt them to comply. But if this is not the case, the court then has the further option of pursuing contempt proceedings and so to speak maintaining the pressure till compliance is achieved. And if it is not so achieved, the court can finally also punish the contemnor (the option used in the NRO case, which ultimately led to compliance). In most cases, however, this final option may not even need to be utilized. Even the threat of contempt without actual sanctions can prove to be extremely influential. Parrillo, for instance, finds that the most typical outcome in contempt proceedings in the U.S. is a finding of contempt

without fine or imprisonment (a “reprimand” with “no sanction”); however, this finding is not powerless:

“Our research found many examples of agencies shifting toward compliance on being faced with a mere contempt motion. Agency officials and their lawyers may sometimes be willing to push the envelope on compliance, but the prospect of a contempt finding can make them back off. In the social and media world that agency officials inhabit, being held in contempt can have shaming and reputation-harming effects. Attorneys and officials make decisions on the premise that such shame is a real force. The Justice Department, which is famously self-controlled in its decisions to appeal, has shown itself willing to do so in the case of sanctionless contempt findings, when officials’ reputation is the only thing at stake.”

To sum up what has been discussed above: there are a number of reasons to suspect the belief that judges are (or should be) discouraged to rule a particular way if they face potential disobedience. Even where an order is disobeyed, judges may still be able to get partial payoffs in the form of building their individual and collective reputation, establishing favorable precedent and voting sincerely. Disobedience also opens a whole array of strategic choices, including the initiation of contempt of court proceedings which may result in compliance with the court’s preferred position. Furthermore, there appears to be no real cost of disobedience. Notably, the legitimacy of the court should not suffer as a result of disobedience where the public overwhelmingly supports the underlying judicial decision, and this decision is made in the context of deep public distrust of the government. Finally, court curbing attacks (at least successful ones) may not always follow disobedience of court orders by the government. The constitutional and political dynamic in certain countries may itself allow judges the freedom to rule against the executive without an immediate threat to their independence. And judges can surely frame their strategy in light of the broader institutional context that they find themselves in.

II. THE SUPREME COURT OF PAKISTAN: EMBRACING DISOBEDIENCE

(i) *The Supreme Court of Pakistan: Background and the Disobedience Puzzle*

The Supreme Court of Pakistan is a court which is shrouded in the history of military dictatorships and civilian governments that have constantly sought to undermine judicial independence. Since the country's independence in 1947, it has faced four military dictators, each of whom has suppressed the Supreme Court in some manner.³⁸ Upon a military takeover, for instance, entire benches of the SCP were sent home, except of course those judges who were willing to openly endorse the coup and take a fresh oath of allegiance.³⁹

Democratically elected leaders have also openly interfered in the SCP's operations by both dismissing recalcitrant judges and appointing judges of their choice. And any attempts by the SCP to create space for itself were historically crushed with an iron fist. In 1997, for instance, when a Chief Justice came close to challenging the incumbent Prime Minister, supporters of the Government publicly ransacked the SCP's building and forced judges to suspend the Court's operations.⁴⁰ Needless to say, this has been not an environment conducive for an independent judiciary. And so, it is only natural for the SCP to look towards developing, and jealously

³⁸ The history of military rule in Pakistan is dealt with in some detail in chapter III of this dissertation.

³⁹ *Ibid.* at 495.

⁴⁰ According to some reports, the then Prime Minister Nawaz Sharif also wanted to summon the Chief Justice before the privileges committee of the National Assembly and effectively send him to jail for a night or more. See

Bitter memories of 1997 contempt case against Sharif, The News (online) (Jan 19, 2012) available at:

<https://www.thenews.com.pk/archive/print/619617-bitter-memories-of-1997-contempt-case-against-sharif>

guarding, its public legitimacy as a defense;⁴¹ this is more so following what transpired in 2007, as public support for the Court and its activism demonstrably translated into a powerful public movement for upholding its independence.

On November 03, 2007, following a highly charged confrontation between the SCP led by Chief Justice Chaudhry and the executive under General Pervez Musharraf's dictatorship, a state of "emergency" was declared.⁴² A majority of judges of the superior courts were sent home that day, including the Chief Justice of Pakistan and 14 judges of the Supreme Court.⁴³ This action, while patently unconstitutional, was not unprecedented given Pakistan's history with military dictatorships. The reaction which followed was, however, remarkably unique.

Nation-wide protests ensued forcing Musharraf to lift the emergency, hold elections and eventually resign under the threat of impeachment from the newly elected Government.⁴⁴ By August 18th, 2008, Musharraf was gone, but the question of restoring the deposed judges of the superior courts, including Chaudhry, remained. The newly elected Government headed by President Zardari was resisting their restoration – they did not want to set a dangerous precedent by encouraging independent-minded judges. And so, the public movement for their restoration carried on. With extensive support from the media and lawyers (who were generally friendly to

⁴¹ Admittedly, and especially recently, the Court has also come to rely upon the civil-military imbalance in Pakistan as a means of ensuring its survival, as chapter III of this dissertation discusses in detail. However, this does not mean that the Court's legitimacy or public support in general is not important for the Court.

⁴² See *General (r) Pervez Musharraf v. Nadeem Ahmed Advocate*, Civil Review Petition Nos. 328 & 329 Of 2013 In Constitution Petition Nos. 8 & 9 Of 2009

⁴³ *Ibid.*

⁴⁴ See Zeeshan Haider, *Musharraf quits under impeachment threat*, Reuters (Aug 18, 2018), available at:

<https://www.reuters.com/article/idINIndia-35058020080818>

Chaudhry's cause), hundreds of thousands of people from all walks of life marched towards the capital city of Islamabad.⁴⁵ The Government finally succumbed.⁴⁶ And so, for the first time in the history of Pakistan, judges who were illegally deposed by a military dictator were one by one restored to office.⁴⁷ This movement for the independence of the judiciary finally culminated on March 16, 2009, with the restoration of Justice Chaudhry as the Chief Justice of Pakistan.⁴⁸

With the reinstatement of Chaudhry and his cohort of loyal judges, the judiciary, and the Supreme Court of Pakistan, in particular, was infused with both vigor and vision. From the various speeches delivered by leaders of the movement for the restoration of judges, including many public statements by Chaudhry himself, it was clear that the restored judiciary would be expected to do more than just be a legitimizing force for incumbent executive policies.⁴⁹ Indeed, the poor service delivery of the democratically elected Government led by President Zardari (who personally faced several corruption probes), can be said to have provided them the space for an expansionist role.⁵⁰ Any activist agenda, however, required the support of the public; more

⁴⁵ For a historical account of the "lawyers movement" which started after Chaudhry's removal see, generally: Muneer Malik, *The Pakistan Lawyer's Movement: An Unfinished Agenda*, Islamabad: Pakistan Law House (2008)

⁴⁶ There is evidence to suggest that this decision was made once the Chief of Army Staff intervened in the matter. Gen. Kanyani reportedly refused to provide troops to disperse the protestors, which weakened the Government's resolve to prolong the crisis. Be that as it may, this certainly does not discount the role of public opinion in the process. After all, if the Court was not respected or considered legitimate, a popular movement for its independence would not be able to materialize to begin with. See Jane Perlez, *Pakistan Avoids Pitfall, but Path Ahead Is Unclear*, *The New York Times* (Mar 16, 2009), available at:

<https://www.nytimes.com/2009/03/17/world/asia/17pstan.html>

⁴⁷ See Nick Schifrin, *Pakistani Chief Justice Iftikhar Chaudhry Reinstated*, ABCnews (Mar 16, 2009), available at: <http://abcnews.go.com/International/story?id=7094949>.

⁴⁸ *Ibid.*

⁴⁹ See *The Pakistani Lawyers' Movement and the Popular Currency For Power*, 123 Harv. L. Rev. 1705 (2010), pp 1715-1725

⁵⁰ Robinson has extensively studied the rise of the Supreme Court of India and attributes its increasing authority largely to a fractured government and poor service delivery. India it should be noted is also quite similar to Pakistan both in terms of cultural and constitutional history. See

so because of the history of executive interference and the continuous threat to the independence of the judiciary.

This focus on pursuing an activist agenda and building the Court's legitimacy was also internalized across the judiciary. Various judges who were ousted by Musharraf were personally humiliated at the hands of the executive during this time.⁵¹ For these judges, this experience and their subsequent restoration was clear evidence that, among other things, they always needed to keep the public at their side. It should also be noted that under Justice Chaudhry's leadership, after the restoration of judges, the SCP passed an order declaring as illegal all appointments made by General Musharraf to the superior courts of Pakistan.⁵² Judges who had been appointed to this office before the declaration of emergency, but choose to align themselves with the military dictator were issued contempt notices. As an offshoot of this move, over a hundred judges who had essentially chosen to the side to the military government were removed from service, resigned or opted for early retirement.⁵³ What remained, therefore, was a superior judiciary comprising judges with a nearly uniform commitment to the ideals of judicial independence and an activist approach to judging, with a particular emphasis on maintaining and building their legitimacy. Given the latter motive in particular, however, the extent to which the Court encountered disobedience (and at an unprecedented rate) may surprise students of judicial behavior.

Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 *Wash. Uni. Global Studies Law Rev.* 1 (2009)

⁵¹ Chaudhry was personally manhandled by low ranking police officials. Others judges faced similarly humiliating experiences such as house arrests, eviction from official residences and deprivation of sanctioned privileges.

⁵² See Saroop Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, 1 *Lums Law Journal* 1 (2013)

⁵³ *Ibid.*

Table 1 lists out the number of contempt petitions filed before the Court between the years 2000-2013. As is evident, the numbers start rising around 2005 and spike following 2009, which is the year when Justice Chaudhry and the deposed judges were restored to office. One can also imagine that since contempt petitions often don't follow disobedience, the actual count of disobedience of Court orders in Pakistan would be way higher than what is presented in Table 1.

Table 1 – Contempt petitions registered before the SCP between the years 2000-2013

Year	Contempt in Const. Petitions	Contempt in HR/Suo Motu
2000	3	0
2001	0	0
2002	0	0
2003	2	0
2004	1	0
2005	1	1
2006	4	2
2007	5	3
2008	4	4
2009	17	3
2010	3	14
2011	31	13
2012	20	18
2013	28	11
Total	119	69

Source: SCP Records

That the story presented by Table 1 is a natural extension of the Court's activist agenda (particularly following the restoration of judges in 2009) is somewhat intuitive. Given the history of executive dominance in Pakistan, it should come as no surprise that an activist Court would face some measure of disobedience from the Government. And by the looks of it, it indeed appears that this disobedience did not deter the Court. This is more so because much of this disobedience was recorded under the Court's suo motu jurisdiction. The uninitiated should note

that this jurisdiction essentially allows the Court to frame its agenda.⁵⁴ In essence, the Court does not require a petitioner to act and can effectively use its suo motu jurisdiction to admit any issue for hearing.⁵⁵ The cases entertained under the Court's suo motu jurisdiction also reflect a coherent strategy, since it operates at the sole discretion of the Chief Justice of Pakistan.⁵⁶

Students of judicial behavior may nonetheless argue that data from Table 1 is not sufficient to corroborate this claim. After all, it could just be that the Court (and more particularly the Chief Justice) did not fully anticipate disobedience in every case or that once it encountered disobedience in a particular case, it avoided such cases in the future. Even in a specific case which invited disobedience, the Court could strategically avert further disobedience by refusing to provide it further hearing or changing the direction of the case. The unique powers of the Chief Justice of Pakistan would certainly facilitate such a strategic withdrawal.

The Chief Justice is responsible for a variety of administrative matters including docket management, assignment of cause lists and constitution of judicial benches in the Court for hearing specific cases.⁵⁷ Thus, the Chief Justice could easily stop the hearing of any case, if the Court encountered disobedience in it. Similarly, if some judge on the Court was bent upon ruling in a fashion which would invite disobedience, the Chief Justice could assign the relevant matter

⁵⁴ For a general background on the SCP's suo motu jurisdiction see: Werner Menski, Ahmad Rafay Alam & Mehreen Kasuri Raza, *Public Interest Litigation in Pakistan*, London: Platinum Publishing (2000)

⁵⁵ The Court has overtime broadly read Article 184 (3) of the Constitution – the source of the Court's suo motu powers – in a manner which allow it to question any issue, whether affecting an individual or the State at large. See Asher A. Qazi, *Suo Motu: Choosing Not to Legislate*, in *Politics and Jurisprudence of the Chaudhry Court*, Moeen H. Cheema & Ijaz S. Gilani (Eds.), Islamabad: Oxford University Press (2015), pp. 285-287

⁵⁶ *Ibid.*, 288-289

⁵⁷ See Maryam Khan, *The Politics of Public Interest Litigation in Pakistan in the 1990s*, 3 Social Science and Policy Bulletin 2 (2011), pp.6

to another judge.⁵⁸ These measures may seem drastic, but one would certainly expect to see them if we assume that disobedience deters judges (especially from the perspective of legitimacy maintenance). A more in-depth analysis of the Court's experience in encountering disobedience is, therefore, needed to make a fair determination about its strategy. In other words, we need to conclusively determine (or rule out) that the Court did not back down in cases where disobedience was largely predictable and avoidable. The following section attempts to do that.

(ii) *Predicting Disobedience: Sample Selection and Data Analysis*

Sample Selection and Methodology

To analyze the extent to which the Court (and more particularly the Chief Justice) could have predicted and avoided disobedience, I study all the suo motu cases initiated by the SCP between the years 2002-2015. This period was selected partly out of convenience and partly out of necessity. The first suo motu case was initiated in Pakistan back in 1990. Stretching the sampling period to this year would have been difficult since the state of record keeping at the SCP is quite poor. Even for the period under study various orders and case files could not be located.⁵⁹ In any event, the 2002-2015 period should be sufficient for this study as it covers the years in which the Court appears to have noted extensive disobedience (see Table 1). This period also offers a significant diversity of judicial leadership and executive response, as it is spread across the tenure of seven Chief Justices (including one de-facto Chief Justice) and three different Governments, including a military dictatorship (see Table 2 below). (Justices in

⁵⁸ It should be noted that cases at the SCP are typically heard by a minimum of three justices with each justice carrying an equal vote.

⁵⁹ Case records older than 2009, are harder to track by court staff given that records at the SCP are not digitized. On numerous occasions court staff also expressed their inability (and perhaps unwillingness) to trace older case files.

Pakistan, including the Chief Justice, retire at the age of 65 and the most senior judge at the time of the incumbent Chief Justice’s retirement is appointed as the next Chief Justice.)

Readers may note that most of the suo motu cases initiated in this period, and for that matter the history of the SCP, were initiated by one Chief Justice – Justice Ifitikhar Muhammad Chaudhry. However, this should not affect the broader object of this study, which is determining in part whether potential disobedience deters judges (including of course Chief Justice Chaudhry). Having said this, to counter any bias which this anomaly may produce, this study also analyses a second sample of cases selected from the SCP’s regular pool of constitutional and civil petitions. The second sample group has also been selected using a census approach but with a different methodology.

Table 2 – Chief Justices of Pakistan between the years 2002-2015

Chief Justice	Number of <i>Suo Motu</i> Actions	Tenure (Time)	Tenure (approx. months)	Incumbent President
Sh. Riaz Ahmed	7	1 st Feb 02 - 31 Dec 03	23	General Musharraf
Nazim H Siddiqui	10	31 Dec 03 – 29 Jun 05	18	General Musharraf
Iftikhar Chaudhry	M. 161	30 Jun 05 – 09 Mar 07 (suspended) 20 July 07 (restored) – 3 rd Nov 07 (terminated) 22 Mar 09 (restored) – 11 Dec 13	80	General Musharraf/ President Zardari (PPP)/ President Mamnoon Hussain (PML - N)
Abdul H. Dogar (<i>de-facto</i> Chief Justice)	2	03 Nov 07 – 21 Mar 09	17	General Musharraf/ President Zardari (PPP)

Table 2 Cont.				
Tassudug H. Jillani	9	11 Dec 13 – 05 July 14	6	President Mamnoon Hussain (PML - N)
Nasir-ul-Mulk	9	06 July 14 – 16 Aug 15	13	President Mamnoon Hussain (PML - N)
Jawwad S. Khawaja	3	17 Aug 15 – 23 Sep 15	1	President Mamnoon Hussain (PML - N)

The number of cases fixed before the SCP run in the thousands and not all information concerning these cases is publicly accessible.⁶⁰ At first, therefore, studying all of these cases (as was done with the suo motu sample) does not appear to be practical. To counter this, I focus on the tenure of Chief Justice Jawwad S. Khawaja. His tenure was merely 23 days (see Table 2), but the cases fixed before his bench during this time are quite diverse and cover a range of matters including, for instance, constitutional petitions which had been filed as far back as 2003. His tenure also follows that of Chief Justice Chaudhry's, so it provides some insight on whether Chaudhry's strategy was carried through by other judges in subsequent years. For the purposes of sample selection, I identified all constitutional petitions and appeals in which a Governmental body or department was listed as a party, as well as any human rights applications which were heard during his tenure.

Based on the methodology described above, a sample of 201 suo motu cases and 36 constitutional petitions, human rights cases and civil appeals was created. The court staff could

⁶⁰ Between June 2015-May 2016 alone, the SCP decided over 17,000 cases. See *Supreme Court Annual Report June 2015- May 2016*, available at: http://www.supremecourt.gov.pk/web/user_files/File/SCP_Annual_Report_2015_2016.pdf

not locate all case files, so the number of cases studied was reduced to a sample of 190 suo motu cases and 34 constitutional petitions, human rights cases, and appeals. During the course of the study, it was further observed that certain constitutional petitions and suo motu cases in this sample had been clubbed together and heard as one matter. To avoid repetition, therefore, this study also treats clubbed petitions and suo motu cases as one matter. All in all, 209 “matters” formed the locus of this study. It should be noted that 60 (approximately 28.7%) of these matters were still pending were the SCP as of the last visit to the SCP’s archives on November 01, 2016.

In terms of mapping disobedience, this study relies on the observations of the Court itself in each order passed by it whether such an order has been “reported” as precedent or not.⁶¹ It should be noted that suo motu and constitutional cases (especially those involving governance issues) can be heard over a period of time and the orders (which can be multiple) passed in these cases evolve on the basis of changing circumstances and the reports presented by the executive in response to the Court’s directives. By studying every order, therefore, one can systemically map the progress of each case and directly identify non-compliance of orders as noted by judges themselves.⁶² This measure has two advantages. First, it removes the subjectivity which is

⁶¹ “Reported” orders can be cited as precedent in future decisions by of the SCP and are binding on lower courts. These orders are reported in publicly available law journals. Orders which are not reported are considered by the SCP as not having made a substantial contribution to the development of the law. These orders are therefore not published in law journals and are such not publicly accessible. Having said this, these orders are the bulk of orders passed by the SCP and indeed constitute the overwhelming majority of orders included in this study (over 99%).

⁶² Based on the progress in these cases, the court may in its orders (which are often not reported) note its satisfaction in relation to the compliance of its directions. At times, the court uses these orders to identify gaps in compliance and even outright disobedience. For instance, in an order passed on April 09, 2012 in Suo Motu Case No.1 of 2012, the Court expresses its annoyance at the fact that its orders relating to the arrest of certain persons were not complied with. Such an observation may or may not accompany contempt proceedings. But for the purposes of this study, any such observation of non-compliance is marked as “disobedience”. Admittedly, disobedience by the executive takes various shapes and forms and disobedience in one case may be more important or extreme than in another. However, attempting to quantify these differences

inherent in any exercise aimed at determining whether a judicial order has been complied with or not.⁶³ Secondly, this methodology also helps in screening one of my hypotheses. After all, if potential disobedience deters judges (because they are afraid that disobedience may decrease the legitimacy of their court), then we should expect them to be less willing to admit actual disobedience in their orders. Indeed, some might say that this measure would bias my findings i.e., if the strategic school is correct, the study would report a lower incidence of disobedience than the actual number. However, this is an underreporting bias against the hypothesis and only serves to make my data more salient, which, as will be discussed shortly, records an exceedingly high rate of disobedience.

Results of data analysis

The results are staggering and indeed substantiate a higher incidence of disobedience than what Table 1 had initially suggested. In my sample of 209 matters, disobedience was noted at least once in approximately 31.58% (N=66) of the matters. The frequency of disobedience is also

will only bring more subjectivity to the data analysis without adding much value. For the purposes of this study, it is sufficient to note that it is only because the cause of disobedience was important for the SCP that it chose to highlight it in its orders.

⁶³ This subjectivity increases manifold in cases involving social policy, especially where there's an absence of relevant data. This is not to say that impact studies are not possible. Indeed, several attempts have been made to measure the social impact of judicial decisions. See, for instance: Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago: University of Chicago Press (2008) (Rosenberg provides a rich empirical account of the successes and failures of the U.S. Supreme Court in desegregation of public schools and promotion of civil rights, among other issues; see also, César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*. Texas Law Review. 89 (2011) (Garavito considers the direct and indirect effects of judicial intervention in the context of Latin America). However, these studies are usually case specific and for good reason. Mapping compliance of orders involving questions of social policy is a complex and time-consuming task. Therefore, this exercise is not entirely suitable for the nature of this study which aims to quantitatively analyze over 200 cases.

remarkable. In almost 14.95% (N=231) of the 1545 orders⁶⁴ passed in these cases, the SCP noted some form of disobedience.

In terms of the differences between disobedience noted in suo motu cases as compared to constitutional cases, the suo motu sample on the whole recorded a lower incidence of disobedience. Disobedience was noted in approximately 61% of the matters which were selected from Justice Khawaja's tenure as Chief Justice (primarily constitutional petitions), as compared to roughly 27% of the suo motu matters. This does appear to suggest that the Chief Justice was strategically using his suo motu powers to avoid issues which could lead to potential disobedience. But this fact in of itself is not sufficient to negate my hypothesis.

Firstly, over a quarter of the suo motu cases observe disobedience at some stage. This figure in its own right is powerful enough to suggest that the SCP was generally not afraid of potential disobedience while setting its agenda. Secondly, the disobedience noted in suo motu cases may be understated when compared to say constitutional petitions and civil appeals. Court proceedings for suo motu cases are inquisitorial in nature, since they typically do not have petitioners. The presence of a petitioner can be highly instrumental in fleshing out disobedience, as this serves their interest. In suo motu cases, the Court (more often than not) can only rely upon the reports submitted to it by government functionaries to judge compliance. These functionaries it should be noted are also incentivized to exaggerate and even misrepresent compliance. The higher incidence of court observed disobedience in constitutional and appellate proceedings of the Court might, therefore, just be a reflection of the difference in the Court's ability to identify

⁶⁴ While all of these orders were passed in the 209 matters included in the sample, it should be noted that these orders are not all the orders passed in these matters. A number of orders are missing from the sample because court records were either incomplete or inaccessible.

disobedience in these cases. Either way, for the purposes of my analysis it is sufficient to note that the SCP was not shy of publicly admitting on the record that its orders were being disobeyed, whether in constitutional or suo motu cases.

Importantly, certain trends are immediately apparent in the data which make it clear that potential disobedience did not dissuade the Court. In this reference, perhaps the clearest indication is the frequency of disobedience in the cases which noted disobedience (see Table 3). Approximately 45.5% (N=30) of the cases in which disobedience was noted, observed disobedience in three or more of the orders passed by the SCP in these cases. Therefore, if there was any doubt about potential disobedience in a particular case, it would have been quickly corrected once disobedience was observed. A traditional reading of strategic behavior cannot explain why the SCP would choose to continue to hear cases once the potential for disobedience was realized. Yet we find that the SCP not only continued to hear many of these cases, but continued to publicly admit disobedience.

Table 3 – Analysis of Sample Matters Which Note Disobedience

Median number of times disobedience is noted	2
Average times disobedience was noted	3.5
Number of matters in which disobedience was noted only once	24
Number of matters in which disobedience was noted only twice	12
Number of matters in which disobedience was noted three or more times	30
Highest observance of disobedience in a matter	23

Note:

a. Total number of matters in which disobedience is noted is 66 or 31.58% of the sample. Total number of orders in which disobedience is noted is 231.

Moreover, based on historical trends, it is safe to assume that any judge familiar with the workings of the Court could predict which cases would attract disobedience. For instance, if the sample is categorized on the lines of the factual issue presented before the Court, it becomes apparent that cases which involved an investigation by the Court into the availability of public goods/service or an environment issue for that matter, had a low potentiality of disobedience. Yet these cases are a minority in the sample group (see Table 4). Similarly, matters which raised an issue of systemic maladministration or governance – issues where the Court was actively trying to change the wider practice or procedure of an executive department/functionary – were heard time and again, even though these matters attracted the most resistance in implementation. Equally, if the matter involved raised an issue of executive incompetence, abuse of power or corruption, then it was highly likely that it would attract disobedience (see Table 5). However, yet again, these cases were heard repeatedly on the Court’s own motion. For instance, 113 (approximately 62.5%) of the total (N=181) matters heard under the Court’s suo motu jurisdiction raised issues of executive incompetence, abuse of power or corruption. The Court, therefore, clearly appeared to be undeterred by the potential of disobedience in so far as setting its agenda was concerned.

Table 4 – Categorization of Sample by Factual Issue

Factual Issue	Number of times matter appeared in sample	Number of matters in which disobedience was recorded	Number of orders passed	Number of orders in which <u>disobedience</u> was noted
Crime (e.g. rape, murder, illegal confinement, terrorism, etc.)	60	9	297	25
Protection of public (e.g., corruption/mismanagement in public enterprises, encroachment of state land, etc.) and private property (e.g. encroachments, arson, etc.)	34	11	287	38

Table 4 Cont.				
Pricing and availability of public goods and services (e.g., excessive fees for medical colleges, airline fares, etc.)	9	1	20	1
Rights of prisoners, workers, and senior citizens	12	4	55	8
Protection of environment (e.g., building of a new housing society, clearing of hazardous waste, etc.)	13	2	44	3
Civil servant appointments, removals, transfers and benefits (e.g. pension benefits for widows, illegal transfers, etc.)	14	6	93	23
Systemic maladministration/governance ^b	56	32	731	132
Independence and respect of the judiciary (e.g., contempt of court, non-appointment of judges, etc.)	7	1	14	1
Other ^c	4	0	4	0
Total	209	66	1545	231

Notes:

a. A case may involve more than one issue. But this table has been populated based on the facts which led to the case being taken up by the SCP. For instance, inadequate investigation in a rape case may lead to the transfer of the relevant police official. However, I would still categorize the issue in this case as a ‘crime’ and not ‘civil servant appointment, removal and transfer.’

b. Cases which raise ‘systemic maladministration/governance’ issues may also raise other issues covered in this table such as protection of public property, crime, etc. However, what distinguishes this category is that the Court does not restrict its judgment or review to individual parties, rather it considers and attempts to change the relevant practice. For instance, in one case (SMC 10 of 2010), the Court took notice of corruption in the arrangements made for *Hajj* pilgrims to Makkah in 2010. The SCP could have restricted its order to compensating the relevant pilgrims or ensuring that the relevant public officials are investigated. However, it chose to go further and also considered the wider mechanism for awarding *Hajj* related public contracts, selection of contractors, suitable arrangements for future pilgrims, and so forth. For this reason, this case was categorized as a type of ‘systemic maladministration’ and not ‘protection of public and private property.’

c. ‘Other’ covers issues which don’t neatly fit any of the other categories. Examples include a case involving the import of pork into Pakistan and a case concerning the equivalency of a specific individual’s foreign degrees who was seeking admission in a medical college.

Table 5 – Categorization of Sample by Identified Executive Issue

Type of executive issue alleged	Number of times matter appeared in the sample	Number of matters in which disobedience was recorded	% of matters in which disobedience was recorded	Number of orders passed	Number of orders in which disobedience was noted	% of orders in which disobedience was noted
Executive abuse of power	40	9	22.5%	216	16	7.4%
Executive inefficiency	69	34	49.27%	707	133	18.81%
Executive corruption	26	18	69.23%	386	76	19.69%
Other	74	5	6.76%	236	6	2.54%
Total	209	66	31.58%	1545	231	14.95%

Note:

a. If a case raised an issue concerning the alleged inability of an executive agency to properly administer the law, the issue raised was marked as “inefficiency.” For instance, a suo motu notice taken over a regulatory agency’s failure to provide clean drinking water to the residents of Islamabad was marked as a form of inefficiency. If the facts indicated that the executive agency had taken an action contrary to the law, it was marked as an “abuse of power.” For instance, a suo motu action taken over an allegation that a person had been illegally detained by the Police was marked as an abuse of power. Where the matter alleged corruption directly, it was marked as “corruption.” A case could raise one or more of these issues, but for this data analysis the most pertinent issue in the case was identified and coded for each matter. All other issues (such as a case which alleged that pig meat was being used in poultry feed by private parties) were marked as “other.”

(iii) *Public Perception of Disobedience*

Given the data considered above, it appears that potential disobedience was not an active deterrent for the Court. But did it negatively affect public opinion about the SCP? It appears not. For instance, as I have previously noted various public opinion surveys conducted during the tenure of Chief Justice Chaudhry – who initiated many of the suo motu actions that attracted disobedience – strikingly revealed high levels for public support for him:

“In 2011, Justice Chaudhry was ranked as the most popular person in Pakistan – above any politician and celebrity. In August 2012, respondents were asked to comment on the performance of Justice Chaudhry: 53% noted that it was good or very good and only

13% felt that it was bad or very bad. In another survey respondents were asked whether they would extend the tenure of the Chief Justice if they had the power to do so. In response, 47% said yes, while 35% did not support such a move and 18% did not respond.”⁶⁵

These surveys, however, still leave part of the question open. After all, one may well argue that the relatively high respect accorded to Chaudhry could have been higher had orders of the SCP not been disobeyed. To thoroughly test the hypothesis, therefore, there is a genuine need to independently assess the results of perceived disobedience of court orders on the Court’s public perception. For this purpose, a public survey was prepared by this author in collaboration with Gallup Pakistan.

In the public survey conducted by Gallup Pakistan in January 2017, a nationally representative sample of more than 1800 respondents was divided into two separate groups.⁶⁶ One group – the treatment group – was read out the following introduction before being asked specific questions:

“Last year the Supreme Court ordered the Government to make a major policy change. The Government has not implemented the Court’s order, despite repeated directives from the Court. Some critics suggest that the Court’s directive was beyond its power. Others however believe that many decisions of the Supreme Court that may be beneficial for the public, like this one, are being routinely disobeyed by the Government. Now I am going to ask you some questions about the Supreme Court.”

The introduction was designed keeping in view the narrative various media outlets may create about any major policy decision delivered by the Court i.e., some will support it, and others will criticize it. In addition, I wanted to emphasize that orders of the Supreme Court were being

⁶⁵ See Qazi, *supra* note 55, at 312

⁶⁶ The survey was conducted with more than 1800 men and women statistically selected (stratified random sampling) from all four provinces of Pakistan and comprised a cross section of age and socio-economic classes. The results of the survey were compiled in a report which is available on file with the author for review. The survey was conducted in the Urdu language, which is the national language of Pakistan. The text of the survey has been translated in English for the purposes of this dissertation.

persistently disobeyed. The control group, on the other hand, was simply told that they were “going to be asked a number of questions about the Supreme Court of Pakistan.”

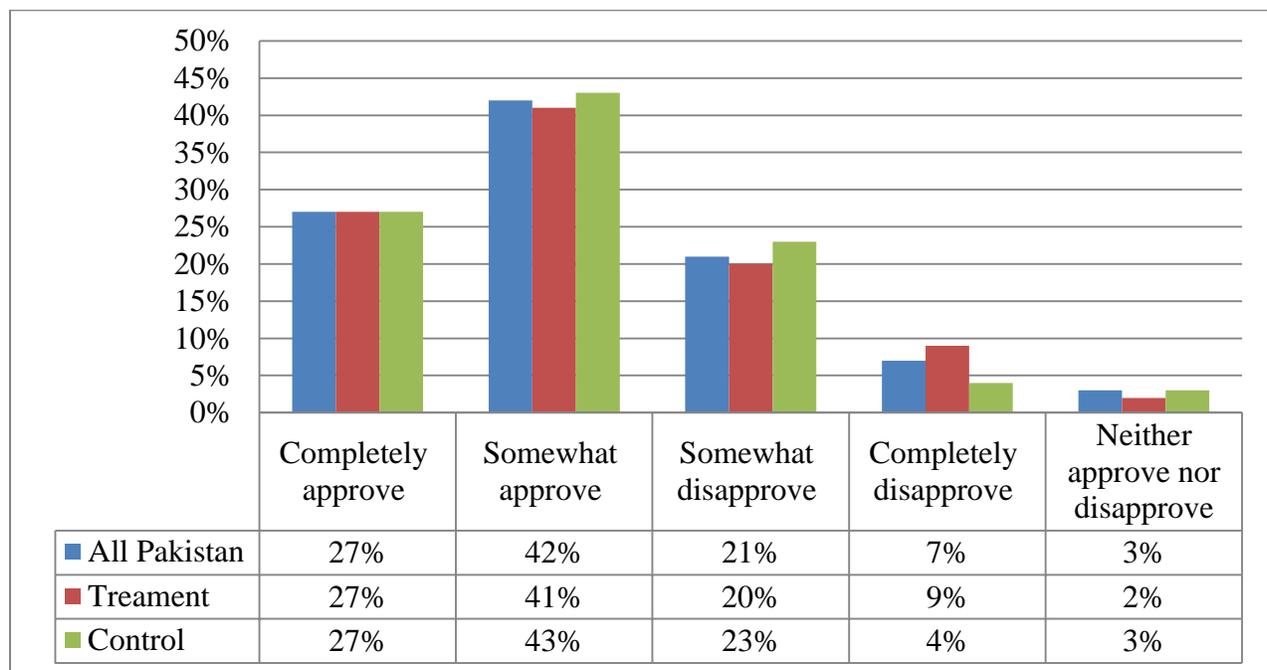
As predicted, there were no statistically significant differences between the control and treatment groups in relation to their perception of the SCP’s legitimacy. Importantly, respondents in both the treatment and control groups reported high levels of respect and legitimacy for the SCP (see Figures 1-3). For instance, 68% of the respondents in the treatment group completely approved or somewhat approved of the way the Supreme Court was handling its job (see Figure 1). It may be noted that 9% of respondents in the treatment group did express complete disapproval of the way the Supreme Court was handling its job, which was almost double to that of the control group; however, as noted earlier this difference was statistically insignificant. Even otherwise, for the remaining questions responses of the treatment group are more supportive of the Supreme Court’s legitimacy when compared to responses of the control group (though these differences are also statistically insignificant). For instance, when asked to report which institution has the most power in Pakistan, 50% of the respondents in the treatment group choose the Supreme Court compared to 45% of the respondents in the control group. Strikingly, the Supreme Court was voted as having the most power among the options provided, which included the Parliament and the Police (see Figure 2). Similarly, respondents in the treatment group reported higher levels of respect for the Supreme Court as compared to the control group (See Figure 3). Again, the differences were statistically insignificant, but it is still interesting to note that 82% of the respondents in the treatment group reported as having “very much” or “to some extent” respect for the Supreme Court, compared to 78% of the respondents in the control group.

The SCP also fared well in comparison to other institutions in terms of the public’s respect for it. For instance, only 14% percent of the respondents in the treatment group reported

as having “very much” respect for the police. This figure was 37% for the Parliament and 47% for the SCP (this data is not graphically represented).⁶⁷ Similarly, respondents noted a high level of trust and confidence in the Chief Justice of Pakistan (see Figure 4), especially when compared to other political leaders. For instance, 50% of the respondents in the treatment group expressed a lot of confidence in the Chief Justice; for the President of Pakistan, only 23% of the respondents reported this level of trust and similarly for the Prime Minister this figure was 27% (this data is not graphically represented). Here again, differences between the responses recorded for the treatment and control group were statistically insignificant.

Figure 1 – Public Approval of the Supreme Court

Question: Do you approve or disapprove of the way the Supreme Court is handling its job?



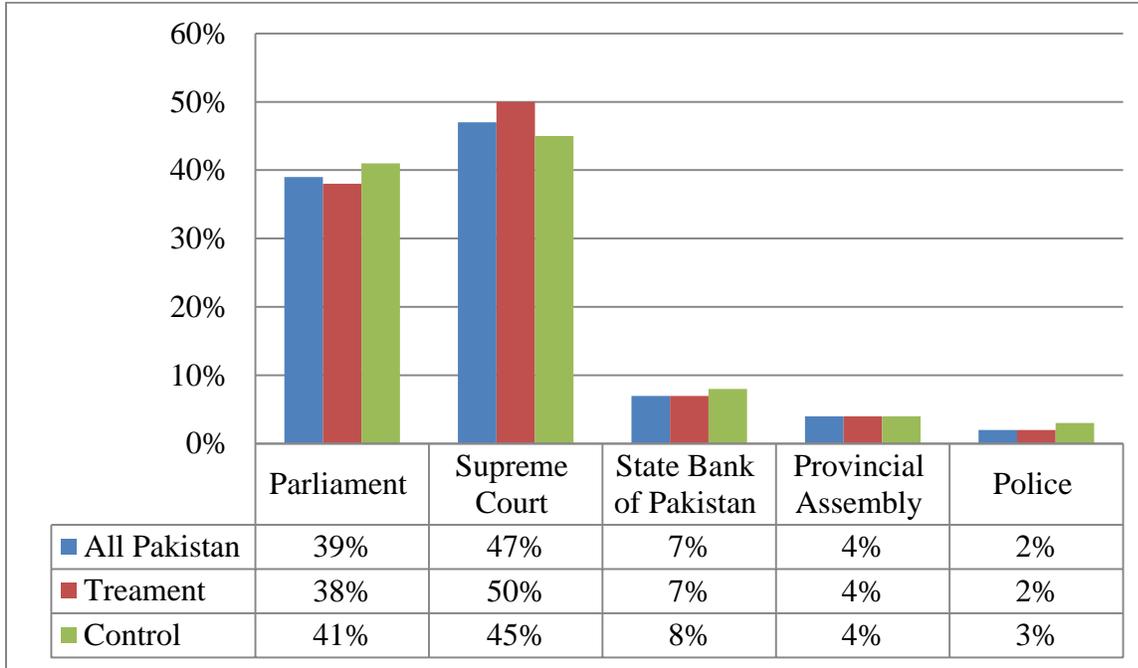
Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Difference between control and treatment group is statistically non-significant (P= 0.842)

⁶⁷ Differences between the treatment and control groups were statistically insignificant in so far the respect for the Parliament and the police were concerned.

Figure 2 – Public Perceptions of Institutional Power

Question: Which of the followings institutions has the most power?

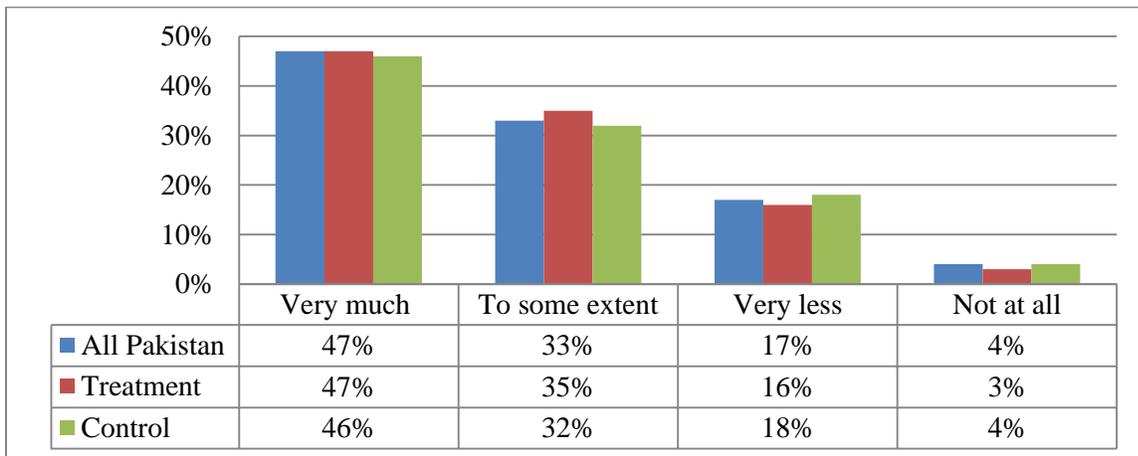


Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences in public opinion between control and treatment groups were statistically non-significant (P= 0.207)

Figure 3 – Respect for the Supreme Court

Question: In your opinion, how much respect does the Supreme Court have?

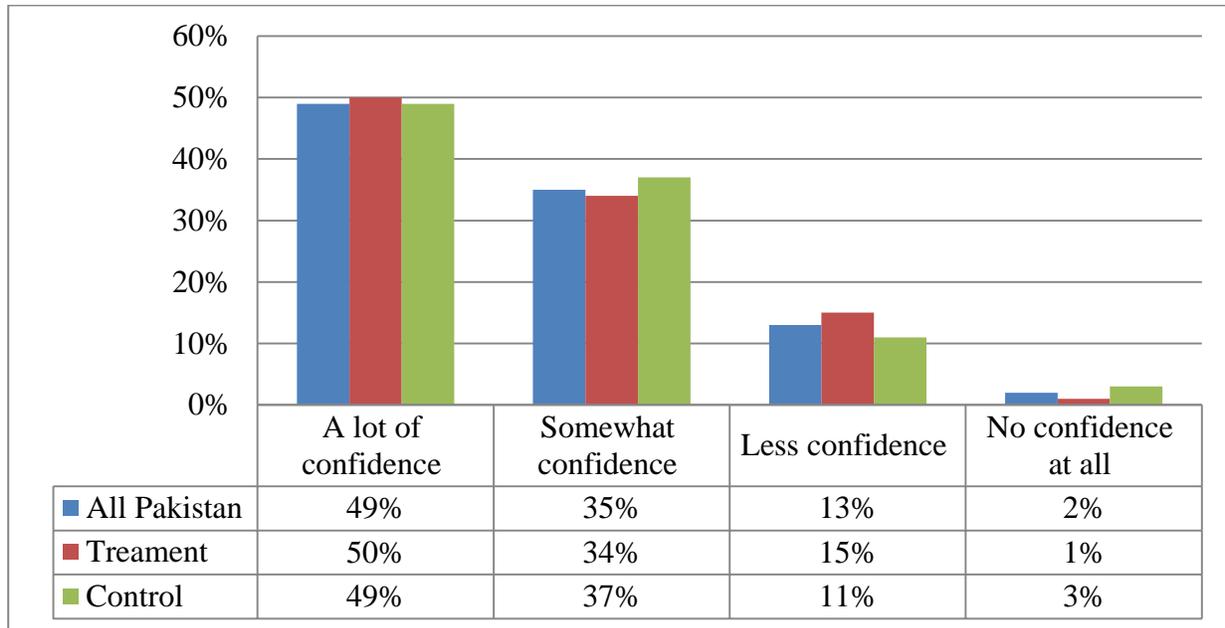


Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences in public opinion between control and treatment groups were statistically non-significant (P= 0.695)

Figure 4 – Trust and Confidence in the Chief Justice of Pakistan

Question: How much trust and confidence do you have in the Chief Justice of Pakistan?



Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences in public opinion between control and treatment groups were statistically non-significant ($P= 0.628$)

The data considered above supports my hypothesis and shows that a perception of disobedience will not necessarily lower the legitimacy of the Supreme Court. But should we expect a similar effect on expected compliance rates by the public i.e., should we not expect the public to disobey orders of the SCP because it is seeing orders of the Court being disobeyed by the Government? The data seems to dispel any such conclusion. In fact, it appears that expected compliance rates actually rise for the treatment group in relation to decisions which don't specifically support.

To test changes in compliance related behavior, respondents were asked to answer the following the two questions in progression:

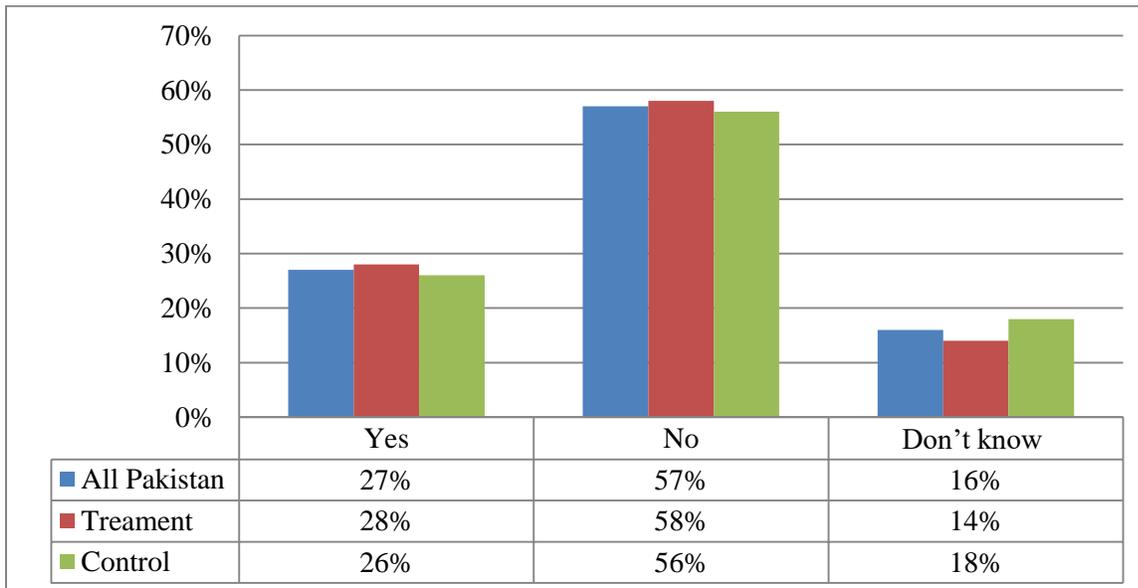
“1. If the police arrest your political party’s leader and your party calls you for protest, will you go?”

2. Now suppose, Supreme Court gives the decision that the arrest was legal but the party still calls you for protest saying that the court’s decision was unfair, then will you go and protest?”

The object was to determine whether the SCP’s decision compelled respondents to forgo their personal preferences (presumably because of the respect they had for the SCP) and what changes (if any) a narrative of disobedience would produce on this behavior. The results are presented in Figure 5-6. Overall, the SCP appears to have a strong “legitimacy-conferring” role. But what is striking is that respondents in the treatment group drastically change their position: 28% of the group reported as wanting to go to the protest before the SCP’s decision, and only 15% chose to protest after the decision; this figure compares with a 26% to a 24% drop for the control group. The differences in opinion are statistically significant.

Figure 5 – Willingness to Protest on Command of Party Leader

Question: If the police arrest your political party’s leader and your party calls you for protest, will you go?

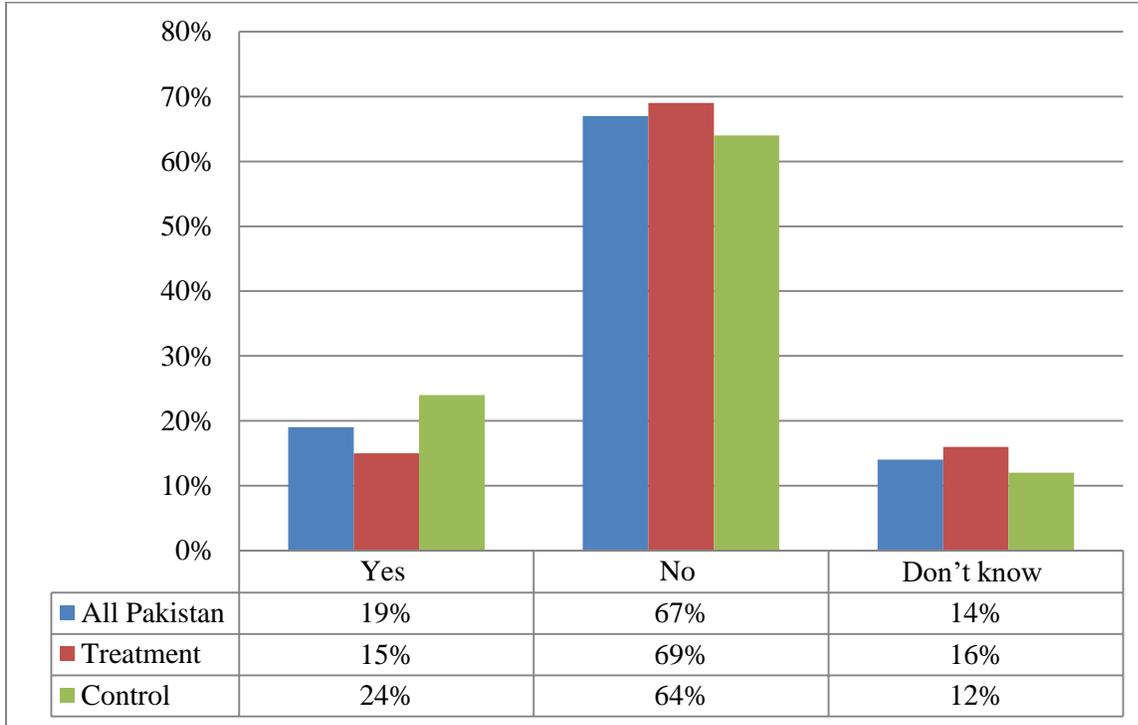


Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences in public opinion between control and treatment groups were statistically non-significant (P= 0.067)

Figure 6 – Willingness to Protest after Supreme Court Order

Question: Now suppose, Supreme Court gives the decision that the arrest was legal but the party still calls you for protest saying that the court’s decision was unfair, then will you go and protest?



Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences in public opinion between control and treatment groups were statistically significant (P= 0.001)

What makes this data particularly striking is that the legitimacy related questions did not report statistically significant differences between the control and treatment groups. One would typically expect higher levels of legitimacy for the SCP to be associated with higher compliance by the public, so why is it that (all else remaining equal) respondents who were primed on a disobedience narrative were actually more prone to abide by the SCP’s decisions? There are factors which can explain this anomaly. For instance, it could just be that the treatment group felt more compelled to abide by the SCP’s decisions because they thought that the SCP was more impartial. The primer describes the Government as having consistently not implemented

decisions of the Court. The people in the treatment group who switched their decision could, therefore, be members of a political party in opposition to the Government. Alternatively, it could be that this anomaly is just that: an anomaly, which won't be reproduced in another survey or sample group. Either way, what is important for our purposes is that reported compliance rates did not fall as a result of the perceived disobedience of the SCP's decisions.

III. DECIPHERING THE SCP'S STRATEGY

(i) Executive incompetence, corruption, and abuse of power: an easy target

To make better sense of the SCP's strategy, one needs to analyze the cases in which it encountered disobedience. Perhaps the most important statistic in this reference is that approximately 92.5% (N=61) of the total matters (N=66) in which disobedience was noted, were cases which raised issues of executive inefficiency, abuse of power or corruption (see Table 5 above). These cases not only allowed the Court to expand its authority and implement its vision of governance, but were also ideal from the perspective of building its legitimacy and support network. Judges could indeed be confident that even if they encountered disobedience in these cases, it would not threaten their legitimacy.

Maladministration has been a major concern in Pakistan ever since its inception. For instance, the World Justice Project's Rule of Law Index ranks Pakistan as having one of lowest perceptions of accountability, worse than Nepal, Afghanistan, and India.⁶⁸ The law enforcement arm – the Police – is not trusted by the public and has been consistently rated as the most corrupt

⁶⁸ See *The Rule of Law in Pakistan*, The World Justice Project, available at: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/rule-law-pakistan>

authority in numerous surveys.⁶⁹ Crime is rampant and criminal investigative services are non-existent.⁷⁰ Corruption is classified as a major issue and is one which implicates everyone on the political spectrum – from the support staff in the civil service to the Prime Minister of Pakistan.⁷¹ The judiciary too offers little respite. Access to justice (and timely justice for that matter) is a major issue.⁷² It can take years before parties exhaust all appeals and a matter is finally disposed of by the SCP.⁷³ The frustration with the judicial system was in part the reason why the Pakistani

⁶⁹ A public opinion survey by Gallup Pakistan in 2013 found that 88% of the population viewed police officials as being involved in corruption related practices – the highest figure for any public organization. The figure declined to 82% in 2016, nevertheless 4 in 5 Pakistanis still believe that police officers are corrupt. See *2013-2016: Majority urban Pakistanis view police as the most corrupt authority*, Gallup Pakistan (Aug 23, 2017), available at: <http://gallup.com.pk/2013-2016-majority-urban-pakistanis-view-police-as-the-most-corrupt-authority-judges-and-magistrates-are-perceived-to-be-the-least-corrupt-world-justice-project-and-gallup-pakistan/>

⁷⁰ Recently, for instance, Karachi – the country’s financial capital and home to over twenty million people – was ranked as the most unsafe city to live in the world by the Economist Intelligence Unit (EIU) — the research and analysis division of The Economist Group. See *Economist's report marks Karachi as most unsafe city in world*, Dawn.com (Oct 13, 2017), available at: <https://www.dawn.com/news/1363593>

⁷¹ Political scandals and corruptions probes against politicians are not seen as an anomaly. Recently, for instance, Prime Minister Nawaz Sharif was defending himself before the SCP against various charges of corruption, money laundering and tax evasion. Sharif was ultimately disqualified as a Member of Parliament by the SCP and was forced to step down as Prime Minister. He is now facing criminal charges which are being adjudicated upon by the country’s anti-corruption court. See Asad Hashim, *Nawaz Sharif Appears Before Anti-Corruption Court*, Al-Jazeera (Sep 26, 2017) available at: <http://www.aljazeera.com/news/2017/09/nawaz-sharif-appears-anti-corruption-court-170926063512762.html>

⁷² For an overview of Pakistan’s failing justice system and several unsuccessful attempts at judicial reform see: Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice*, Cambridge: Cambridge University Press (2013)

⁷³ Pakistan has a three-tiered judicial system and various matters can be appealed as of right to the SCP. For an overview of the Pakistani judicial process see: Faqir Hussain, *The Judicial System of Pakistan*, Law and Justice Commission of Pakistan, available at: http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

Parliament recently voted to amend the Constitution and create distinct military courts for trying people accused of terrorism.⁷⁴

In these circumstances, by directly hearing cases involving executive abuse of power, ineptitude, and corruption, the SCP struck a chord generally with the entire country or at least a good majority of the people living in it. For instance, Constitution Petition 77 of 2010, concerned the law and order situation in Baluchistan – one of Pakistan’s provinces and the largest one in terms of area. Over 112 orders were passed in this case concerning all sorts of matters such as the safety of doctors, the role of paramilitary forces, and the seizure of unlicensed cars and weapons. The SCP was also not shy in admitting that its orders were being disobeyed. Indeed, this case distinguished itself by recording disobedience at least 23 times – the maximum in this study’s sample group of cases. At one point, frustrated by the Provincial Government’s ability to implement the Court’s orders, the Chief Justice even remarked that the Provincial Government in Baluchistan had lost all constitutional authority and was “*ruling at its own risk.*”⁷⁵ He added that the Baluchistan Chief Minister “*should take the responsibility for the continued killings and disappearances across the province instead of blaming the police force.*”⁷⁶

⁷⁴ Military courts were introduced in Pakistan in 2015 through a constitutional amendment. The amendment included a self-destruct sunset clause, which in effect only allowed these courts to function for a period of two years. During this period, it was expected that the Parliament would bring about substantial changes in the judicial procedure, thereby reducing delays and removing the necessity for specialized courts. The changes, if any, were largely unsuccessful and as a result Parliament voted again to extend the life of military courts. See *National Assembly Votes overwhelmingly in favour of military courts*, Dawn.com (Mar 21, 2017) available at: <https://www.dawn.com/news/1321945>

⁷⁵ See *Baluchistan Government has no legality: CJ*, Pakistan Today Online (Dec 6, 2012) available at: <https://www.pakistantoday.com.pk/2012/12/06/balochistan-govt-has-no-legality-cj/>

⁷⁶ Ibid.

Other cases similarly offered the opportunity of building alliances with large pockets of people which were left underserved by the Government. Almost every case in which disobedience was noted raised social governance issues with the potential of directly impacting large groups (such as lawyers,⁷⁷ doctors,⁷⁸ and journalists⁷⁹), while at the same time resonating with the broader public. At times, the SCP's orders even purported to affect key urban areas and rural centers.⁸⁰

While people could (and many perhaps did) doubt the impact of the Court's intervention, the very fact that the SCP was taking on governance issues mattered to the public. After all, an order from the SCP upholding their rights was better than no order at all. Take the example of

⁷⁷ There were several suo motu cases which impacted, or related, to the legal community. SMC 3 of 2014, for instance, concerned an incident of terrorism at the premises of the district courts in Islamabad, Pakistan. Eight lawyers died as a result of this incident. The case centered on providing compensation to the victims of this attack as well as further strengthening the security arrangements of court premises. All the relevant bar associations were parties to this case. Similarly, SMC 21 of 2007 was initiated after several lawyers were injured while clashing with the police during a protest. The SCP severely chastised the security agencies in this case, which further emboldened the position of the Bar Associations as a powerful street force.

⁷⁸ The management of the Pakistan Medical and Dental Council (PMDC) – the regulatory body for doctors in Pakistan – leaves much to be desired. Several doctors highlighted problems in the operations of the PMDC and these were extensively reviewed by the SCP in Constitution Petition 10 of 2014. The SCP heard this matter at least thirteen times and disobedience was recorded once during this time.

⁷⁹ SMC 5 of 2007, for instance, was a suo motu case taken up on the application of the Press Association to address intimidation and violence against journalists by the authorities. Such cases were quite common. But perhaps the case with the most far reaching impact was Constitution Petition 104 of 2012. This case, which is also part of my sample, concerned mismanagement by the Pakistan Electronic Media and Regulatory Authority (PEMRA). It was heard over sixty times and even led to the constitution of a Judicial Commission which was tasked with suggesting regulatory reforms for the electronic media. Parties to the case included the Federal Government, PEMRA, the Pakistan Cable Association, and all leading media outlets. Disobedience was recorded at least 18 times in this case.

⁸⁰ There are various cases which could have impacted entire localities. For instance, SMC 13 of 2010 was initiated to address the contamination of Rawal Dam – the only source of water for the Federal capital and surrounding areas. Disobedience was recorded at least two times in this case.

the missing persons' issue which was at a time being pursued by the Court. Under Chaudhry's leadership, the Court began pressuring the relevant authorities to trace the "missing" persons and produce them before the Court.⁸¹ Yet many were skeptical about the Court's chances of securing implementation. In September 2012, for instance, Gallup Pakistan conducted a poll asking respondents to provide their opinion about the extent to which the SCP will be successful in tracing the missing persons. Only 24% of the respondent said there were very high chances of recovering the missing persons, while 70% claimed that there was little or no chance.⁸² Nevertheless, one can argue that the public still supported the SCP's quest for justice and thought that it could add value. In this reference, consider Gallup's related survey from September 2013. Gallup Pakistan asked respondents to comment on a decision of the SCP whereby the relevant security agencies were directed to produce certain missing persons within two weeks and that if they failed, consequences would follow. Respondents were asked the following question: *in your opinion, what are the chances that this decision by Chief Justice Iftikhar Chaudhry will improve the peaceful conditions in the country, especially Baluchistan?* The majority of respondents seemed optimistic: 33% said that that there was a very high chance for such an order to pave the way for peace in Baluchistan, 53% claimed there was some chance, while 14% believed there was no chance at all.⁸³

⁸¹ Numerous, and according to some estimates thousands, of people were being picked up by state agencies without formal cause or recourse to the judicial process. According to the Human Rights Watch, by 2015 authorities had recovered the bodies of 4,557 suspected victims of enforced disappearance and subsequent extrajudicial execution. See Saroop Ijaz, *Dispatches: Identifying Pakistan's 'Disappeared'*, Human Rights Watch News (Feb 12, 2015) available at: <https://www.hrw.org/news/2015/02/12/dispatches-identifying-pakistans-disappeared>

⁸² 6% of the respondents did not respond. *Perceptions of Pakistanis on the Supreme Court: Detailed Report*, Gallup Pakistan (Nov 26, 2013) (Report on file with the author)

⁸³ *Ibid.*

Importantly, disobedience in these cases had a low likelihood of hurting the Court's legitimacy. Admittedly, the Court did not have access to public opinion data on a regular basis, but it was somewhat intuitive to expect that disobedience of court orders in cases concerning executive incompetence or corruption would not hurt the Court. In many ways, one could argue that resistance from the Government in these cases would reflect poorly on the Government and not the Court.⁸⁴ After all, for the public, the Government, and not the Court, was getting in the way of ensuring good governance, social justice, and accountability. The Court on its part has also made a concerted effort to strengthen this narrative. Recently, for instance, in a case relating to the illegal felling of trees in the capital city of Islamabad, the Court forcefully confronted the Capital Development Authority for not implementing its earlier directives. But it didn't stop there. The confrontation accompanied a tirade against the Authority. During the hearing, one of the judges referred to the Authority as the "*Capital Destruction Authority*" (emphasis supplied).⁸⁵ Another judge, voicing public concern, remarked that "*there is no footpath for a pedestrian in the city, but the authority is worried about wealthy car owners.*"⁸⁶ Such comments

⁸⁴ Certainly disobedience was not always a product of executive ineptitude. In various cases the SCP was attempting to solve complex social issues that did not have easy fixes. For instance, consider SMC 11 of 2011, which sought to fix the law and order situation in Karachi – the largest city of Pakistan with a population of over 20 million. Crime in Karachi is the result of several factors including, for instance, severe poverty for which the incumbent Government could not entirely be blamed. Be that as it may, it was still easy to blame the Government when the Court's orders were not being implemented. Orders of the SCP may have been impractical and optimistic, but they were not being disobeyed due to the force of public opinion or social norms. The SCP, therefore, appears to have been following closely following McCloskey's advice i.e. it was exercising self-restraint and not straying too far from public opinion. See Robert G. McCloskey, *The American Supreme Court (5th rev. ed)*, Chicago: University of Chicago Press (2010), at pp. 112-114.

⁸⁵ See Farid Sabri, *SC displeased over felling of trees in the Capital*, The Pakistan Today (Online) (Nov 02, 2017) available at: <https://www.pakistantoday.com.pk/2017/11/02/sc-displeased-over-felling-of-trees-in-the-capital/>

⁸⁶ Ibid.

were not uncommon and reported quite frequently in the media, given that all cases are provided an oral hearing and hearings are conducted in the presence of journalists.⁸⁷

It should also be noted that even where the Government would publicly resist a charge of incompetence or corruption against it, the Court was quick to rebuff it. In 2009, for instance, the SCP directly responded to the Prime Minister's criticism that the criminal justice system was failing because judges were not dispensing speedy justice. During a hearing of a suo motu case relating to prison overcrowding and prisoners in jail, Justice Khosa observed that "*It's time that the executive takes responsibility and does its duty, which is also its constitutional obligation.*"⁸⁸ Noting his dissatisfaction over the condition of prisoners, he stated in clear words the object of the SCP's intervention: "*We have been monitoring the issue of prison reforms for the last 21 years and the suo motu case was taken by the court only to shake up the government.*"⁸⁹

It should, therefore, be apparent that disobedience in these cases had limited potential to hurt the legitimacy of the SCP. The question is: did they increase the Court's legitimacy? Data recorded in Figures 1-4 above certainly provides evidence to the contrary i.e. there was no statistically significant difference in the perceived legitimacy of the SCP between the control group and the experimental group. Therefore, at first glance the SCP's strategy does seem risky – why would it engage in behavior which could invite possible backlash from the executive as well

⁸⁷ The SCP also had a somewhat favorable relationship with the media, which too can be said to have facilitated the Court's coverage. See, generally: Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 *Law & Social Inquiry* 985 (2010)

⁸⁸ See Nasir Iqbal, *SC judges respond to PM's 'unflattering' remarks about judiciary*, Dawn.com (Jan 16, 2015) available at: <https://www.dawn.com/news/1157341>

⁸⁹ *Ibid.*

as the public? What's the upside for the Court, other than perhaps an expanded role in managing the State (which itself becomes questionable given the record the disobedience)?

In this reference, it should be first be noted that the primer provided to the treatment group in my survey was policy neutral from the perspective of the respondent i.e. the primer did not provide details of the decision in relation to which the Court encountered disobedience.⁹⁰ Thus, one can imagine that if respondents in the treatment group actively supported the underlying decision of the Court, the results might be different.⁹¹ Even otherwise, it should be noted that respondents in both the treatment and control groups reported exceedingly high levels of legitimacy for the Court. This is, in many ways, a reflection of the Court's past strategy, which as noted earlier was centered on aggressively pursuing a good governance agenda undeterred by potential and actual disobedience. Here perhaps one also needs to appreciate that the SCP's role underwent a major transformation after the restoration of judges in 2009. The post-restoration judiciary had set for itself a very public institutional mandate of social reform – not delivering on this promise of reform or, at least, not attempting to deliver on it, may actually

⁹⁰ Respondents were purposefully not given enough information to form an opinion regarding the Court's decision which was being disobeyed, since I wanted to isolate the effects of disobedience.

⁹¹ For instance, in 2009, Gallup Pakistan surveyed respondents in relation to a decision of the Court which was disobeyed and later overruled by means of a Presidential Ordinance. The Court had ordained the reduction of oil prices after striking down a tax. The majority of respondents (69%) believed that the Presidential Ordinance amounted to contempt of Court. 74% of the respondents expressly opined that the President's decision was "bad." It is interesting to note that a majority of the respondents who identified with the ruling coalition supported the charge of contempt. 57% of PPP voters and more than 75% voters of its coalition partner MQM held this view. See *Chief Justice's Decisions Continue to Enjoy Popular Support: 69% Believe Executive Order on Oil Process was in Contempt of Court; 74% Oppose President's Ordinance Against Chief Justice's Decision*, Gallup Pakistan (Jul 29, 2009), available at: <http://gallup.com.pk/wp-content/uploads/2016/06/29-7-091.pdf>

have been more damaging for the SCP's (and especially the individual post-restoration judges') reputation, than disobedience in individual cases.

Above all, while the orders the SCP was giving out in these cases attracted a high likelihood of disobedience, compliance was still a possibility. Indeed, not every case in the sample group appears to have attracted disobedience (see Tables 4&5). Critically, there were a number of cases where the Court noted disobedience at some stage, but they were finally disposed of by the Court with a note of some form of compliance and satisfaction with progress.⁹² Whether it was the threat of contempt, the force of public opinion, or simply a change of heart by the executive, the SCP was able to eventually get closer to its preferred policy position in a number of these cases.⁹³ By not being deterred by potential disobedience, the judges of the SCP were able to secure a remarkable payoff: they secured an expansive role in managing the State; they built a positive and supportive relationship with the public at large (and certainly significant groups within it); and they also began to be seen as national heroes who could successfully solve the governance crisis in the country.⁹⁴

⁹² Of the 31 cases which noted disobedience and were finally decided by November 01, 2016, 17 noted some form of compliance or satisfaction with progress by the date of disposal. It could very well be the case that compliance was not complete and the Court had to compromise on its original position. However, for the purposes of this study, it is sufficient to note that the Court was satisfied with what it got. After all, it could have continued to note disobedience, as it did before and continued to do so in many other cases.

⁹³ For instance, consider the discussion of the NRO implementation case, the RPP corruption case and the Hajj Corruption in Chapter II of this dissertation.

⁹⁴ The success of the SCP in creating this image can be partially gauged from the success of the Human Rights Cell ("Cell") which is administered by the Court. The Cell receives applications/complaints directly from the public. With the rising popularity of the Court, tens of thousands of applications were sent to the Cell. The public attention the Cell received is sharply contrastable with that given to other Federal bodies which were specifically tasked with tackling maladministration. For instance, between the years 2005-2008, the Federal Ombudman's office received in total less complaints than the Cell received in roughly a year. The Federal Ombudman it should be noted has been tasked with addressing issues of maladministration since

Importantly, as the next section discusses, the SCP was fairly successful in repelling attacks against it post-2009. And this would have surely impacted its confidence to battle the executive without fear of sanction.

(ii) *Battling the executive: the SCP's defense*

Judges giving decisions which are persistently being disobeyed by the Government is indicative of judges who are not attentive to the preferences of the Government. In other words, there is, or will be, a clear conflict of interests between the executive and the judiciary. This conflict can be imagined to be particularly heightened in the case of Pakistan where a considerable number of suo motu cases in my sample highlighted issues of executive incompetence and corruption. Pakistan's history, as noted earlier, has also not traditionally welcomed judicial independence.

I have already discussed how President Musharraf unconstitutionally removed Chaudhry and his loyal cohort of judges, following the latter's challenge to Musharraf's government.⁹⁵

1983, way before the creation of the Cell. Statistics relevant to the Human Rights Cell and the Federal Ombudsman can be respectively accessed at the following websites:

http://www.supremecourt.gov.pk/Annual_Rpt/Human%20Rights%20Cell.pdf

<http://www.mohtasib.gov.pk/wafaqimoh/userfiles1/file/publications/Annual-Reports-2008.pdf>

⁹⁵ It is not clear what precisely triggered or influenced Chaudhry's challenge to Musharraf's Government in the first place. After all, until his appointment as Chief Justice, Chaudhry too was a regime loyalist who had sanctified various unconstitutional measures taken by Musharraf (including his coup). Perhaps Chaudhry always had political ambitions and the powers afforded to him as Chief Justice allowed him to realize this ambition. There is certainly some evidence for this view. For instance, following his retirement and the two-year political activity ban envisaged in the Constitution, Chaudhry launched a new political party in Pakistan – the Pakistan Justice Democratic Party. However, for obvious reasons, it cannot be confirmed whether Chaudhry always had this ambition. Conversely, supporters of Chaudhry would argue that he simply wanted to improve social governance in Pakistan. His public speeches certainly support this position, but here again it is very difficult to confirm whether he really meant what he saying publicly.

Musharraf’s move was, however, ultimately defeated. Following a powerful public movement and a timely intervention by the then Chief of Army Staff, all the deposed judges, including Chaudhry were restored to office.⁹⁶

Chaudhry’s restoration to office was unprecedented in the history of Pakistan and clearly enthused him to do more to build a direct relationship with the public and, more particularly, with the various institutional actors that had supported him.⁹⁷ Accordingly, he aggressively started challenging the Government on issues which represented these varied interests. Consider, for instance, the data in Table 6 below. In 2008, the Court led by Chief Justice Dogar who had been handpicked by Musharraf, only initiated two suo motu actions. The very next year, when Chaudhry was restored to office, the Court initiated 26 such cases.

Table 6 – Year-wise breakdown of suo motu actions taken by the SCP

2002	3
2003	4
2004	4
2005	17
2006	16
2007	26
2008	2
2009	26
2010	26
2011	20
2012	22
2013	15
2014	8
2015	12

Source: SCP Records

Note:

⁹⁶ See Jane Perlex, *Pakistan Avoids Pitfall, but Path Ahead Unclear*, The New York Times (Mar 16, 2009), available at: <https://www.nytimes.com/2009/03/17/world/asia/17pstan.html>

⁹⁷ This critically included the military. See chapter III of this dissertation for more details in this reference.

a. Figures from the years 2012-13 include a number of suo motu actions which were inaccurately tagged in the court records as constitution petitions

The Government was not happy, especially since Chaudhry gutted a key legislative measure which provided protection to various members of the ruling party from prior criminal charges, including corruption references.⁹⁸ Be that as it may, the ability of the Government to take action against Chaudhry and/or contain the Court was limited in part by the Constitution itself. After all, the process for appointing and removing judges of the superior courts was effectively controlled by judges not politicians.⁹⁹

In this backdrop, the Parliament unanimously passed the 18th Constitutional Amendment which *inter alia* sought to change the way judges of the superior courts were appointed.¹⁰⁰ Whereas previously the Chief Justice was effectively the sole decision maker in the appointment process, through the Amendment the judicial appointment process was broken down into two tiers.¹⁰¹ Nominations would first be processed by a ‘Judicial Commission’ comprising the Chief Justice, some senior judges, the law minister and representatives of the Bar Council.

⁹⁸ See *Pakistan's Supreme Court invalidates politicians' amnesty*, CNN (Dec 16, 2009) available at:

<http://www.cnn.com/2009/WORLD/asiapcf/12/16/pakistan.supreme.court.amnesty/index.html>

⁹⁹ It should be noted that this was not always the case. The Constitution formally provided the President the authority to appoint judges of the Supreme Court. This authority was to be exercised in “*consultation*” with the Chief Justice of the Supreme Court. However, the President effectively had the last say. This changed in the 1990s. In *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324), the Supreme Court interpreted the relevant constitutional provision in a manner to essentially hold that the advice of the Chief Justice was binding on the President, unless very strong reasons were given by the President (which could also be challenged and overturned in Court).

¹⁰⁰ See *Analysis: Five Years Of The 18th Constitutional Amendment: Federalist Imperatives On Public Policy And Planning*, UNDP Pakistan Report, available at: http://www.pk.undp.org/content/pakistan/en/home/library/hiv_aids/development-advocate-pakistan--volume-2--issue-1/analysis--five-years-of-the-18th-constitutional-amendment--feder.html

¹⁰¹ See Hussain Zaidi, *New method of judges' appointment*, Dawn News (Jan 01, 2011) available at: <https://www.dawn.com/news/595422>

Recommendations of the Judicial Commission would then need to pass muster before a ‘Parliamentary Committee’ comprising members of Government and the opposition.¹⁰²

The SCP confidently responded to this attack when the Amendment was challenged before the SCP. The Court recommended that the Parliament make certain changes to the Amendment or risk the Amendment being struck down for violating the ‘independence of judiciary’, which was considered to be part of the basic structure of the Constitution.¹⁰³ Critically the SCP sought to remove the veto power of the Parliamentary Committee. The Parliament passed another Constitutional Amendment accepting some of the recommendations of the SCP, but rejecting others.¹⁰⁴ The SCP, however, in clear defiance to the Parliament simply got what it wanted by interpreting the 19th Amendment in a manner which served its interests.¹⁰⁵ Judges, and especially the Chief Justice, still retain primacy in the judicial appointment mechanism.¹⁰⁶

Within a matter of months after 18th and 19th amendment saga, the SCP and the Government were set for another conflict. The Court was pressuring the Government to pursue corruption references against the President, among others. Towards this end, the Court had already disqualified Prime Minister Yousaf Raza Gilani from office, after first convicting him for

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ See Ijaz, *supra* note 52 (The SCP effectively took away the Parliamentary Committee’s power to veto recommendations of the Judicial Commission. It stated that only the Judicial Commission had the power to review the competency of a person to become a judge and that if the Parliamentary Committee disagreed with the Commission’s recommendations, it should provide its reasons in writing. Additionally, the Parliamentary Committee’s decision could be challenged and overturned by the superior courts.)

¹⁰⁶ Since the adoption of the 19th Amendment, the Judicial Commission has formulated its own rules of conduct (the Judicial Commission of Pakistan Rules 2010). Critically, these Rules vest the power to initiate nominations before the Judicial Commission in the Chief Justice of Pakistan alone.

contempt of court for failing to obey its orders.¹⁰⁷ The SCP had threatened a similar consequence for the then incumbent Prime Minister Raja Pervaiz Ashraf.¹⁰⁸ The Government decided that this was the right time to amend the law relating to the contempt of court.

On July 12th, 2012, the Contempt of Court Act, 2012 (“Contempt Act”) was passed. The Contempt Act introduced a number of changes to the law relating to contempt of court. Critically, it (i) introduced a number of defenses which could be raised by any public official facing a contempt charge; and (ii) provided a right of appeal against any conviction and a mandatory suspension of the sentence.¹⁰⁹ The Contempt Act was challenged before the SCP, which quickly (less than a month later) moved to strike it down for being unconstitutional.¹¹⁰ Among other things, the Court was of the opinion that the Contempt Act unduly interfered with the Court’s plenary powers of dealing with contempt; it, therefore, was an infringement of the cardinal principle of independence of the judiciary.¹¹¹

Later in the year, the Government tried to exert financial pressure on the SCP by summoning its Registrar – its key executive officer – before the Public Accounts Committee (“PAC”) of the Parliament. The Registrar, with the full backing of the SCP, blatantly refused to

¹⁰⁷ See Jon Boone, *Pakistan's prime minister Yousuf Raza Gilani disqualified by supreme court*, The Guardian (June 19, 2012), available at: <https://www.theguardian.com/world/2012/jun/19/pakistan-prime-minister-yousuf-gilani-disqualified>

¹⁰⁸ See Declan Walsh and Salman Masood, *New Pakistani Premier Faces Contempt Notice on Corruption Inquiry*, The New York Times (August 08, 2012), available at: <http://www.nytimes.com/2012/08/09/world/asia/raja-pervez-ashraf-faces-contempt-charges-in-pakistan.html>

¹⁰⁹ See *SC declares Contempt of Court Act 2012 illegal*, The News Online (Aug 04, 2012) available at: <https://www.thenews.com.pk/archive/print/624228-sc-declares-contempt-of-court-act-2012-illegal>

¹¹⁰ See *Baz Muhammad Kakar & another v. Federation of Pakistan* (Const. Petition 79 of 2012)

¹¹¹ *Ibid.*

appear. The SCP held that the PAC does not have the authority to scrutinize the administrative expenditure of the Court and that doing so would be against the independence of the judiciary.¹¹²

In recent times, the Government has contemplated other court curbing measures including several proposals to curtail the Court’s suo motu powers.¹¹³ The SCP, however, has largely remained unscathed.¹¹⁴ And this is despite the fact that there appears to be no significant change in the SCP’s strategy. As Table 7 makes clear, even in my sample, the number of orders passed by the SCP and the number of times disobedience was noted, increased drastically after 2009 (though not always consistently). Last year, Chief Justice Saqib Nisar is reported as having initiated thirty-four suo motu actions, even surpassing Chaudhry’s record.¹¹⁵ Like before, many of these cases raise issues of executive incompetence, abuse of power and corruption. And like before, it is expected that the Court will face extensive resistance from the Government in so far as managing compliance is concerned. The SCP, therefore, still appears to be aggressively challenging the Government in areas of social governance without regard to potential disobedience.

Table 7 – Year Wise Breakdown of Number of Orders Passed in Sample

Year	Number of Orders	Disobedience Noted
2002	7	0
2003	6	0
2004	11	0
2005	21	1

¹¹² See *SC suspends PAC notice summoning registrar*, Dawn.com (Jan 01, 2013) available at: <https://www.dawn.com/news/775490/sc-suspends-pac-notice-summoning-registrar>

¹¹³ For instance, various law makers have sought to introduce an amendment whereby aggrieved parties are provided a right to appeal suo motu decisions of the SCP. See Malik Asad, *Amendment seeking appeal on suo motu lands in NA*, Dawn.com (Mar 23, 2017) available at: <https://www.dawn.com/news/1322280>

¹¹⁴ There are admittedly various reasons why this is so including a fragmented political elite and the civil-military imbalance in Pakistan, as discussed in detail in chapter III of this dissertation.

¹¹⁵ See Masood Rehman, *CJP took 34 suo motu notices in 2017*, Daily Times (Dec 25, 2017), available at: <https://dailytimes.com.pk/166739/cjp-took-34-suo-motu-notices-2017/>

Table 7 Cont.		
2006	25	0
2007	17	4
2008	7	0
2009	60	2
2010	105	14
2011	132	5
2012	264	48
2013	338	62
2014	148	18
2015	332	58
2016ⁱ	71	17

Note:

a. The orders passed in 2016 are lower in number since the sample does not include any suo motu cases which were initiated in this year. Additionally, some of the older suo motu cases would have been dismissed/disposed by 2016.

CONCLUSION

The SCP's story is telling from multiple perspectives. It is by far the clearest demonstration of judges not being deterred by potential disobedience; in fact, it shows how judges can effectively incorporate and address disobedience as part of their wider strategy. By remaining undeterred, judges of the SCP have been able to obtain a remarkable payoff: (i) they secured an expansive role in managing the State; (ii) they ensured compliance in a number of cases where disobedience was expected as well as cases where disobedience was encountered initially; (iii) they built a positive and supportive relationship with the public at large (and certainly significant groups within it); (iv) they began to be seen as national heroes who could successfully solve the governance crisis in the country; and (v) they established favorable precedent for further action in line with their preferences.

Importantly, public opinion data from Pakistan negates any impression that disobedience of court orders automatically damages the legitimacy of a court or creates an environment for further disobedience. Given the context of a dysfunctional Government, by focusing on social

governance and maladministration issues, the SCP effectively preempted any damage which disobedience could have caused to its legitimacy. Indeed, during the period under study the Court was considered to be one of the most legitimate public institutions in Pakistan – second perhaps only to the military.

These are important findings which go against current thought in the field of judicial behavior. Whether these findings are extendable to other jurisdictions is a question which remains unanswered. There are certainly various features of the SCP, and the Pakistani political context, which make this case study unique; for instance, the SCP's suo motu powers and its ability to ward off court curbing attacks are quite rare indeed.¹¹⁶ Similarly, the Lawyers' Movement in Pakistan and the restoration of judges were exceptional events, even by Pakistani standards. However, there is still reason to believe that (at the very least) part of the SCP's strategy can be mimicked, especially in countries which suffer from governance issues.

Judges in these jurisdictions can aim to create further space for themselves by focusing on social justice and governance issues.¹¹⁷ While they may (much like the Pakistani Supreme

¹¹⁶ For instance, the SCP's jurisprudence relating to the 'basic structure' doctrine allows it to question any constitutional amendment, especially one which challenges the independence of the judiciary. Surely, this doctrine gave the SCP significant leeway to respond to legislative attempts at curbing its autonomy, including by way of changing the appointment and removal mechanism of judges. Similarly, the role of the Pakistani army as an independent actor also limited the ability of the Government to take action against the SCP, which has also cultivated a supportive relationship with the military. See chapter III of this dissertation for a detailed discussion on this issue.

¹¹⁷ Judges of the Pakistani Supreme Court are certainly not unique in so far as their quest for power is concerned. Widner, for instance, has extensively studied judicial institutional building in Tanzania. She finds that the former Chief Justice Nyalali (much like Chief Justice Chaudhry) strategically increased space of the Tanzanian judiciary by focusing on developing supportive public opinion and creating a constituency for judicial review. See generally: Jennifer A. Widner, *Building The Rule Of Law: Francis Nyalali And The Road To Judicial Independence In Africa*. New York: W.W. Norton & Company, Inc. (2001)

Court judges) encounter disobedience, they will also in the process establish favorable precedent (for further expansion) and build supportive public constituencies for their activism and independence. In certain cases, these judges may even overcome disobedience and secure compliance. In any event, their legitimacy and reputation will not be at risk so long as the orders they pass remain popular with the public (even if these orders are being disobeyed by the Government). The only meaningful threat to the sustainability of this strategy is reproach by the executive. If a court curbing attempt succeeds in removing the relevant judges or altering the court's jurisdiction, then this strategy could backfire (for worse). However, the extent to which the executive can successfully take court curbing actions is partly dependent on the relevant constitutional and political context, and partly on the legitimacy of the court itself. If the court's activism succeeds in creating greater public support for it, then the chances of these attacks might actually fall.¹¹⁸

Preliminary evidence from India certainly appears to provide some evidence regarding the broader applicability and success of this strategy. The Supreme Court of India has previously been noted to be extremely interventionist and has successfully managed to create space for itself in an environment of a dysfunctional government.¹¹⁹ The Indian Supreme Court also appears to be somewhat unsuccessful in meeting compliance, yet remains exceedingly popular.¹²⁰ It has also been fairly successful in repelling attacks against it; for instance, recently it defeated an attempt to change the judicial appointment mechanism.¹²¹ Scholars may, therefore, consider

¹¹⁸ See Clark, *supra* note 37

¹¹⁹ See Robinson *supra* note 50

¹²⁰ *Ibid.*

¹²¹ See Pradeep Thakur, *Govt offers compromise on judicial appointments MoP*, The Times of India (Jan 17, 2018), available at: <https://timesofindia.indiatimes.com/india/govt-offers-compromise-on-judicial-appointments-mop/articleshow/62531917.cms>

studying this jurisdiction as a starting point to verify whether my findings have broader appeal. I would certainly expect to see results which are consistent with the conclusions of this study.

CHAPTER II: CAPTURING THE CIVIL SERVICE

The previous chapter considered the resilience of the Pakistani Supreme Court in the face of disobedience. But in noting that the Supreme Court was not deterred by disobedience, I certainly do not mean to suggest that it was not interested in ensuring compliance. Indeed, the Court took a number of actions to counter disobedience, which this chapter will discuss.

INTRODUCTION

Recently, the Supreme Court of Pakistan (“Court”) was petitioned to investigate various allegations of corruption and money laundering against Nawaz Sharif who had been elected as the Prime Minister of Pakistan for the third time.¹ The Court noting the indifference (and perhaps complicity) of the National Accountability Bureau (“NAB”) – the country’s main anti-corruption agency – moved to constitute its own joint investigation team (“JIT”) to investigate the matter.² The composition and membership of the JIT was determined with the Court’s approval and the JIT was tasked to report directly to the Court, irrespective of any agency affiliation that individual members of the team had.³ The Court consistently monitored the activities of the JIT and addressed any difficulties it faced from time to time. After the JIT delivered its final report, the Court moved to declare that Sharif was ineligible to be a Member of Parliament, as he was considered “dishonest”; he would accordingly also cease to serve as the Prime Minister of Pakistan.⁴ Moreover, the Court ordered the NAB to file criminal charges against Sharif, among

¹ See Naveed Siddiqui, *Supreme Court issues notice to Nawaz, others in Panamagate petitions*, Dawn News (Oct 20, 2016), available at: <https://www.dawn.com/news/1291132>

² See *A timeline of the Panamagate JIT's 60-day investigation*, Dawn News (Jul 10, 2017), available at: <https://www.dawn.com/news/1344426>

³ Ibid.

⁴ See Hasnaat Malik, *Panamagate saga ends: Prime Minister sent packing*, The Express Tribune (Jul 28, 2017), available at: <https://tribune.com.pk/story/1468452/supreme-court-set-panamagate-verdict/>

others. And since the NAB could not be trusted to do its job, the Court directed that a judge nominated by it would supervise the operations of the NAB in relation to the proceedings. The Court also ordered that the tenure of service of each JIT member should be safeguarded and that “no adverse action of any nature including transfer and posting shall be taken against them without informing the monitoring Judge of this Court nominated by the Hon’ble Chief Justice of Pakistan.”⁵

The Court’s opinion has been the subject of much discussion. Some consider it as clear evidence of an independent judiciary in Pakistan that is willing to pursue accountability at the highest levels of Government. Many others, including Sharif and his supporters, consider it to be simply another attempt at undermining democracy and the separation of powers.⁶ I, for one, find the Court’s opinion to be interesting principally because it defies, or at least challenges, dominant conceptions of judicial authority. After all, at its core, is it not thought provoking to note that the Court successfully managed to investigate (and later dismiss) a Prime Minister who was not only popularly elected, but also commanded (either directly or indirectly) the various civil servants on whom the Court relied upon to achieve its objectives?

Traditionally, the judiciary has been considered to be the “least dangerous branch” of the State, since it has no direct control over the “sword or the purse.”⁷ Practically speaking what this

⁵ Ibid.

⁶ For instance, Sharif’s review petition before the Court noted that “*the request made by the five-judge bench to the Chief Justice of Pakistan for nominating a Supreme Court judge to supervise and monitor the implementation of the final judgment and “oversee the proceedings conducted by NAB and the Accountability Court” is tantamount to arrogating to the apex court the role of complainant, investigator, prosecutor, judge, jury, and court of ultimate appeal all at once.*” See Hasnaat Malik, *Deposed PM challenges disqualification in SC*, The Express Tribune (Aug 15, 2017), available at: <https://tribune.com.pk/story/1482073/nawaz-challenges-disqualification-verdict-top-court/>

⁷ See *The Federalist Papers*, No. 78.

really implies is that the judiciary, unlike other branches of State, is not designed (in theory at least) to exercise control over the deployment and supervision of civil servants – the people who are really responsible for the implementation of any directive, whether it involves the expenditure of financial resources or the use of the State’s policing powers.⁸ The legislature is thought to possess this authority since it can, among other things, fund and defund executive agencies (and as a consequence it members).⁹ Within the executive, heads of departments or divisions have this authority since they are empowered to appoint, promote, remove and otherwise oversee their subordinates. Civil servants, therefore, are typically not expected to implement judicial directives which run counter to the incumbent government’s preferences.¹⁰ Like any rational actor, they are likely to approach their decision making by weighing the relevant costs and benefits of following a judicial order, which in turn are largely negotiated by the incumbent government.

The model described above, well-entrenched as it may be, assumes that the judiciary cannot play any role in modifying or informing the cost-benefit analysis for civil servants.¹¹ The

⁸ Recognizing this power of civil servants, many have actually referred to them as the “Deep State” which can move to even undermine the interests and directions of elected representatives. See George Friedman, *The Deep State Is A Very Real Thing*, Huffington Post (Mar 16, 2017), available at: https://www.huffingtonpost.com/entry/the-deep-state_us_58c94a64e4b01d0d473bcfa3

⁹ In addition, the legislature may also exercise various “soft powers” in relation to administrative agencies, such as holding oversight hearings. See Brian D. Feinstein, *Congress in the Administrative State*, Coase-Sandor Working Paper Series in Law and Economics 838 (2017), available at: https://chicagounbound.uchicago.edu/law_and_economics/838

¹⁰ This is not to say that civil servants will always disobey judicial orders based on the incumbent government’s preferences. Indeed, they may have reasons of their own to obey the judicial order. For instance, they may believe in the order’s underlying policy and/or that the order will bring them some benefit.

¹¹ It should be noted that when I use the term “civil servants”, I am primarily referring to the officer cadre in any bureaucracy which is principally responsible for the implementation of all major policy decisions. This expressly excludes any personnel of the armed forces.

contempt powers of the judiciary too are ultimately dependent on executive enforcement and so assumed to be practically meaningless. Prisons and the police are after all staffed by law enforcement officials (commanded by the executive) and not judges. Be that as it may, why can we not imagine a judiciary creatively tinkering with the ability of the executive and the legislature to impose costs and benefits on civil servants or for that matter developing new means to impose these costs itself? If anything, the means through which the Pakistani Supreme Court removed the Prime Minister should offer us some evidence of what a court can accomplish in this reference.

If we look at the series of directions passed by the Supreme Court in Sharif's case, one of the first critical moves it made was constituting an investigation team, the membership of which was approved by it. Courts all over the world involved in what is described as "public law" or "institutional reform" litigation, have for long exercised the power to appoint commissions, administrators and masters, who are tasked with monitoring compliance.¹² In exercising this power, courts recognize both: (i) the tendency of civil servants to misrepresent and evade compliance; and (ii) the limited ability of judges to effectively reach outside the courtroom to collect evidence which can be trusted and relied upon. But if courts can reach out to third parties and experts to increase their manpower and resources, why can't we imagine them siphoning off civil servants who can be trusted to do the job? Government agencies, and their members, don't have uniform preferences.¹³ Some may actually support the agenda being pursued by a court and

¹² For an overview of the defining characteristics and use of "public law litigation" see, generally: Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harvard Law Review 1281 (1976), pp. 1281-1316

¹³ That civil servants may have different preferences from their superiors in the executive or members of the legislature is clear from the various instances where lawsuits have been brought by a civil servant to "*declare unlawful a statute, regulation, or command that he or she is charged with enforcing.*" Essentially, if civil servants can turn to the courts to legitimize their

in turn be willing to being used by it. Directly deploying and supervising civil servants to do their bidding may also make compliance simpler for judges. After all, bureaucrats can more easily use executive resources and personnel (some of whom they may oversee directly) to implement the court's directives.

For civil servants who may be identified by a court for engendering compliance, the costs of doing so against the government's preferences may be dire. While it is typically less likely that the legislature will defund a government agency that follows specific judicial directives, sanctions (or withholding of benefits in the forms of promotions, etc.) for individual civil servants may be expected, given that most heads of government agencies/departments are appointed by the government and would typically toe the government's policy line. However, this is not to say that the judiciary is incapable of protecting or shielding civil servants from sanctions that may arise as a result of facilitating compliance. The traditional negative injunction order is relatively easy to monitor and enforce. For this reason perhaps it is often also believed that courts will be more successful at telling the government what not to do or blocking "significant social reform", compared to taking a positive action and effecting social change.¹⁴ If so, the judiciary should theoretically be able to bar or overturn any attempt by the government to punish civil servants for following judicial directives. Indeed, this was the strategy adopted by

right to disobey clear directives, they can obey court orders on their own terms for similar reasons. See Alex Hemmer, *Civil Servants Suits*, 124 Yale Law Journal 3 (2014), 576-881; See also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994), at 68 (Easterbrook famously notes that "*intent is elusive for a natural person, fictive for a collective body.*")

¹⁴ See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*. Chicago: The University of Chicago Press (2008), pp. 5

the Court in relation to members of the JIT: the Court barred the Government from taking any adverse actions against its members, without first conferring with the Court.

Courts it should also be noted have the capacity to impose costs on civil servants. I mentioned earlier how prison time for contempt of court may be difficult to enforce.¹⁵ However, the threat of contempt even without actual sanctions can still be extremely forceful. Parrillo, for instance, finds that while the most typical outcome in contempt proceedings in the U.S. is a finding of contempt without fine or imprisonment (a “reprimand” with “no sanction”), this finding is not powerless:

“Our research found many examples of agencies shifting toward compliance on being faced with a mere contempt motion. Agency officials and their lawyers may sometimes be willing to push the envelope on compliance, but the prospect of a contempt finding can make them back off. In the social and media world that agency officials inhabit, being held in contempt can have shaming and reputation-harming effects. Attorneys and officials make decisions on the premise that such shame is a real force. The Justice Department, which is famously self-controlled in its decisions to appeal, has shown itself willing to do so in the case of sanction less contempt findings, when officials’ reputation is the only thing at stake.”¹⁶

¹⁵ While it is difficult to conceive the enforcement of prison time against civil servants who are following government policy, there may be cause to think that enforcement is not entirely impossible. Prisons are not staffed by judges, but they aren’t staffed by politicians either. Some police officials may have different preferences than the incumbent government. The court it should be noted only requires the support of a few officers to enforce its directives, not the entire police force. The involvement of multiple actors with varying preferences, would accordingly make it difficult for any civil servant to conclusively determine that a prison sentence against him or her would not be enforced. Such a determination also requires the civil servant to have complete faith that the government will support him or her in the event a prison sentence is awarded; such faith, however, can be hard to conjure in a world where political positions are extremely fickle. Therefore, while a prison sentence for contempt of court may be hard to enforce (and is indeed rarely awarded), the threat of incarceration is very much real.

¹⁶ See Nicholas Parrillo, *Holding the Federal Government in Contempt of Court: What Powers Do Judges Have Over an Administration?*, (Mar 02, 2017) available at: <https://www.justsecurity.org/38268/holding-federal-government-contempt-court-powers-judges-administration/>

A conviction for contempt of court (even without imprisonment) may also become a bar for future employment in the public sector as well as participation in politics. In Pakistan, for

Moreover, even if a court does not actually indict a civil servant for contempt, the court can sully his or her reputation by highlighting partisan behavior and/or incompetence.¹⁷ Such statements from the highest court in the land are likely to be reported in the media and can pressurize a person to comply with the court's directives.

The measures noted above may also extend beyond individual cases. In fact, as I demonstrate in this chapter, courts can also make a concerted attempt to systemically change the costs and benefit structure for civil servants, especially as it relates to the compliance of judicial directives. Principally, courts can move to counter political influence and control in the process whereby civil servants are appointed, promoted, and removed from office. And if civil servants, like most other rational actors, value option creation and discretion, then they can be expected to support any effort by the judiciary in this reference; at the very least, in a multi-party democratic system we would expect support from civil servants who have been neglected or purposefully sidelined by the incumbent government on political grounds.

While I argue that courts can be successful in capturing, so to speak, the executive, this does not mean that the court's efforts will be without resistance. Indeed, as the judiciary attempts to control the civil service, the executive and the legislature may step in to control the judiciary. Court curbing actions often do follow bouts of judicial activism. One may, therefore, argue that by exercising control of the bureaucracy, courts may ultimately weaken their position against any such attack. After all, public opinion – the ultimate line of defense for the judiciary – may not

instance, courts have long held that a conviction of contempt of court effectively disqualifies a person from becoming a Member of the Parliament.

¹⁷ Reputation is an important consideration for any rational actor, including judges. See, generally: Nuno Garoupa and Tom Ginsburg, *Judicial Reputation*, Chicago and London: The University of Chicago Press (2015)

support a court which is exercising “unconstitutional” powers and breaching the delicate separation of powers. I, however, argue that this threat may be overemphasized and can be mitigated, particularly in countries suffering from maladministration and public distrust for the government.

Two factors are important to consider in this reference. First, the threat to public support for a court assumes both public knowledge of the court’s decisions and its constitutional role. Public awareness of judicial decisions is typically considered to be low,¹⁸ but even if this knowledge is presumed, why do we assume that the public can discern what exercise of powers by a court will be unconstitutional? This is more so because the majority of the public typically believes that the Supreme Court has the last say when it comes to constitutional interpretation.¹⁹ Second, even if we assume that the public (or some section thereof) may accept an action as judicial overreach or encroachment, we should not immediately assume that they will also condemn it. Political context is important, as always. Where representative institutions are non-functional and unpopular, the public may welcome positive change regardless of how it has been

¹⁸ Lack of awareness of specific judicial decisions appears to be a global issue. Pew Research Center, for instance, found low public awareness in the U.S. about some of the Supreme Court’s major rulings. In 2012, it conducted a survey to test public knowledge about court’s ruling on the Affordable Care Act. It noted that “*despite a lengthy buildup to the court’s ruling and high public interest in the case, just 55% knew that the court had upheld most provisions of the ACA; 15% said the court had rejected most parts of the law, while 30% said they didn’t know.*” See Meredith Dost, *Dim public awareness of Supreme Court as major rulings loom*, Pew Research Center (May 14, 2015) available at:

<http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom/>

¹⁹ In one U.S. study, for instance, respondents were asked the following: *Do you happen to know who has the last say when there is a conflict over the meaning of the Constitution – the U.S. Supreme Court, the U.S. Congress, or the President?* More than 50% of the respondents correctly answered that the Supreme Court has the last say. See James L. Gibson and Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 *Journal of Politics* 2 (2009), p. 433

achieved. Military coups, unconstitutional as they are, can also receive public support. Furthermore, most dictatorships actually rely upon the judiciary to add legitimacy to its actions: why should we not expect this ‘legitimizing’ role to apply to the court’s own ‘unconstitutional’ actions?

This chapter draws upon the recent experience of the Pakistani Supreme Court to make its argument. Pakistan is a country where political influence has historically been rife in all matters concerning civil servants. However, increasing levels of judicial intervention over the past decade or so, has arguably introduced the judiciary as a new master for civil servants. Admittedly, various conditions (somewhat particular to the Pakistani political context) have made this possible. The Pakistani Supreme Court is extremely well-respected and legitimate, especially when compared to the Government which is considered to be ineffective and corrupt.²⁰ This dynamic provides the Court both the space and legitimacy to expand its authority.²¹ Moreover, the Pakistani Supreme Court is also fairly political insulated – both the judicial appointment and removal processes are controlled by judges.²² As a result, Pakistani

²⁰ For instance, the law enforcing arm of the Government – the Police – has been consistently rated as the most corrupt authority in numerous surveys. A public opinion survey by Gallup Pakistan in 2013 found that 88% of the population viewed police officials as being involved in corruption related practices – the highest figure for any public organization. The figure declined to 82% in 2016, nevertheless 4 in 5 Pakistanis still believe that police officers are corrupt. See: *2013-2016: Majority urban Pakistanis view police as the most corrupt authority*, Gallup Pakistan (Aug 23, 2017) available at:

<http://gallup.com.pk/2013-2016-majority-urban-pakistanis-view-police-as-the-most-corrupt-authority-judges-and-magistrates-are-perceived-to-be-the-least-corrupt-world-justice-project-and-gallup-pakistan/>

²¹ The Government is also fractured and weak and has traditionally been subject to the will of unelected institutions like the military. Chapter III of this dissertation discusses this aspect in greater detail.

²² As per Article 209 of the Constitution, the power to remove judges of the superior courts is constitutionally entrusted to a Supreme Judicial Council (SJC) that is manned entirely by judges. The process for appointing judges of the superior courts was changed recently. However, the

judges can develop policy positions which are somewhat against the incumbent Government's interests. Indeed, after the famous Lawyers' Movement of Pakistan and the restoration of the judges who had been forcibly removed from office by General Musharraf, to some extent the Pakistani Supreme Court and specifically individual judges like Chief Justice Chaudhry, were called upon to be exceedingly active and independent.²³ Their individual as well as collective reputations depended on this;²⁴ they were, therefore, certainly incentivized to insulate and control the bureaucracy. Be that as it may, none of these conditions take away from what the Pakistani Supreme Court has come to accomplish; and it is indeed a valuable case study for anyone interested in testing the limits of judicial authority (specifically from an institutional perspective), even if it marks the periphery of otherwise observed judicial behavior.

The chapter proceeds as follows. Section I lays out the history of the Pakistani civil service; in particular, it attempts to map how each successive political regime in Pakistan has tried to subjugate the civil service. Section II traces the recent attempt of the Pakistani Supreme Court to both: (i) nullify political control over the bureaucracy; and (ii) exercise its own influence. This section explores in detail how the Court has attempted to eliminate political discretion (and in turn influence) in matters concerning the appointment, promotion, transfer and removal of civil servants. It is argued that by making these issues justiciable, the Court has

Supreme Court has interpreted the relevant Constitutional Amendments in a manner which still provides primacy to judges in the judicial appointment process. See *infra* note 308

²³ From the various speeches delivered by leaders of movement for the restoration of judges, including many public speeches by Chaudhry himself, it was clear that the restored judiciary would be expected to do more than just be a legitimizing force for incumbent executive policies and military interventions. See *The Pakistani Lawyers' Movement and the Popular Currency For Power*, 123 Harv. L. Rev. 1705 (2010), pp 1715-1725

²⁴ See, generally: Nuno Garoupa and Tom Ginsburg, *Judicial Reputation*, Chicago and London: The University of Chicago Press (2015) (discussing *inter alia* how reputation – especially among specific audiences – is a major consideration for judges)

opened its door to disgruntled civil servants who would arguably see the judiciary as an ally and would also become a source for compliance. Equally, the Court has aggressively attempted to take control of the executive by summoning senior civil servants and showering them with praise or humiliation, depending on their behavior. The Court has also sought to directly shield civil servants from political retaliation for compliance with its directives. Section III attempts to address the key question: *was the Court successful in meeting its objectives*. My hypothesis is that it was, at least partly. To test my hypothesis, I examine three case studies dealing with high level political corruption where the Government was visibly at odds with the Court. In all three cases, despite initial and blatant disobedience, the Court was successful in achieving compliance using some of the very tools which have been discussed in Section II. Section IV considers evidence of public support for the Court's activism. It notes that not only has the Court enjoyed widespread legitimacy, there appears to be specific public support for increasing judicial control of the civil service; especially, where the Court is perceived to be encountering disobedience. The data may help explain, albeit partly, why the Court was successful in achieving in some of its objectives. Lastly, Section V sums up the arguments presented in this chapter and offers preliminary evidence from India, which appears to have also witnessed an attempt by the Supreme Court to capture and/or liberate the civil service. The experience of the Pakistani Supreme Court may, therefore, not be unique and may perhaps be used as a model for addressing patronage and nepotism which pervade most bureaucracies today.

Let me also take this opportunity to expressly state what this chapter will not aim to discuss (and what some may find to be its key shortcoming). As mentioned in the introduction to this dissertation, I do not comment on (in any detail at least) the broader normative question of whether the Pakistani Supreme Court *should* have attempted to take control of the executive,

especially in the manner that it proceeded. Some may argue that the Court's efforts may have undermined the return of democracy in Pakistan, and were clearly anti-majoritarian as well as unconstitutional. For instance, as Section I will explore, political control of the bureaucracy seems to have been pushed both by democratically elected leaders as well as military dictators. Undermining the independence of the civil servants, therefore, appears to have been a conscious choice on part of the political leadership; a choice which was exercised partly in response to actions taken by the civil service to sideline politicians in Pakistan's early history. Additionally, one may argue that the judiciary's control of civil servants creates further risk of *bad* decisions being implemented. People in this camp will point to deficiencies of the judicial system and its limited capacity to make *good* decisions of social policy.²⁵ Indeed, critics may argue that in the pursuit of political accountability, the Court has struck investor confidence and has perhaps done more harm than good.²⁶ As enticing as these arguments may be, I will not discuss them here. For me, the primary questions are simply how, and to what extent, the Pakistan Supreme Court has been able to push its agenda using the civil service and, in turn, what the public reaction to this move has been. In this reference, at least, I expect readers to find that this chapter makes an important contribution.

²⁵ See, generally: Donald L. Horowitz, *The Courts and Social Policy*, Washington, D.C.: The Brookings Institution (1977)

²⁶ The Court often struck down and declared as void any commercial venture which was marred by corruption. Investors in these ventures were hit the hardest, as they had to bear the brunt of refunding all payments received as well as picking up the costs and losses associated with the illegal project. Some foreign investors have been successful in challenging their treatment by the Pakistani Government in international arbitration. In the Rental Power Plant (RPP) case, for instance, which is discussed in this chapter, the Turkish firm, Karkey Karadeniz, claims to have secured an \$800 million compensation award – well above the recoveries made by the Pakistani Government as a result of the Supreme Court's intervention. See Khaleeq Kiani, *Pakistan to pay dearly for 'expropriating' assets of Turkish firm Karkey*, Dawn News (Sep 22, 2007), available at: <https://www.dawn.com/news/1359163>

I. A HISTORY OF THE PAKISTANI CIVIL SERVICE: THE TOOLS OF POLITICAL CAPTURE

“The services are the backbone of the state. Governments are formed. Governments are defeated. Prime Ministers come and go, ministers come and go, but you stay on. Therefore, there is a very great responsibility placed on your shoulders. You should have no hand in supporting this political party or that political party, this political leader or that political leader. This is not your business... May be some of you may fall victim for not satisfying the whims of ministers. I hope it does not happen, but you may even be put to trouble not because you are doing anything wrong but because you are doing right.”²⁷

The passage above is drawn from a speech Muhammad Ali Jinnah gave to government servants, shortly after founding Pakistan on August 14, 1947. At the time some may have thought that Jinnah’s fears were unfounded; after all, at independence Pakistan inherited an extremely organized, well trained and powerful civil service.²⁸ The Civil Services of Pakistan (“CSP”) – successor to the Indian Civil Services (“ICS”) – had extensive experience with governance. ICS members were considered to be the “steel frame” which supported the British colonial enterprise in India.²⁹ The ICS was indeed created in the image of the ideal Weberian bureaucracy: a politically neutral, meritocratic, and independent organization that would implement colonial policies without fear or favor.³⁰ By some accounts, ICS officials never numbered over eleven hundred at any given time, yet they managed and controlled a hostile local population of over

²⁷ See *Bureaucrats recall words of Quaid Resistance snowballing in ranks of civil service*. The News (Jul 27, 2011) available at: <https://www.thenews.com.pk/archive/print/615453-bureaucrats-recall-words-of-quaid-resistance-snowballing-in-ranks-of-civil-service>

²⁸ See, generally: Charles H. Kennedy, *Bureaucracy in Pakistan*, Oxford: Oxford University Press (1988)

²⁹ Lloyd George, who served as Prime Minister of the United Kingdom during WWI, referred to the ICS as “*the steel frame on which the whole structure of our government and of our administration in India rests.*” See Ian Jack, *The Indian civil service still rests on a frame built by the British*, The Guardian (Oct 11, 2013), available at:

<https://www.theguardian.com/commentisfree/2013/oct/12/indian-civil-service-frame-british>

³⁰ See Maryam Tanwir, *Gender Neutrality and the Pakistani Bureaucracy*, 15 Journal of International Women's Studies 2 (2014), pp 143-144

three hundred million people.³¹ On the other hand, at the time of independence, politicians in Pakistan were severally unequipped to deal with the demands of the modern state. In the words of a retired civil servant, political leaders “*were mostly from rural areas and not trained or educated; [and they] grew dependent on [bureaucrats].*”³² The political dependence on civil servants was so extensive that career bureaucrats came to occupy some of the most seminal policy positions in the country including that of President, Governor General and Chief Justice of Pakistan.³³

The dominance of civil servants in Pakistani politics came at a heavy cost. Career civil servants who occupied leading positions in the Government, frequently sidelined democratically elected leaders. In 1954, for instance, Governor General Ghulam Muhammad – a career bureaucrat – ignored the mandate of the people and dismissed the first Constituent Assembly of Pakistan.³⁴ Similarly, President Iskander Mirza, another civil servant, invited the declaration of

³¹ See Aurangzeb Khan, *The Whole Roedad*, The Herald (Feb 24, 2015) available at: <https://www.dawn.com/news/1165632>

It is also worth noting that while there are numerous civil servants and technocrats, what distinguished the CSP (successor to the ICS in Pakistan) were the broad powers and authority which were conferred upon their officers. CSP officers could be posted anywhere in Pakistan and indeed all positions in the upper echelons of bureaucracy were reserved for them. At their core, CSP officers were generalists and could be tasked to perform policing, taxing, as well as judicial functions. As the International Crisis Group notes in its report on the civil service: “*every district was administered by a single ICS official who collected the revenue, allocated rights in land, relieved famines, improved agriculture, built public works, suppressed revolts, drafted laws, investigated crimes, judged lawsuits, inspected municipalities, schools, hospitals, cooperatives – the list is endless*” See *Reforming Pakistan’s Civil Service*, International Crisis Group Asia Report (Feb 16, 2010), at p.3, available at: https://www.ecoi.net/en/file/local/1018101/2107_1307533836_neu.pdf

³² Ibid.

³³ Chaudhry Muhammad Ali, a career civil servant, became Pakistan’s fourth prime minister. Alvin Robert Cornelius, also a commissioned ICS officer, served as the 4th Chief Justice of Pakistan.

³⁴ See Anas Malik, *Political Survival in Pakistan: Beyond Ideology*, London and New York: Routledge (2011), pp. 55

the first martial law by General Ayub Khan; a move which would later prove to be the first real dent in the power of the civil service.³⁵

As the Chief Martial Law Administrator, Khan quickly moved to consolidate his power and assume control over the civil services. He dismissed a number of bureaucrats and, with the force of the army behind him, effectively cautioned the remaining ones to toe the line.³⁶ Civil servants by and large complied; in the interests of retaining their power, they willingly became junior partners to the military regime.³⁷ Some civil servants even openly admitted later that they helped Khan rig the 1965 presidential election.³⁸

In 1968, public protests and infirmity drove Khan to resign, whereupon he handed the charge to General Yahya Khan.³⁹ General Yahya Khan also realized the importance of the civil service and the crucial role they played in operationalizing Ayub Khan's rule. So, as a first step, he too dismissed a large number of civil servants.⁴⁰ Given the steaming public resentment against the civil services and their role in Ayub Khan's regime, Yahya Khan also constituted a Services Re-organization Committee to address grievances against the bureaucracy.⁴¹ Yet no major changes were made and none were required from the military's perspective; after all, the authority of the military government appeared to be firmly in place.

³⁵ *Ibid.*, at 57

³⁶ See Tasneem Noorani, *A little respect*, Dawn News (Jul 11, 2014), available at: <https://www.dawn.com/news/1118370>

³⁷ Crisis Group, for instance, notes that civil servants played a major role in prohibiting opposition politicians from entering politics. See Crisis Group Report, *supra* note 31, at p.4

³⁸ See Aurangzeb Khan, *supra* note 31

³⁹ See Asad Hashim, *Pakistan: a political timeline*, Al-Jazeera (April 30, 2013), available at: <http://www.aljazeera.com/indepth/interactive/2012/01/20121181235768904.html>

⁴⁰ See Crisis Group Report, *supra* note 31, at p.4

⁴¹ *Ibid.*

In 1970, elections were held and the Awami League obtained a Parliamentary majority. Unwilling to cede power to the Bengali centric party, the military launched an operation in East Pakistan.⁴² In the months which followed, a full-fledged civil war erupted in Pakistan. Finally, with the intervention of India and a successful local independence movement, the Pakistan army was defeated and the sovereign State of Bangladesh was created. Yahya Khan was humiliated and forced to resign.

The creation of Bangladesh further weakened the civil service, as it led to the departure of over 89 senior officers who choose to join the new Bangladeshi bureaucracy.⁴³ However, this loss was miniscule compared to the extensive purge (removal of roughly 1300 officers) and administrative reforms implemented by the new civilian President, Zulfikar Ali Bhutto.⁴⁴

Bhutto came to power in 1971 with an overwhelming public mandate. His Government is responsible, and indeed credited, for the unanimous passage of the Constitution of Pakistan, 1973 (“Constitution”) which remains in place till date (though certainly a number of amendments have been made to it). In designing the new Constitution, reforming the civil services was a clear priority for Bhutto. He was cognizant of the role the civil services had played in undermining democracy and, therefore, sought to assume complete control of the bureaucracy, rather than merely taking them on as junior partners (as the military had done before).⁴⁵ The governing framework which Bhutto instilled for the civil service is largely still in place, so it is worth discussing in greater detail.

⁴² Ibid. at p.5

⁴³ See Saeed Shafqat, *Pakistani bureaucracy: crisis of governance and prospects of reform*, 38 Pakistan Development Review 4 (1999), p. 1005

⁴⁴ Ibid. at 1003

⁴⁵ Ibid. at 1006

Bhutto assumed control of the civil services through a number of measures. Firstly, and most importantly, he removed the constitutional guarantee of tenure that had been present in all previous constitutions of the country.⁴⁶ The new Constitution provided the respective Federal and Provincial legislatures the authority to determine the terms and conditions of service for civil servants.⁴⁷ The legislature could, therefore, if it deemed fit include provisions which allowed politicians to remove civil servants at will. While the laws which the relevant legislatures eventually adopted did not go so far as allowing termination of service without cause, they did broadly define the reasons for which a civil servant's service could be terminated. For instance, the service of civil servants could be terminated for being "inefficient" or "ceasing to be efficient."⁴⁸ Critically, civil servants could no longer approach the superior courts of the country, if they were aggrieved by any order relating to the terms and conditions of their service.

Pursuant to Article 212 of the new Constitution, the Parliament was authorized to create administrative tribunals which had exclusive jurisdiction for dealing with any disciplinary cases, among other matters, relating to civil servants. The said administrative tribunals (or 'Service Tribunals' as they are formally called) were established under The Service Tribunals Act, 1973

⁴⁶ All Constitutions prior to the one passed in 1973 contained express provisions whereby civil servants could not be removed from office unless they were given "a reasonable opportunity of showing cause" against the proposed action. For an overview of the relevant constitutional provisions see: Firozuddin Ahmed Faridi, *Constitutional protection to public servants*, The Business Recorder (Aug 10, 2011), available at: <https://fp.brecorder.com/2011/08/201108101221242/>

⁴⁷ See Article 240 of the 1973 Constitution. Following this delegation of authority to the Federal and Provincial legislatures, a vast number of laws, rules, regulations and procedures were framed to govern almost every aspect of the civil service. Some of the more important laws include: (i) The Civil Establishment Code ("ESTACODE"); the Civil Servants Act of 1973 ("Civil Servants Act"); Civil Servants (Appointment, Promotion and Transfer) Rules, 1973; Government Servants (Conduct) Rules, 1964; Government Servants (Efficiency and Discipline) Rules, 1973 ("CS Discipline Rules"); and the Civil Servants (Appeal) Rules, 1977.

⁴⁸ See Rule 3 of the CS Discipline Rules.

(“Service Tribunal Act”). Critically, Members (or plainly judges) of the Service Tribunals were to be appointed by the President, which further strengthened the position of the Government in relation to the civil service.⁴⁹

Courts were expressly barred from granting any injunction, making any order or entertaining any proceedings in respect of any matter within the jurisdiction of Service Tribunals.⁵⁰ While civil servants could potentially petition the Supreme Court to overturn orders of a Tribunal, the right of appeal was not automatic. In fact, and unlike the otherwise wide appellate jurisdiction of the Supreme Court, the Court could only entertain an appeal from orders of a Service Tribunal if it was satisfied that the case involved a substantial question of law and public importance.⁵¹

The reforms envisaged by Bhutto not only gave him control over the removal of recalcitrant civil servants, but also allowed him to appoint his favorites to high powered positions. Traditionally, entry to the civil services was extremely competitive and indeed quite exclusive. Applicants had to (and many still need to) pass an exceedingly tough exam that is

⁴⁹ It is interesting to note that at the time the Service Tribunal Act was enacted, the President also had the power to appoint judges of the superior courts. However, this power could only be exercised after express consultation with the relevant Chief Justice (in case of the Supreme Court, the Chief Justice of Pakistan). In the years that followed, the Supreme Court also held that the advice of the Chief Justice was binding on the President unless his or her rejection was recorded in writing with substantive reasons that could be challenged and overturned in court. This judgement effectively ensured that there was no executive interference in the appointment of judges (unlike that which remained in so far as the appointment of Service Tribunal members was concerned.) See *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324)

⁵⁰ See Article 212 (2) of the Constitution

⁵¹ See Article 212 (3) of the Constitution

notorious for its low passage rates.⁵² Bhutto's reforms impacted the appointment and progression of civil servants in three important ways.

Firstly, Bhutto introduced a "lateral entry" scheme, which dispensed with the requirement of an exam for lateral entrants who had been vetted by a Selection Board (comprising members which reported directly to Bhutto).⁵³ As a result of this scheme, roughly 5,000 officials were directly recruited in the bureaucracy.⁵⁴ Secondly, Bhutto abolished the primacy of the CSP and instead created different occupational groups (e.g. customs, railways, etc.) within the civil services that were provided the same pay scales and opportunities of growth which had traditionally only been reserved for CSP officers.⁵⁵ Previously, as a result of this preferential treatment, CSP members completely dominated the upper echelons of bureaucracy. In 1970, for instance, two-thirds of the positions carrying a rank equivalent to Joint Secretary or above in the Federal Secretariat were reserved for members of the CSP.⁵⁶ With the abolishment of the CSP,

⁵² In 2016, for instance, about 12,000 people appeared for the entrance exam for the CSS. Only 379 (or 0.003%) of those who appeared qualified for the next round of interviews. See 368 candidates pass CSS exam, 238 qualify for service, The Express Tribune (Apr 27, 2016), available at:

<https://tribune.com.pk/story/1092948/238-candidates-qualify-css-exam/>

⁵³ See Crisis Group Report, *supra* note 31, at p.6

⁵⁴ Many of the recruitments were also considered to be based on patronage: "In July 1974, an Urdu daily in Lahore identified one hundred senior civil service political appointees who were close relatives and associates of ministers in Bhutto's cabinet." See Andrew Wilder, *The Politics of Civil Service Reform in Pakistan*, Columbia SIPA Journal of International Affairs (May 01, 2010) available at:

<https://jia.sipa.columbia.edu/politics-civil-service-reform-pakistan>

⁵⁵ CSP officers are not the only form of civil servants in the Pakistan. In fact, according to one study, in 1971 there were six hundred pay scales for the various types of government servants employed by the State. Bhutto's reforms called for the establishment of uniform pay grades. These grades known as the Basic Pay Scales (BPS) ranged from BPS 1-22. Officers were admitted at BPS 17 and the most senior postings in the bureaucracy, typically the Federal Secretaries, were reserved for BPS 22 officers. See Charles H. Kennedy, *Prestige of Services and Bhutto's Administrative Reforms in Pakistan, 1973-1984*, 12 Asian Affairs 3 (1985), p.28

⁵⁶ Kennedy notes the following domination of the CSP: "In 1971, twelve CSP officers were federal secretaries, five others were additional secretaries; all five chief secretaries of the

Bhutto effectively allowed other (previously disgruntled) civil servants to rise up the ranks and possibly remember the favor. Lastly, the appointment and promotion rules for civil servants which were drafted pursuant to Bhutto's administrative reforms, ensured that he (as Prime Minister) could both actively and passively control the progression of civil servants. In essence, the Civil Servants (Appointments, Promotions and Transfers) Rules, 1973, required the Prime Minister's direct approval for promotions to all senior (Secretarial level) positions in the bureaucracy.⁵⁷

The control which Bhutto acquired over the civil services was remarkable, but it did not prevent him from being overthrown by another force – the army. In 1977, the then Chief of Army Staff, General Zia-ul-Haq, declared martial law and displaced Bhutto.⁵⁸ General Zia

provinces were CSP officers, as well as three additional chief secretaries; eighteen divisional commissioners were members of the CSP, thirty-eight were deputy commissioners; five others were High Court justices; the administration of the national training institutions was dominated by twelve well-placed CSP officers; twelve others were chairmen and managing directors of autonomous governmental corporations; and eight members of the CSP were advisors and private secretaries to major politicians.” Ibid., at 19

⁵⁷ The Constitution establishes a parliamentary form of Government and the Prime Minister (or Chief Minister in case of the Provincial Government) is responsible for the selection of his or her Cabinet Ministers from among the directly elected Parliamentarians. There are numerous Ministries and each such Ministry or Division is headed by a Minister who is responsible for taking policy decisions (typically in conjunction with the Cabinet and the PM/CM) falling within the domain of his or her relevant Ministry. These policy decisions are then implemented by civil servants who could number in the thousands for any particular Ministry. The Secretary of a Ministry is the highest ranking civil servant within a Ministry. Immediately below the Secretary in order of seniority are Additional Secretaries, Joint Secretaries and Deputy Secretaries. The Secretary of any Ministry plays a crucial role in the workings of that Ministry, including approving important decisions, managing departmental budgets, carrying out performance reviews of juniors as well as initiating disciplinary proceedings. The latter is perhaps the most powerful tool at the disposal of Secretaries. Disciplinary proceedings and annual evaluations directly affect the career prospects of any junior civil servant. Secretaries also have the power to suspend officers while any disciplinary proceedings are pending. Suffice it to say, a Secretary can easily change the course of his or her given Ministry.

⁵⁸ Bhutto was later executed in 1979 after being indicted for conspiracy to murder. See Hashim, *supra* note 39

resolved to restore confidence among the civil service and for this purpose also constituted the Anwar-ul-Haq Commission to specifically suggest reforms which would reduce political control of civil servants.⁵⁹ Unsurprisingly, however, the reform efforts did not go very far and were just another mask for gaining control over the civil service.

Zia removed the lateral entry scheme which Bhutto introduced only to replace it with a lateral entry scheme of his own. In 1980, he institutionalized the entry of military officers in the civil service by decreeing that 10% of vacancies at the entry levels (BPS-17 and 18) in the bureaucracy would be reserved for retired or released military officers.⁶⁰ The selection process for these officers was also different: they were not required to take the entrance exam and would be selected by a high powered committee headed by Zia himself.⁶¹ Zia also amended the Civil Servants Act, 1973 (“Civil Servants Act”), in a manner which allowed him to remove (without notice) any civil servant who had been appointed or promoted between January 1, 1972 to July 5, 1977;⁶² essentially all Bhutto appointees would need to serve under the sword of Zia or be thrown out of service.

With the death of Zia in 1988, roughly a decade of civilian rule followed. While no major reforms of the civil service were implemented in this period, none were needed from the Government’s perspective – the existing rules and regulations provided enough leeway to the elected representatives to control the civil service. The PML (N) Government – the last civilian one in the 90s – was dismissed by the army once again in 1999 by General Pervez Musharraf. Under Musharraf, over the next decade, the civil service would suffer another wave of rapid

⁵⁹ See Shafqat *supra* note 43, at 1003

⁶⁰ *Ibid.*

⁶¹ See Crisis Group Report, *supra* note 31, at 6

⁶² See Section 12A of the Civil Servants Act

militarization. Musharraf, however, went further than Zia or any of the previous military dictators in Pakistan. Not only were military officials appointed to key civilian posts, they were made directly responsible for appointing, supervising and training civil servants.⁶³ Specified monitoring teams (comprising military officers) were established which would oversee the performance of civil servants. In the words of one former Federal Secretary, “[it] was perhaps the most humiliating exercise that the civil bureaucracy was ever subjected to in Pakistan’s history [:] junior military officers of the rank of major and even captain supervised and evaluated the performance of senior civil servants.”⁶⁴ Musharraf also promulgated the Removal from Service Ordinance, 2000, which allowed him to remove and indefinitely suspend any civil servant without even requiring a hearing.⁶⁵

Musharraf finally resigned in 2008 under the threat of impeachment by the newly elected Parliament.⁶⁶ Democracy has since thrived in Pakistan, but the political attitude towards the civil service has largely remained the same. While the Government partly rolled back the militarization of the civil service, it has taken no major steps to make the civil service independent. Thus, we frequently witness the arrival and departure of entire teams of civil servants based on which political party is in power. Civil servants who are favorites of a political

⁶³ A military official, for instance, chaired the Federal Public Service Commission, which is responsible for the recruitment of civil servants, as well as the Civil Services Academy, which is responsible for conducting training courses for civil servants. See Crisis Group Report, *supra* note 31, at 10

⁶⁴ *Ibid.*, at 9

⁶⁵ For instance, consider Section 3 (2) of the Ordinance whereby an officer could be removed from service without a right of hearing, if the “competent authority” determined that such a hearing is not: (i) “*reasonably practicable*”; (ii) in the “*interest of security of Pakistan or any part thereof*”; or (iii) “*expedient*.”

⁶⁶ See Zeeshan Haider, *Musharraf quits under impeachment threat*, Reuters (Aug 18, 2018), available at: <https://www.reuters.com/article/idINIndia-35058020080818>

party are even brought out of retirement,⁶⁷ so that they continue serving their political masters.⁶⁸ Bureaucrats who don't toe the line are often weeded out or left without serious work by being granted "Officer on Special Duty (OSD)" status, which is really just a fancy term for forced leave. In 2010, for instance, at least twenty-one senior civil servants had been effectively sidelined by the Government by being assigned the 'OSD' status.⁶⁹

To sum up, neither civilian leaders nor military dictators have sought to reform the civil service and make it more independent. While over 30 commissions have been constituted to reform the civil service, major changes remain either unapproved or unimplemented.⁷⁰ Politicians have overtime gained complete primacy in matters concerning the appointment, promotion, and even removal of civil servants. The consequences of this control on the outlook of civil servants were best reflected in a 2010 study which sought to map the perceptions of civil servants in relation their job. Twenty-one civil servants were asked whether "*it is possible to be successful and politically neutral?*" Eighteen of the respondents replied: "*absolutely not possible.*"⁷¹ Similarly, none of the civil servants interviewed thought that it was possible to have "*immunity against political action*" in the current system.⁷² It was clear that the bureaucracy had

⁶⁷ Civil servants mandatorily retire at sixty years. See Section 13 of the Civil Servants Act

⁶⁸ Though the Civil Servants Act does not prohibit re-employment after retirement, it does discourage the practice. Section 14 (1) of the Civil Servants Act states: "*A retired civil servant shall not be re-employed under the Federal Government, unless such re-employment is necessary in the public interest...*"

⁶⁹ See Zahid Giskori, *21 bureaucrats sidelined by authorities*, The Express Tribune (Nov 20, 2010), available at:

<https://tribune.com.pk/story/79139/21-bureaucrats-sidelined-by-authorities/>

⁷⁰ See Crisis Group Report, *supra* note 31, at 10

⁷¹ See Maryam Tanwir & Shailaja Fennel, *Pakistani bureaucracy and political neutrality: a mutually exclusive phenomenon?*, 49 Pakistan Development Review 3 (2010)

⁷² *Ibid.*

internalized political domination and felt defenseless; at the very least, this was the sentiment in 2010.

II. “CAPTURING” THE CIVIL SERVICE

On February 25th, 2012, Waheeda Shah, a candidate for the Sindh Provincial Assembly, was caught on tape while slapping an election polling staff officer.⁷³ Four days later, the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, took suo motu notice of the incident and issued notices to Shah, the Election Commission of Pakistan and the Inspector General of Police (“IGP”) - the highest ranking law enforcement official in the province.⁷⁴ During the course of hearing, the Court repeatedly criticized both Shah and the IGP, even suggesting that the latter should resign.⁷⁵ The incident was not unique and the attention of the Court was soon drawn to the broader plight of civil servants, by none other than a serving civil servant: Anita Turab. Turab filed an application in Court citing an incident of a school teacher being beaten by a member of the ruling party.⁷⁶ She added that the police officer who sought to take action against the politician was prematurely transferred, much like many other civil servants who have pursued political accountability. The Court ordered the IGP to personally look into the matter and also inform the Court whether the relevant police officer had been transferred due to political

⁷³ See *Waheeda Shah says slapping was ‘unintentional’*, Dawn News (Mar 05, 2012), available at: <https://www.dawn.com/news/700372/waheeda-shah-says-slapping-was-unintentional>

⁷⁴ See *CJ takes suo motu of Waheeda Shah incident*, Geo News (Feb 29, 2012), available at: <https://www.geo.tv/latest/77783-cj-takes-suo-moto-of-waheeda-shah-incident->

⁷⁵ See Azam Khan, *Waheeda Shah suo motu: ‘Assault more serious than Sarfraz Shah Killing’*, The Express Tribune (Mar 02, 2012), available at: <https://tribune.com.pk/story/344400/assaulting-mpa-wahida-shah-arrives-at-sc-for-suo-motu-hearing/>

⁷⁶ See Nasir Iqbal, *Waheeda case draws SC’s attention to service conditions*, Dawn News (March 13, 2012), available at: <https://www.dawn.com/news/702282>

interference.⁷⁷ The Court also issued notices to the Chief Secretaries of the four provinces (the highest ranking civil servants in each province) and procured suggestions on how the rights of civil servants may be protected. Over the course of the next few hearings, the Court would proceed to pass a series of orders aimed at providing, among other things, security of tenure to civil servants.

The way that the Court proceeded in the Anita Turab case was really unprecedented. Historically, the Supreme Court (and more generally the judiciary) has not really played a major role in reforming or protecting the civil service. After the creation of the distinct Service Tribunals in 1973, courts would often dismiss matters concerning the terms and conditions of civil servants for lack of jurisdiction. Even where the matter was entertained by the Supreme Court in appeal, it appeared that the relief granted was restricted to individual cases. For instance, a civil servant who had been wrongly or arbitrarily removed from office, may have had the departmental orders against him or her overturned; but that was it. Sure another precedent would be established, but there was no real follow-up or progressive attempt by the Court to deal with the underlying systemic issues per se. To be fair, the Pakistani Supreme Court was itself hardly in a position to take on the elected representatives or military dictators. For much of its history, the Supreme Court too suffered glaring interference in matters of appointments and removals of judges.⁷⁸ The Court, therefore, largely remained a legitimizing force (or rubber

⁷⁷ Ibid.

⁷⁸ For an overview of the Supreme Court's role in Pakistan's history see: Hamid Khan, *Constitutional and Political History of Pakistan*, Karachi: Oxford University Press (2009)

stamp) for incumbent executive policies i.e. until the appointment of Chaudhry as the Chief Justice of Pakistan.⁷⁹

There are no clean explanations for why Chaudhry decided to take the path which he did.⁸⁰ But what is clear is that he: (i) was forcibly removed from office after conflicting with a military dictator on various policy issues;⁸¹ (ii) was restored to office, after a very forceful Lawyers' Movement which centered on the independence and empowerment of the judiciary;⁸² and (iii) sought a very broad and active role for the Supreme Court and his powers as Chief Justice allowed him to push the Court in that direction.⁸³

Chaudhry was the first judge in Pakistan who had triumphed in the face of opposition from a military dictator. He also enjoyed vast public support. But none of this would prevent his

⁷⁹ See Aziz Huq, *Mechanisms of Political Capture in Pakistan's Superior Courts*, 10 *Yearbook of Islamic & Middle Eastern Law* 1 (2006), pp 22

⁸⁰ Isolating the intention or motives of a judge is an exceedingly difficult task. Some may argue that Chaudhry was activist because he had political ambitions. There is also some evidence for this. For instance, following his retirement and the two-year political activity ban envisaged in the Constitution, Chaudhry launched a new political party in Pakistan. However, for obvious reasons, it cannot be confirmed whether Chaudhry always had this ambition. Supporters of Chaudhry would argue that he simply wanted to improve social governance in Pakistan. His public speeches certainly support this position, but here again it is very difficult to confirm whether he really meant what he was saying publicly.

⁸¹ See *General (r) Pervez Musharraf v. Nadeem Ahmed Advocate*, Civil Review Petition Nos. 328 & 329 Of 2013 In Constitution Petition Nos. 8 & 9 Of 2009

⁸² For a historical account of the Lawyers' Movement which started after Chaudhry's removal see: Muneer Malik, *The Pakistan Lawyer's Movement: An Unfinished Agenda*, Islamabad: Pakistan Law House (2008)

⁸³ The Chief Justice, unlike other judges of the Court, has a number of distinct administrative powers that allow him to control both the constitution and agenda of the Court. These powers include: (i) having primacy in the appointment of Supreme Court justices; (ii) determining the constitution of each bench which is tasked with hearing cases pending before the Court; (iii) docket management; (iv) managing the budget of the Court; and (v) initiating suo motu actions. See Maryam Khan, *The Politics of Public Interest Litigation in Pakistan in the 1990s*, 3 *Social Science and Policy Bulletin* 2 (2011), pp.6

orders from being blatantly disobeyed. If, for instance, the SCP's workload in relation to constitutional and suo motu matters is considered as a whole, the account of disobedience appears to be quite unprecedented, even for the Court's recent history. Consider Table 1 (see Chapter I) above which mentioned the number of contempt petitions filed between the years 2000-2013. As mentioned earlier, the numbers clearly acquire an upwards trend around 2005-2006 and start spiking after 2009, following Chaudhry's restoration to office. It should also be noted that contempt petitions are filed or registered as a last resort and typically follow a fair number of warnings from the Court.

Chaudhry, therefore, was compelled to do more to ensure that his activist agenda was implemented: in essence, he required the support of the very same civil servants who had been forced into submission by political leaders. For this purpose, I posit, Chaudhry simultaneously aimed to: (i) reduce political patronage and control within the bureaucracy ("passive control"); and (ii) provide civil servants incentives for compliance or impose costs for defiance ("active control"). What follows is a discussion of the various tools used by Chaudhry to achieve each of these objectives.

(i) *Passive Control*

a. *Opening the Supreme Court's doors*

There are a number of judgments of the Court, even prior to Chaudhry's appointment, which call for the Government to abide by statutory rules and regulations governing civil servants.⁸⁴ The problem, however, has always been enforcement – or lack of it. Given the

⁸⁴ See, for instance: *Zahid Akhtar v. Government of Punjab through Secretary, Local Government and Rural Development, Lahore and 2 others* (PLD 1995 SC 530); *Federation of Pakistan through Secretary, Planning & Development Division, Islamabad v. Muhammad Akram*

exclusive nature of the Service Tribunal's jurisdiction,⁸⁵ it could take years before a matter was finally heard and decided by the Supreme Court. Historically, attempts by civil servants to sideline the Service Tribunals (by approaching the superior courts directly) were rarely successful because of two reasons. First, as mentioned earlier, Article 212 of the Constitution barred any court (including the Supreme Court) from entertaining a matter which fell within the jurisdiction of the Service Tribunals (though it may be noted that a narrow exception was crafted by courts for promotion matters).⁸⁶ Second, any petitioner seeking to utilize the original jurisdiction of the Supreme Court had to satisfy the Court that the matter concerned: (i) the infringement of a fundamental right protected under the Constitution; and (ii) was of public importance.⁸⁷ Even if some exception was to be created for the bar of jurisdiction contained in Article 212 of the Constitution (as was done for promotion matters), one can intuitively see how difficult it would be to satisfy the Court that a matter relating to an individual civil servant's

& others (1995 SCMR 1647); and *Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others* (PLD 1990 SC 1092)

⁸⁵ For instance, in a case relating to the alleged illegal termination of a civil servant's employment, it was held that: "*If the petitioners' appointments were in accordance with law as contended by them, termination of their services without any justifiable reason would entitle them to maintain appeals before the Service Tribunal and not a writ petition or Intra-Court Appeal or the present petitions for leave to appeal... We are, therefore, of the view that the present petitions for leave to appeal are misconceived. The petitioners should approach Services Tribunal.*" See *Muhammad Iqbal and others v. The Government of the Punjab and others* (1995 SCMR 1047)

⁸⁶ During the late 1980s, the Supreme Court ruled that since aggrieved parties could not approach the Service Tribunals for matters relating to their fitness for promotion, they could approach the High Courts for relief in this reference. Their reasoning was that no wrong should go without a remedy. Section 4 1(b) of the Service Tribunals Act, 1973 provided that: "*No appeal shall lie to a Tribunal against an order or decision of a departmental authority determining the fitness or otherwise of a person to be appointed to or hold a particular post or to be promoted to a higher grade.*" Therefore, since promotions matters were not within the purview of Service Tribunals, by extension the ouster of jurisdiction under Article 212 of the Constitution did not apply. See: PLD 1989 SC 26; 2000 PSC 599; and PLD 2003 SC 17

⁸⁷ See Article 184 of the Constitution, which specifies the conditions under which the original jurisdiction of the Court can be exercised.

appointment, promotion or removal from service is of ‘public importance’. Yet, by 2010, the Supreme Court was somehow satisfied that these matters deserved the Court’s direct attention.

On November 06, 2009, Tariq Aziz-ud-Din, a civil servant, wrote a letter to the Chief Justice Chaudhry stating that the Government had promoted certain officers and sidelined others, including him, in an arbitrary matter. The Court entertained this letter as a petition and held that it was maintainable under the Court’s original jurisdiction. The Court noted:

“[T]he exercise of discretion contrary to settled principles has not only affected the left out officers but has left a far-reaching adverse effect upon the structure of civil servants-- -- be in the employment of the Federal or the Provincial Governments, autonomous and semi-autonomous bodies, etc. --- and if the decision of the competent authority under challenge is not examined keeping in view the Constitutional provisions, the efficient officers who have served honestly during their service career, would have no guarantee of their future service prospects. Consequently, such actions are also likely to affect the good governance as well as framing of policies in the welfare of the public and the State. Therefore, to assure the public at large, more particularly the civil servants in this case that their fundamental rights will be protected, this Court is constrained to exercise jurisdiction under Article 184(3) of the Constitution.”⁸⁸

It also appears that the Court is no longer constrained by the ouster of jurisdiction prescribed under Article 212 of the Constitution. In *Muhammad Azhar Siddiqui v. Federation of Pakistan*, for instance, the Court found that the test of maintainability is easily met in cases which “*pertain to appointments, promotions, dismissals ... of key executive officials, including but not limited to ministers, senior bureaucrats and heads of regulatory bodies and statutory corporations.*”⁸⁹ For the Court, entertaining these matters was important because “[*t]he executive, especially its upper echelons, is the first and foremost branch of the constitutional government which is entrusted with the execution of laws and framing and enforcement of policies which directly affect the citizens’ rights, including Fundamental Rights.*”⁹⁰ Thus, the

⁸⁸ See *Tariq Aziz-ud-Din and others v. Federation of Pakistan* (2010 SCMR 1301)

⁸⁹ PLD 2012 SC 774

⁹⁰ *Ibid.*

Court during Chaudhry’s tenure clearly opened its doors for all sorts of issues relating to civil servants. By doing so, the Court can be said to have made a powerful leap towards countering political patronage and, in turn, increasing its own influence over the bureaucracy.

b. Constraining Discretion in Executive Appointments and Promotions

The statutory rules and regulations governing civil servants permit considerable discretion, especially in matters concerning their appointment and promotion, and, in certain instances, removal. For instance, the Civil Servants Act requires that promotion to certain positions be made solely on the basis of “merit”, but it does not really specify how this “merit” is to be determined.⁹¹ Similarly, while a civil servant is to compulsorily retire at sixty years of age, he or she can be re-employed on contract, if it serves the (seemingly wide and undefined) “public interest.”⁹² The rules also envisage a broad exception to the so called “mandatory” requirements in relation to initial appointments. Whereas appointment to a specific post may require the satisfaction of specified terms and conditions (such as minimum length of service, relevant experience, etc.), these requirements can be easily bypassed by appointing (on a deputation basis) civil servants from another Division or Ministry.⁹³ Essentially, the Government can simply transfer or depute its favorite civil servants to high profile positions within the bureaucracy. And, not surprisingly, political leaders have used this wide discretion to influence the civil service.

Pakistani courts have traditionally constrained the exercise of discretionary powers by requiring executive functionaries to act in a manner which is reasonable and not arbitrary.⁹⁴ The

⁹¹ See Section 9 of the Civil Servants Act

⁹² See Sections 13 and 14 of the Civil Servants Act

⁹³ See Chapter 3 of the Esta Code

⁹⁴ See, for instance: *Director Food NWFP v. M/s Madina Flour and General Mills (Pvt) Ltd.* (PLD 2001 SC 1). Authority for this power is drawn from Section 24A (1) of the General

Chaudhry Court went one step further than this. Instead of simply striking down executive decisions which were, for instance, unreasonable, the Court moved to curtail executive discretion altogether in matters concerning the service of civil servants. The Court attempted to achieve this in a number of ways.

In matters of promotion, the Chaudhry Court required the Government to lay out objective criteria, preferably in the form of statutory rules, on the basis of which it would make ‘merit’ appointments.⁹⁵ One of the objective criterion, which the Court itself highlighted, was seniority. In one case, for instance, the Punjab and Sindh Government had amended the Civil Servants Act to recognize “gallantry” as a reason for promoting members of the police force. The stated object was to reward officers of the police force who had made sacrifices in the War on Terror. The Court, however, was suspicious of the Government’s motive and fearing that this would promote nepotism, struck down the amendment and all ‘out-of-turn’ promotions.⁹⁶ In the *Tariq Aziz-ud-Din* case, the Court also expressly recognized the right of every civil servant to be

Clauses Act, 1897, which states that: “*Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.*”

⁹⁵ In the *Tariq Aziz-ud-Din* case, the Court first alluded to the desirability of an objective criteria for deciding promotion matters. While striking down a number of promotion orders for being arbitrary, the Court noted that “*it would appreciate*” if the statutory rules governing promotion (which were rescinded in 1998) were brought back into place. Later in 2013, in the *Orya Maqbool Abbasi* case (Const. Petition 22 of 2013), the Court’s request became firm and it stated unequivocally that the Government was to outline an “*objective criteria for promotion [which would] make the civil servant an honest officer and free from political pressure.*” The need for an “*objective criteria*” or policy was also noted in the context of initial nominations to certain positions. For instance, in the province of Sindh, the Chief Minister was legislatively permitted to nominate his chosen officers to take positions as ‘Assistant Commissioner’ – an extremely powerful management position at the District Level. The Court, however, held that this wide discretion was unlawful and ordered the Government to frame a policy that would regulate the Chief Minister’s discretion. See *Ali Azhar Khan Baloch and others v. Province of Sindh* (C.R.P. NO. 193 of 2013 in Const. Petition no.71 of 2011)

⁹⁶ See Haseeb Bhatti, *Out-of-turn promotions case: Supreme Court demotes 121 Punjab police officers*, Dawn News (Mar 28, 2017), available at: <https://www.dawn.com/news/1323361>

considered for promotion along with his or her peers. The Court held that “[t]he right [to be considered for promotion] contemplated under section 9 [of the Civil Servants Act] is neither illusory nor a perfunctory ritual and withholding of promotion of an officer is a major penalty in accordance with the Civil Servants (Efficiency and Disciplinary) Rules, 1973.” Effectively, therefore, one could challenge not only the promotion of allegedly unfit civil servants, but also the denial of promotion to any civil servant. Civil servants who were potentially disliked and disposable for the Government could, as a result, count on the Court as a powerfully ally.

The Court similarly restricted the deputation and re-employment of civil servants by expressly requiring the Government to satisfy certain conditions before any such orders were given. Deputation and re-hiring of retired civil servants have been known to increase political interference, particularly because these officers are hired on a temporary (contract) basis and are in turn dependent on politicians for any extension in their term of office. Recognizing this potential for abuse and nepotism, the Court ordered the withdrawal of all deputed officers, even where a province had passed a law authorizing the permanent absorption of these deputed officers.⁹⁷ Similarly, the Court practically banned the re-employment of retired civil servants. And it is interesting to note that in taking this step, the Court again tried to strike a chord (and provide a cause of action) to civil servants who were negatively affected by this practice. The Court noted that the re-employment of retired civil servants: “*is likely to affect the junior officers, who are waiting for promotion to the next higher rank as their right of promotion is blocked. They have to wait till such re-employed officer completes his contract . . . The*

⁹⁷ See Naeem Sahoutara, *Appointments on deputation: SC tells 136 officers to go back to their departments*, The Express Tribune (April 09, 2013), available at: <https://tribune.com.pk/story/532874/appointments-on-deputation-sc-tells-136-officers-to-go-back-to-their-departments/>

promotion of an employee is not to be blocked to accommodate a retired officer, however, if the right of promotion is not blocked by re-employment, then such powers can be exercised, that too in an exceptional case.”⁹⁸

In matters of appointment of civil servants, especially in the context of statutory organizations, the Court appears to have gone further than merely requiring objective criteria for appointment. In *Muhammad Yasin v. the State*,⁹⁹ the Court outlined the following three step test for validating public appointments: “(a) whether an objective selection procedure was prescribed; (b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisaged in [the law]; (c) if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with [rigor], objectivity, transparency and due diligence to ensure obedience to the law.” The Court, therefore, was clearly signaling that it would not only insist on objective criteria for the appointment and promotion of civil servants, but would also examine the suitability of this criteria and the process by which it was applied.¹⁰⁰

A year later, the Court went even further. As the country was gearing up for elections in 2013, Khawaja Muhammad Asif, a veteran politician, filed a petition before the Court challenging numerous appointments, transfer, and postings which had been made by the Caretaker Government (presumably in an attempt to influence the election). The prayer in the

⁹⁸ See Order dated November 11, 2013 in *Corruption in Hajj Arrangements* (Suo motu Case No. 24 of 2010)

⁹⁹ PLD 2012 SC 132

¹⁰⁰ In *Ashraf Tiwana, etc. v. Pakistan, etc.* (2013 SCMR 1159), the Court used this criteria to strike down the appointment of the Chairman, Securities and Exchange Commission of Pakistan. While the Court was satisfied that the relevant legislation provided objective criteria for the selection of the Chairman, it struck down the appointment since “no attempt whatsoever was made to attract the pool of potential talent having the requisite statutory qualifications.”

petition was restricted to overturning the reshuffling of government servants which had taken place during the tenure of the Caretaker Government. However, the Court expanded the ambit of the case and also examined the broader practice of nepotism in the appointment of civil servants (particularly, appointments to key positions in regulatory agencies and statutory corporations). The Court noted several instances where the Government had appointed its “*favorites*” despite them “*lacking [any merit] to hold such posts/positions.*”¹⁰¹ It was almost as if the Court had lost all confidence in the Government and sought to take appointment powers away from it altogether. The Court ordered, in relevant part, as follows:

*“ . . . in order to ensure the enforcement of the fundamental right enshrined in Article 9 of the Constitution and considering it to be a question of public importance, a Commission headed by and comprising two other competent and independent members having impeccable integrity, may be the Federal Ombudsman or Chairman NAB or a Member of Civil Society having exceptional ability and integrity, is required to be constituted by the Federal Government through open merit based process having fixed tenure of four years to ensure appointments in statutory bodies, autonomous bodies, semi-autonomous bodies, regulatory authorities, etc. The Commission should be mandated to ensure that all public appointments are made solely on merit.... No public appointment must take place without first being recommended by the Commission.”*¹⁰²

The decision, remarkable as it is, did not survive long for it to have any meaningful effect. Shortly after Chaudhry’s retirement, the decision was set aside by the Court itself.¹⁰³ Be that as it may, this decision is critical for demonstrating the extent the Chaudhry Court was willing to go to for undermining political influence in the appointment process of civil servants.¹⁰⁴

¹⁰¹ See Order dated June 06, 2013 in *Khawaja Muhammad Asif v. Federation of Pakistan* (Const. Petition 30 of 2013)

¹⁰² *Ibid.*

¹⁰³ See Nasir Iqbal, *SC revisits appointments case judgement*, Dawn News (Nov 15, 2014), available at:

<https://www.dawn.com/news/1144590>

¹⁰⁴ Through the *Khawaja Muhammad Asif* case, the Chaudhry Court had practically sidestepped the statutory appointment procedures for civil servants in over twenty-two government

c. *Removal of Civil Servants*

Some of the principles noted above have also been extended to matters involving the removal of civil servants. The Court was well-aware that the new Constitution removed the guarantee of tenure for civil servants in 1973, so it sought to provide greater protection to civil servants by subjecting any dismissal orders to higher levels of scrutiny.¹⁰⁵ In addition, the Court ruled that dismissal of government servants without cause, even where permitted under statutory rules, is not allowed. The Court was of the opinion that “*an independent and lawful institutional environment*” cannot be created “*if employees do not have safeguards against arbitrary or mindless termination.*”¹⁰⁶ Accordingly, regulatory bodies such as the Securities and Exchange Commission of Pakistan, could not allow dismissal of employees without cause, even where the relevant statutory rules or regulations permitted this.¹⁰⁷

d. *Transfers and Postings of Civil Servants as Officers on Special Duty (OSD)*

Even before Chaudhry’s tenure as Chief Justice, the Court had clarified that civil servants could not be transferred or posted as OSD, except under exceptional circumstances.¹⁰⁸ The rules

controlled corporations and regulatory bodies, without actually specifically striking down the relevant statutes. Indeed, this was one of the reasons for setting aside this decision a year later.

¹⁰⁵ See, for instance: *Federation of Pakistan through Secretary Establishment vs. Liaqat Ali and Tauqir Ahmad Faiq* (Civil Petition Nos. 836 and 837 of 2006) (“*just like the appointment of civil servants, their removal and dismissal from service has not been left to anyone’s whims and caprice. It is governed by rules and regulations, amongst them the Civil Servants (Efficiency and Discipline Rules), 1973. Indeed, the anachronistic concept where government servants held office during the pleasure of the Crown has no place in a dispensation created and paid for by the people.*”)

¹⁰⁶ See *Ashraf Tiwana, etc. v. Pakistan, etc.* (2013 SCMR 1159)

¹⁰⁷ *Ibid.*

¹⁰⁸ See, for instance: *Mir Shah Nawaz Marri v. Government of Balochistan, etc.* [2000 PLC (CS) 533]; *Syed Ajmal Hussain Bokhari v. Commissioner, Rawalpindi* [1997 PLC (CS) 754]; *Sajjad Ahmad Javed Bhatti v. Federation of Pakistan* (2009 SCMR 1448); and *Lt. Col. (R.) Abdul Wajid Malik v. Government of the Punjab* (2006 SCMR 1360)

and regulations governing civil servants explicitly state that the tenure for a particular posting is ordinarily three years; courts have also, time and again, reiterated this view. What distinguished the Chaudhry Court was that it openly declared that it would start issuing contempt notices if it found that a civil servant had been transferred or posted as OSD in violation of the precedents established by the Court.¹⁰⁹ The Court also ensured that its judgment in the *Anita Turab* case was circulated to all relevant executive officials including the: Federal Secretary Establishment, the Chief Secretaries of the Provinces, the Commissioner Islamabad Capital Territory and the Secretaries of all Federal and Provincial Government departments. As a consequence, the relevant Chief Secretaries of the Provinces also ordered their subordinates to immediately take notice of the directions contained in the *Anita Turab* case.¹¹⁰

e. Obeying illegal orders from superiors

The Court also stepped in and emphasized that a civil servant is not bound to obey every order issued by his or her superiors, including the Minister-in-charge of his or her Division.¹¹¹ The Court clarified that obedience to illegal orders cannot be defended on the ground that disobedience would have exposed the civil servant to disciplinary action. It noted in particular

¹⁰⁹ In the *Anita Turab* case (PLD 2013 SC 195), after recalling several previous directions passed by the Court in relation to the terms and conditions of civil servants, the Court notes that: “... *in view of Articles 189 and 190 of the Constitution, a civil servant will be entitled to make a departmental representation or initiate legal proceedings before a competent forum to enforce a legal principle enunciated by this Court. . . In appropriate cases the failure of a state functionary to apply a legal principle which is clearly and unambiguously attracted to a case, may expose him to proceedings also under Article 204(2)(a) of the Constitution. This article, it may be recalled, grants this Court the power to punish for contempt any person who “disobeys any order of the Court”. . . If there still remains any doubt, let us clarify that those executive functionaries who continue to ignore the Constitution and the law, do so at their own peril.*”

¹¹⁰ See *Chief Secretary presides meeting of all Secretaries*, Punjab Government Newsroom (Dec 01, 2012), available at: <https://www.punjab.gov.pk/node/1800>

¹¹¹ See *Anita Turab* case (PLD 2013 SC 195)

that civil servants were obligated to either disobey illegal orders or, at the very least, create a note of dissent on the relevant file which marks the officer's position on the issue.¹¹² Where a civil servant failed to do this and still carried out an illegal order, he or she would personally liable for this action. This measure sought to create an important ripple in the bureaucracy; thus, if a Minister asked a civil servant to not implement a Court order (an illegal action), the civil servant by obeying this command would be directly exposed to penal action.

f. Making the Service Tribunals Independent

As mentioned earlier, Bhutto's reforms introduced distinct Service Tribunals with exclusive jurisdiction to settle disputes relating to the terms and conditions of service of civil servants. Since Members (or judges) of the Service Tribunals were appointed by the President on the advice of the Prime Minister, the Government could easily manipulate the composition of the Service Tribunals.¹¹³ In addition, the Service Tribunals were not financially autonomous and depended entirely on the Government for their continued existence. In a manner, Members of the Service Tribunals were remarkably susceptible to political interference, especially when compared to judges of the superior courts who enjoyed (formally at least) considerable administrative and financial autonomy.¹¹⁴

¹¹² See *Human Rights Cases No. 4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759)*. The Court perhaps hoped that the superior officer or Minister would be dissuaded by this action, as the note would form part of the public record and could later be presented in Court.

¹¹³ See Section 3 (4) of the Service Tribunals Act

¹¹⁴ See Asher A. Qazi, *Suo Motu: Choosing Not to Legislate*, in *Politics and Jurisprudence of the Chaudhry Court*, Moeen H. Cheema & Ijaz S. Gilani (Eds.), Islamabad: Oxford University Press (2015), pp. 297

The Court under Chaudhry's leadership took up the independence of the Service Tribunals as an issue and in *Riaz-ul-Haq v. Federation of Pakistan*¹¹⁵ ordered the Federal and Provincial Governments to reframe the law governing Service Tribunals in a manner which made them administratively and financially independent.¹¹⁶ The language which the Court used in its order drew upon its rhetoric noted earlier; the Court again emphasized the importance of civil servants and how the judiciary could be relied upon to effectively guard their rights.¹¹⁷ Critically, the Court noted that since Service Tribunals by their very nature performed "judicial functions", the appointment of Members of the Service Tribunals must be made after consultation with the relevant Chief Justice (for the Provinces, the relevant Chief Justice of the Provincial High Court, and for the Federal Service Tribunal, the Chief Justice of Pakistan).¹¹⁸

¹¹⁵ Constitution Petition No.53 of 2007 & Constitution Petition No.83 of 2012

¹¹⁶ In relation to financial independence, the Court required the following measures to be put in place:

The Tribunals must be duly empowered to disburse their annual funds, allocated by the Parliament and the Provincial Assemblies, in their respective annual budgets, within the prescribed limit by the Chairman of the respective Tribunals, without the need to seek approval of the Finance Ministry or provincial Finance Department.

¹¹⁷ Consider, for instance, the following passage from the judgement:

31. Admittedly, civil servants being citizens of Pakistan have Fundamental Rights including the right of access to justice as envisaged under Article 9 of the Constitution. The enforcement of terms and conditions of service of these civil servants depends upon the impartial, independent and unbiased Tribunal. Further, in the words of our founding father, the services are the backbone of the state as the affairs of the Government are performed by the civil servants. Therefore, ultimately, the general public gets affected from the functioning of the service Tribunals; as such, the instant case involves a question of public importance.

¹¹⁸ In reaching this determination the Court relied on prior precedents such as *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445), *Chenab Cement Products v. Banking Tribunal* (PLD 1996 Lahore 672), and *Imran v. Presiding Officer, Punjab Special Court* (PLD 1996 Lahore 542). These cases *inter alia* dealt with the appointment mechanism for judges of special courts (for instance courts constituted for trying persons accused of terrorism). The Court was of the opinion that since the Constitution required the separation of the judiciary from the executive, the terms and conditions of the judges of these courts, including their appointment

(ii) *Active Control*

Suo moto or Public Interest Litigation proceedings rely on the concerned institutions to execute and implement the orders. In the New Murree case, the Environment Protection Agency, Islamabad was directed to ensure that [a] Environmental Impact Assessment (EIA) [is conducted] before proceeding with the project. Getting an EIA done from a self-appointed consultant and then getting the approval of the EPA is not difficult. The poor Director General, EPA, even if he wants to cannot withstand the pressure from the top. The Courts will have to go beyond this. They will have to apply the “preserve, protect and defend” approach and go behind the issue. In the said New Murree case, the Court should have directed that EIA must be prepared by credible consultants and should have given a list. It should have further directed that EIA must be reviewed by an independent committee of experts as provided under the law and the said Committee should have been constituted by the Court to ensure independence and transparency. In addition EPA should have been directed to report to the Supreme Court approvals of all the subsequent mega projects. Such judicial governance is required to ensure a social change.

The passage above has been extracted from a paper presented by Mansoor Ali Shah at an International Judicial Conference hosted by the Supreme Court of Pakistan in 2006.¹¹⁹ Shah was later appointed to serve as the Chief Justice of the Lahore High Court and was recently elevated to the Supreme Court of Pakistan.¹²⁰ The “preserve, protect and defend” approach which Shah was urging the superior courts to use in 2006, appears to have been adopted as the *modus operandi* in the years that followed: ‘Judicial Governance’ was fully embraced by the Chaudhry Court.

As the Chaudhry Court moved to nullify or at least weaken political control over the bureaucracy, it simultaneously began aggressively exercising its own form of control over civil

mechanism, should be structured in a way which fosters the ‘independence of the judiciary’. In this sense, therefore, the conclusion drawn by the Court in the *Riaz-ul-Haq* case was not remarkably unprecedented. What is interesting, however, is timing. The Service Tribunals Act were enacted in the early 1970s – for almost 40 years, it appears, the Court had no issue in upholding its constitutionality.

¹¹⁹ See Syed Mansoor Ali Shah, *Salvaging Democracy – Judiciary Our Last Hope*, International Judicial Conference Pakistan (2006), p. 14, available at:

<http://www.supremecourt.gov.pk/ijc/Articles/17/1.pdf>

¹²⁰ See *Justice Mansoor Ali Shah sworn in as SC judge*, The Express Tribune (Feb 07, 2018), available at: <https://tribune.com.pk/story/1628322/1-justice-mansoor-ali-shah-sworn-sc-judge/>

servants, using in particular the Court’s suo motu jurisdiction.¹²¹ This jurisdiction is unique in two important ways. First, the Court could, on its own motion and without the requirement of any petitioner, hear any issue which was of “public importance” and related to the enforcement of fundamental rights.¹²² Second, since these cases do not have a petitioner the judicial process followed is inquisitorial in nature.¹²³ What this has meant practically is that the Court would itself pursue, as both judge and advocate, the underlying issue and its appropriate relief. In this pursuit, the Court exercises vast authority: it can hear from and give directions to civil servants directly, procure compliance reports, and monitor case progress from time to time.¹²⁴ The use of this jurisdiction was, however, exceptional until Chaudhry’s tenure. Chaudhry is attributed as having initiated approximately 161 suo motu cases, more than any other judge before him (see Table 1 – Chapter I).¹²⁵ The issues raised in these cases were quite diverse and included matters

¹²¹ For a general background on the SCP’s suo motu jurisdiction see: Werner Menski, Ahmad Rafay Alam and Mehreen Kasuri Raza, *Public Interest Litigation in Pakistan*, London: Platinum Publishing (2000).

¹²² Over time, the Court has liberally interpreted the conditions under which suo motu actions can be initiated, such that now a question of ‘public importance’ can arise even where an individual’s fundamental rights have been violated. Similarly, fundamental rights conferred by the Constitution have been read extremely broadly. For instance, Article 9 of the Constitution which provides that “*no person shall be deprived of life or liberty save in accordance with law*”, has been read in manner which places an obligation on the State to provide “*all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity.*” See *Shehla Zia v. WAPDA* (PLD 1994 SC 693)

¹²³ See *Darshan Masih v. The State* (PLD 1990 SC 513)

¹²⁴ The monitoring provided by the Court is perhaps comparable to the “continuing mandamus” or “structural injunction orders” which are passed in some other jurisdictions such as India.

¹²⁵ Table 2 records the number of suo motu actions initiated by Chief Justices between the years 2002-2015. The number of suo motu cases initiated prior to 2002 could not be verified because the Supreme Court database does not provide this information. However, from my review of the Court’s reported judgements which have been published in the relevant law journals, it is clear that the use of the suo motu jurisdiction was exceptional until Chaudhry assumed office.

such as the rights provided to workers,¹²⁶ prison reform,¹²⁷ pricing of public goods,¹²⁸ environmental pollution,¹²⁹ provision of clean drinking water,¹³⁰ and corruption in public enterprises.¹³¹

Chaudhry also activated and revamped the Human Rights Cell (“Cell”) at the Court.¹³² The Cell served as one of the feeders for Chaudhry’s *suo motu* actions and received nearly 200-250 applications daily during his tenure.¹³³ Upon receiving an application, the Cell (consisting of the Court’s administrative staff) would procure reports from the relevant government agency or department. If the reports were unsatisfactory or the agency was unresponsive, the Cell would prepare a summary for the Chief Justice who could then fix the case for regular hearing before the Court. For the years 2009 – 2012, more than 100,000 applications were sent to the Human Rights Cell.¹³⁴ In addition, once the Court projected itself as being amenable to entertaining

¹²⁶ See, for instance, SMC 3 of 2010, which raised the rights of workers under the Social Security Ordinance, 1965, as an issue.

¹²⁷ See, for instance, SMC 2 of 2008, which dealt with the mercy applications of over 6000 prisoners who had been sentenced to death and were awaiting punishment; see also, SMC 1 of 2006, which dealt with the miserable condition of women in jails.

¹²⁸ See, for instance, SMC 10 of 2007, which raised the increase in prices of numerous daily commodities as an issue.

¹²⁹ See, for instance, SMC 10 of 2005, which dealt with the environmental hazard caused by a new developmental project in the Murree area.

¹³⁰ See, for instance, SMC 13 of 2010, which dealt with the contamination of Rawal Dam, the primary reservoir for supply of drinking water to the capital city of Islamabad.

¹³¹ See, for instance, SMC 15 of 2009, which dealt with a mega corruption scam affecting the performance of the Pakistan Steel Mills.

¹³² See *Annual Report January 2012- March 2013*, Supreme Court of Pakistan, available at: http://www.supremecourt.gov.pk/Links/Annual_Rpt_2012-13/index.html#/126

¹³³ *Ibid.*

¹³⁴ *Ibid.*

social governance issues numerous members of the civil society and political parties (not currently in Government), flocked to the Court for relief by filing constitutional petitions.¹³⁵

To assess the impact and extent of the Court's intervention, I have studied all of the (publicly accessible) orders passed in suo motu cases fixed before the Court between the years 2002-2015.¹³⁶ This period was selected partly out of convenience and partly out of necessity. The first suo motu case was initiated in Pakistan back in 1990. Stretching the sampling period to this year would have been difficult since the state of record keeping at the SCP is quite poor.¹³⁷ It is noted that even for the period under study various orders and case files could not be located. In any event, the 2002-2015 period should be sufficient for the purposes of this study as it offers significant diversity of judicial leadership.¹³⁸ The sampling period covers the tenure of seven Chief Justices (including one de-facto Chief Justice) and three different Governments, including a military dictatorship (see Table 2 – Chapter I). The focus on suo motu cases follows the very particular use and inquisitorial process of this jurisdiction, as described earlier. Any attempt by the Court to actively control civil servants would likely be more prevalent in these cases. This, however, is not to say that the Court's attempt to actively control civil servants, as described earlier, was restricted to suo motu cases. One would indeed find examples of this control in the

¹³⁵ These petitions are also filed under Article 184 (3) of the Constitution and much like the Court's suo motu jurisdiction, the ambit for finding a petition maintainable is quite wide. In matters concerning violations of fundamental rights, petitioners also don't need satisfy traditional requirements of *locus standi*.

¹³⁶ Some case files were not properly maintained and did not include every order passed in the case; whereas some case files were missing altogether from the court records.

¹³⁷ Case records older than 2009, are harder to track by court staff given that records at the SCP are not digitized. On numerous occasions court staff also expressed their inability (and perhaps unwillingness) to trace older case files.

¹³⁸ Justices in Pakistan, including the Chief Justice, retire at the age of 65 and the most senior judge at the time of the incumbent Chief Justice's retirement is appointed as the next Chief Justice.

Court's regular constitutional jurisdiction as well.¹³⁹ Be that as it may, my object is just to demonstrate the means by which the Pakistani Supreme Court actively tried to control the civil service and for this limited purpose examining the Court's suo motu docket is sufficient.

My sample includes data on 1080 orders which were passed in 190 suo motu cases.¹⁴⁰ Table 8 identifies the number of orders which were passed each year in my case sample.¹⁴¹ As should be evident, the number of orders passed shoot up after 2009, which is the year Justice Chaudhry was restored to office and started passing many of the "passive control" directives noted earlier. What is striking, however, is that even after Chaudhry's retirement, the number of orders passed each year remains high (with the exception of 2016, though it should be noted that the sample does not reflect any cases which were initiated in 2016 or heard after November, 2016). It appears that once Chaudhry set an expansive precedent for the Court, other justices followed.

The Court's reach in the bureaucracy becomes clearer upon closer inspection of the orders passed in these cases. Table 9 lists down the rank of the most senior civil servant who was present at a court hearing and his or her presence was noted as such on the face of order. There were numerous cases (N=383) where this was not done; it could be that no civil servant was called to appear before the Court at this hearing, he or she did not appear despite an order, or

¹³⁹ See, for instance, Constitution Petition 77 of 2010, which concerned itself with the deteriorating law and order situation in the province of Baluchistan. This case was heard over a hundred times and routinely called upon the Court to supervise the operations of civil servants.

¹⁴⁰ Some suo motu cases had been clubbed together and heard as one matter and they have been treated as such for the purposes of my study. In total 181 such matters were studied.

¹⁴¹ As mentioned earlier, suo motu cases can be heard over a period of time; the Court is particularly interested in following up on its previous orders and identifying any gaps in compliance.

perhaps the Court did not record his or her presence, despite an appearance.¹⁴² However, for the orders where this information is provided, it is fascinating to note that the civil servants who appeared most frequently before the Court, were often the most senior civil servants in their respective Division, Ministry or organization. I recorded BPS-22 (the highest pay scale in the civil service) for any officer who held the position of Secretary, Director General, or Chairman: in other words, the respective heads of department. Similarly, I recorded BPS-21 for the second most senior civil servant in any Division, Minister or organization, normally with the position of Additional Secretary or Director. The number of recorded Court appearances for BPS-22 (N=168) and BPS-21 officers (N=232) cumulatively outweighs the recorded appearances (N=305) of all other junior officers. Critically, it should be noted that Table 9 only mentions the rank of the most senior officer whose presence has been recorded on the face of the Court's order for a specific case. There could have been many other civil servants present before the Court for a particular hearing, including those who were present for another matter.¹⁴³

Table 8 – Year Wise Breakdown of Number of Orders Passed in Suo Motu (sample) Cases

Year	Number of Orders
2002	7
2003	6
2004	11
2005	21
2006	25
2007	17
2008	7

¹⁴² From my interviews with the Court staff, it appears that the presence of civil servants at every hearing is not always recorded.

¹⁴³ On any given day, more than 30 cases are fixed before a bench of the Court for regular hearing. A list is circulated to the relevant parties listing the order in which cases will be called for the day, but no time as such is provided for when a matter will actually be called for hearing. Petitioners, advocates, civil servants and other interested parties, therefore, have to wait (typically in Court) till their matter is called. This provides them ample opportunity to witness proceedings in other cases, including without limitation how civil servants are being treated in other related or unrelated matters.

Table 8 Cont.	
2009	58
2010	105
2011	113
2012	172
2013	244
2014	108
2015	137
2016¹⁴⁴	49
Total	1080

Table 9 – Frequency of appearance of senior civil servants in suo motu case proceedings (2002-2015)

Rank	Number of hearings
BPS-22 (most senior officer rank)	168
BPS-21	232
BPS-20	172
BPS-19	47
BPS-18	50
BPS-17/16 (most junior officer rank)	28
No information available	383

Senior civil servants directly appearing before the Court can be said to have had a powerful impact on the civil service. One can imagine how any junior civil servant would start perceiving the Court after continuously hearing about and witnessing first-hand their senior colleagues being grilled by judges. The experience of personally appearing in court can in of itself have a remarkable effect on anyone. The structure of a court’s building, the language that judges use, their unique dress (robes) and elevated position (benches) within the courtroom, are all signals of authority which reinforce in the mind of the observer the unique position of the

¹⁴⁴ The orders passed in 2016 are lower in number since the sample does not include any suo motu cases which were initiated in this year. Additionally, some of the older suo motu cases would have been dismissed/disposed by 2016.

judiciary.¹⁴⁵ The honorific titles used for judges (most commonly “your Lordship” in Pakistan) also emphasize their legitimacy and call for obedience.

Civil servants were, however, not just appearing before the Court – they were being provided specific directions and could also be called upon to provide explanations for their conduct and that of their division. Table 10 records the nature and frequency of some of the directions issued by the Court in suo motu cases.¹⁴⁶ It is telling to note that perhaps the most common direction issued by the Court was a direction to file a compliance report and/or gather facts: the Court was expressly interested in following-up on its orders and sought regular updates from the relevant officials.

Table 10– Frequency of specific directions recorded in suo motu case proceedings during Chaudhry’s tenure

Nature of Specific Direction	Number of Times Recorded
Directed the relevant official to gather facts/report compliance	356
Directed the relevant officials to conduct a meeting and report progress ^a	25
Directed monitoring of compliance/assistance by specified officials	49

¹⁴⁵ See, generally: James L. Gibson, Milton Lodge and Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 *Law & Society Review* 4 , pp. 837-866

¹⁴⁶ While verbal directions/observations are often provided by judges in Pakistan, this table only records the directions provided in the Court’s written orders. Each order was examined to determine whether there were any specific directions given by the Court in relation to the subject matter of the issue before it. Not every written order contained specific directions. At times, the Court simply recorded the progress made in the case and adjourned the matter. If there were any directions provided, the same were recorded by using a coding sheet which described the various categories under which the direction could be classified. An order could contain numerous directions, but only three distinct sets of directions were recorded for each order. In addition, even where the same direction was provided twice (for instance, a direction to file reports to two separate agencies) at a hearing, it was still recorded only one time for that order. The object was to map the frequency of the various tools/directions used by the Court, as a case progressed, not their actual number.

Table 10 Cont.	
Directed that a matter be investigated/case registered ^b	21
Directed the production of the original record ^c	18
Directed the expenditure of financial resources ^d	25
Directed a change in existing policy ^e	26
Direction that a specified person be arrested	12
Directed that a pending inquiry/case be decided expeditiously	20
Directed that security be provided to specified persons	11
Directed the appointment of a head of an institution ^f	7
Directed that a new officer be charged with the investigation/matter and/or an officer be transferred/ removed from his/her current position	12
Directed the appointment of an amicus	20
Directed the appointment of a commission	15
Other	58

Notes:

- a. If different agencies/divisions were involved in a matter, or where the matter required the consultation of experts, the Court could direct the relevant parties to conduct a meeting (for coordination purposes) and report the findings of this meeting to it.
- b. These directions were typical in situations where the Court would want an agency to initiate criminal proceedings either by way of filing a First Information Report with the Police or by conducting an internal investigation and determining responsibility.
- c. The Court could ask the relevant agency to present in Court the original files relating to the matter. These files could contain internal opinions as well as the views of senior civil servants. It is a requirement under the Esta Code to maintain proper files and most actions by the civil service require written orders, which would be captured in these files.
- d. While any direction by the Court would lead to some financial impact on the Government, these directions capture a situation where the Court is expressly ordering the Government or an agency thereof to spend money. Examples include orders that call for the payment of compensation, provision of new jobs and the opening of new facilities for the public. For instance, in one case the Court ordered the Government to regularize the jobs of thousands of lady health workers and pay any salaries which had been withheld by the Government.
- e. The Court could order a change in an existing policy or the creation of a new policy to deal with a matter on which there are no express rules. For instance, in one case the Court ordered NADRA to issue new regulations to deal with the problems faced by Hindu married women in obtaining national identity cards.
- f. The Court gave these directions in cases where it noted that there is no permanent head of the institution/division, which was the subject of the controversy before the Court. These directions are in a sense related to the Court's insistence on not appointing government employees on a contract basis.

g. Includes some of the less recurring directions given by the Court such as payment of compensation by private corporations/individuals, dissemination of information relating to a court order, seizure of accounts, etc.

One may well argue that civil servants could simply misreport compliance. Alternatively, they could also not file reports altogether or, at the very least, stall the judicial process. And indeed, the Pakistani Supreme Court did witness all of these measures. On numerous occasions, the Court expressed its dissatisfaction with the substance of the reports presented to it.¹⁴⁷ Civil servants and government agencies also routinely failed to file reports for one reason or another. Be that as it may, the Court did have various options to ensure compliance in a particular case or, at the very least, certify the veracity of reports submitted to it. These options included:

1. *Directing that certain identified officials monitor compliance personally* – In my sample, the Court used this strategy at least 49 times. By doing so, the Court attempted to provide civil servants (with the relevant authority) an important stake in the compliance outcome: failure to comply would reflect badly on the civil servant and may also attract consequences.

Senior officials could be identified based on their previous performance before the Court or even based on their general reputation for withstanding political interference. Similar to this measure, the Court could also identify multiple government agencies to carry out its directions and shift work between them, with each agency acting as a

¹⁴⁷ While dissatisfaction was mostly noted verbally, it is telling to observe that in at least 87 of the orders passed by the Court in my sample, it noted in writing some measure of dissatisfaction with the contents of the reports presented before it.

check on the other.¹⁴⁸ Here again, different agencies could be identified based on their reputation and prior performance before the Court.

2. *Directing the appointment of amicus curiae and commissions* – If civil servants could not be trusted, the Court could always rely on experts from outside the system to verify compliance. In at least 15 cases in my sample, the Court appointed commissions with expert knowledge of the subject matter. These commissions could be employed for multiple purposes, including fact gathering, coordination between government agencies as well as monitoring compliance.¹⁴⁹ The Court could also through its order provide for a budget for the commission’s activities, which would typically be drawn directly from the Federal Government. The Court could also rely upon the extensive legal network of lawyers and judges to assist in monitoring compliance. In at least twenty of the cases in my sample, senior lawyers were appointed as *amicus curiae* to assist the Court with both legal issues as well as verification of compliance. While judges of the District Courts were not appointed that frequently to monitor compliance, the Court could always count on them as a last

¹⁴⁸ Such an action can effectively create a prisoner’s dilemma and make a coordinated disobedience effort by the executive difficult. After all, different functionaries would have different preferences. Some may, for instance, favor compliance, some may be against it, while others may just not be sufficiently invested in the matter to actively obey or disobey the Court. With multiple agencies working together, the agency least invested in compliance (or against it) may be compelled to work on a level which is equivalent to the expected compliance rate for any agency that is favoring compliance. If the agency does not do this, and the other agency provides some measure of compliance with the Court’s orders, disobedience by the non-compliant agency would be especially visible for the Court.

¹⁴⁹ In a case concerning prison reforms, for instance, the Court appointed the Secretary, Law and Justice Commission (“LJCP”) as the focal person/commission for the purposes of coordinating and monitoring compliance. The Secretary, LJCP, is appointed by the Chief Justice of Pakistan and works closely with the Supreme Court to carry out the mission of the LJCP, so there is minimal risk of political interference. The Secretary also has the resources and manpower of the LJCP at his disposal, which could be used for monitoring purposes.

resort. In a case concerning the reform of public schools, for instance, after not being satisfied with the reports submitted by the Government, the Court ordered District Judges all over Pakistan to conduct a comprehensive survey which was framed by the Court.¹⁵⁰

3. *Summoning the original record* – To verify statements made by an agency, the Court also had the option of demanding the production of the original record, as well as summoning the relevant officials to testify before it. In my sample, the original record/files maintained by an agency/division were called for at least 18 times. Civil servants, therefore, would have to think twice before misrepresenting the position of an agency/division and/or their superiors in Court.

Thus, there are multiple ways in which the Court could, if it chose to, confirm compliance or the veracity of information submitted before it. Not complying with the Court's directives or making false statements before the Court could also attract severe consequences. In this reference, perhaps the tool most often used by the Court was public humiliation.¹⁵¹ Civil servants who

¹⁵⁰ It should be noted that there are over 4200 judges in Pakistan. The number of court staff could similarly run in the thousands. See Faqir Hussain, *Judicial System of Pakistan*, Supreme Court of Pakistan Online Repository, p.18, available at:

http://www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf

¹⁵¹ There is some evidence to suggest that public humiliation or shaming works for the purposes of inducing behavioral change. The effectiveness of shaming as a punishment is particularly pronounced in Eastern cultures which emphasize collectivistic values as opposed to individualism. Collectivistic cultures have a tendency of valuing group cooperation and needs, over individual desires. Individuals in collectivistic cultures are, therefore, more sensitive to a negative evaluation by group members and would, as a result, be inclined to avoid public humiliation. In India (which shares Pakistan's history and culture), the Modi Government has recently relied on public shaming to effectively reduce the number of people who openly defecate. Even in U.S., which has an individualistic culture, judges have started to rely upon public shaming as an alternate to incarceration. See: Daniel M. T. Fessler, *Shame in two cultures: Implications for evolutionary approaches*, *Journal of Cognition & Culture* 4, pp. 207–262; Vidhi Doshi, *India turns to public shaming to get people to use its 52 million new toilets*, *The Washington Post* (Nov 05, 2017), available at: <https://www.washingtonpost.com/>; *Some*

failed to satisfy the Court were made to endure a barrage of criticism from the bench, which would often be reported in the national news.¹⁵² For instance, in a suo motu case concerning the law and order situation in Karachi, the Chief Justice is reported to have addressed the Inspector-General of Police, in the following manner: “*You need to show some seriousness, Mr IG.*”¹⁵³ The bench proceeded to cross-question the IG on the state of security provided in the region and particularly whether it was not possible for citizens to travel freely in certain areas.¹⁵⁴ The comments from the Court left the IG visibly shaken, according to some observers.¹⁵⁵ At another hearing relating to the same matter, a Supreme Court justice lectured the law enforcement personnel present before it and is reported to have said that “*the mafias are responsible for the law and order situation [in Karachi], but instead of taking any preventive measures, [you] all try to justify why no action has been taken so far.*”¹⁵⁶

This direct exchange between civil servants and the Court can be said to have had a powerful effect on the bureaucracy and an attempt also appears to have been made to stop it. At one stage in the Karachi Law and Order case, the counsel of the Inspector General reportedly

Judges Prefer Public Shaming To Prison, National Public Radio (Aug 24, 2013), available at: <https://www.npr.org/2013/08/24/215097279/some-judges-prefer-public-shaming-to-prison>

¹⁵² It is interesting to note that public humiliation of civil servants was one of the reasons provided by General Pervez Musharraf for proclaiming a State of Emergency in Pakistan on November 03, 2007. The text of the Proclamation of Emergency which led to the temporary suspension of the Constitution and the removal of numerous judges of the superior courts, included the following in its preamble: “*WHEREAS the humiliating treatment meted to government officials by some members of the judiciary on a routine basis during court proceedings has demoralised the civil bureaucracy and senior government functionaries, to avoid being harassed, prefer inaction.*”

¹⁵³ See Zeeshan Mujahid, *Karachi suo motu: Sindh police fail to impress indignant SC*, The Express Tribune (Aug 30, 2011), available at: <https://tribune.com.pk/story/242378/karachi-suo-motu-sindh-police-fail-to-impress-indignant-sc/>

¹⁵⁴ Ibid.

¹⁵⁵ See Nasir Iqbal, *SC suspends former AG’s licence to practise law*, Dawn News (Mar 27, 2015), available at: <https://www.dawn.com/news/1172128>

¹⁵⁶ Ibid.

asked the Court to “*not to solicit direct replies from his client, arguing that the IGP was not obliged to respond to the queries of the court relating to his service matters because he was not subordinate to it.*”¹⁵⁷ The Court, however, snubbed the lawyer’s requested and proceeded with its line of questioning.

Where public humiliation did not suffice the Court had other ‘sticks’ at its disposal to ensure compliance. The Court could, for instance, order the initiation of departmental proceedings against delinquent officers and mandate a senior functionary to report progress on these proceedings.¹⁵⁸ Disciplinary proceedings, even if pending, can adversely affect a civil servant’s career progression.¹⁵⁹ The Court has on occasion even proceeded to disciplining officers directly, including by way of transferring/removing the delinquent officer from their current position.¹⁶⁰ Perhaps most interesting in this reference are orders which call for the attachment of the delinquent officer’s salary till compliance is achieved.¹⁶¹ While the Court’s use of these “sticks” has not been frequent (in my sample $N < 15$), they, nevertheless, remain within

¹⁵⁷ Ibid.

¹⁵⁸ See Qaiser Zulfiqar, *NICL scam: Govt refuses to reinstate Zafar Qureshi*, The Express Tribune (Jul 14, 2011), available at: <https://tribune.com.pk/story/208674/rigmarole-cjp-reinstates-queshi-slams-fia-chief/> (The Chief Justice ordered disciplinary action against the DG FIA, Tehseen Shah, for defying court orders in a corruption related probe.)

¹⁵⁹ In this reference, it is also worth noting that the Supreme Court is the final arbiter (or forum of appeal) for disputes relating to the promotion of civil servants, so they generally have an added incentive not to displease the Court.

¹⁶⁰ In one case, the Court ordered the removal of Fayyaz Ahmed Leghari as the Provincial Police Officer of Sindh and Muhammad Ejaz Chaudhry as the Director General of the Pakistan Rangers in Sindh. See Qaiser & Zeeshan Mujahid, *Sarfraz Shah murder trial: SC turns down judge’s request for extension*, The Express Tribune (Aug 04, 2011), available at: <http://tribune.com.pk/story/223627/sarfraz-shah-murder-trial-sc-turns-down-judges-request-for-extension/>

¹⁶¹ This power was only utilized once in our sample list of orders. However, it appears that the Court relies on it from time to time to push compliance. See Nasir Iqbal, *SC gives CDA two months to formulate low-cost housing policy*, Dawn News (Sep 01, 2016), available at: <https://www.dawn.com/news/1281245>

the Court's arsenal and can be used to threaten civil servants where necessary.¹⁶² It should also be noted that any order that requires a civil servant to be transferred, removed from service, or have his/her salary attached, would be implemented by a different executive official (perhaps even from a different Ministry) who in turn may not be sufficiently driven to disobey the Court's orders.¹⁶³ The Court could, therefore, achieve its objective, at least in so far as punishing the relevant official is concerned.

Finally, the Court also has the option of indicting an official for contempt of court. Though civil servants were rarely, if ever, punished for contempt in Pakistan, the threat of being punished for contempt of court was real, especially after the Court convicted an incumbent Prime Minister for this offence (more details to follow in the next section).¹⁶⁴ The Court also actively threatened various officials with contempt and, in several cases, also charged some of them with this offence. In my sample, for instance, the Court issued show cause notices to various officials in twenty-three different matters.¹⁶⁵ Many of these matters are still pending before the Court.

¹⁶²At times, the Court would vocally threaten civil servants with a prison sentence if they failed to follow its orders. See Qaiser Zulfiqar, *NICL scam: Govt refuses to reinstate Zafar Qureshi*, The Express Tribune (Jul 14, 2011), available at: <https://tribune.com.pk/story/208674/rigmarole-cjp-reinstates-qureshi-slams-fia-chief/>

¹⁶³ Pursuant to the Rules of Business, orders relating to the attachment of salaries would typically be processed by the Finance Division; transfer orders, on the other hand, will be notified by the Establishment Division. These divisions and the officials within them are entirely different from say members of the police force or the foreign office.

¹⁶⁴ As per Section 5 of the Contempt of Court Ordinance, 2003, the punishment for committing contempt of court is imprisonment which may extend to six months and/or a fine which may extend to Rs 100, 000. In my sample, no official was actually given a prison sentence for committing contempt of court.

¹⁶⁵ A show-cause notice is the first step towards the indictment for contempt of court. If the contemnor is unable to satisfy the Court (usually by way of submitting an unconditional apology), the Court can proceed to frame a charge and formally commence contempt proceedings. See Section 17 of the Contempt of Court Ordinance, 2003, for details regarding the procedure followed by the Court.

In terms of awarding benefits to civil servants who complied with the Court's orders, the list was short. The Court could not offer much a part from say public praise and recognition. However, the Court did provide a powerful shield to those civil servants who sincerely followed the Court's orders. In doing so, it attempted to ensure that, at very least, compliant civil servants would not be punished as a result of their obedience. Thus, as we will see in the next section, where civil servants were removed or transferred from their positions as a consequence of complying with the Court's directions, the Court quickly moved to defend them.¹⁶⁶

On a broader level, the Court has also attempted to project itself as an ally of the civil service, and this could have also positively affected compliance rates. For instance, the *Anita Turab* case, among others, was a powerful signal to civil servants that the Court would step in to protect their rights. Civil servants had for long complained of political interference. The Court not only visibly sympathized with them, but also sought to protect them by passing several directions. In this reference, it is also interesting to note that the Court initiated several cases in its *suo motu* jurisdiction that were specifically aimed at positively affecting the civil service as a whole or a notable section within it. In one case, for instance, the Court issued notices to the Federal and Provincial Governments to explain why widows of retired government servants were only entitled to a half pension.¹⁶⁷ Similarly, the Court ordered the Government to explain why the Chairman of the Punjab Service Tribunal had not been appointed, as this was causing delay in the adjudication of cases relating to civil servants.¹⁶⁸ In another case, the Court took notice of

¹⁶⁶ It may be noted that in my sample the Court has had to utilize this power only in exceptional cases. From my review of the relevant orders, it appears that the Government removed civil servants from service only rarely as a consequence of their compliance with the Court's directions. And in all such cases, where this occurrence was highlighted to the Court, it attempted to protect them.

¹⁶⁷ See SMC 23 of 2009

¹⁶⁸ See SMC 4 of 2013

the lengthy process of filing an appeal under the Service Tribunals Act and even opined that this process could violate a civil servant's fundamental right to a fair trial.¹⁶⁹

The Court, therefore, actively attempted to build a strong relationship with the civil service. Civil servants now have a number of reasons to fight for the Court or at least not against it: their collective interest, after all, is closely aligned with the Court's authority.

III. TESTING THE COURT'S COMMAND OF THE BUREAUCRACY

To gauge whether the Court was successful in commanding the bureaucracy, one needs to confirm the degree to which the Court was able to secure compliance. After all, the Court's attempt to control the civil service would be without meaning, if it was unable to achieve compliance despite exercising this control. Testing compliance, however, raises a number of issues. Firstly, there is the question of measuring compliance. If a judicial order directs wide changes in social behavior, then it's typically difficult to both map and quantify compliance.¹⁷⁰ Secondly, there is always the issue of timing. When do we measure compliance? Changes in social behavior often take time to process. If we measure compliance right after the decision we will almost often find no measurable effects, so we need to give some time for the judgment to be absorbed by the community. But how much time is enough? If we give too much time,

¹⁶⁹ See SMC 1 of 2015

¹⁷⁰ This subjectivity increases manifold in cases involving social policy, especially where there's an absence of relevant data. This is not to say that impact studies are not possible. Indeed, several attempts have been made to measure the social impact of judicial decisions. See, for instance, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press (2008) (Rosenberg provides a rich empirical account of the successes and failures of the U.S. Supreme Court in desegregation of public schools and promotion of civil rights, among other issues. See also: César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, Texas Law Review. 89 (2011) (Garavito considers the direct and indirect effects of judicial intervention in the context of Latin America.)

compliance may have been influenced by several intervening actors and that would make it difficult to directly attribute the result to the court's order.¹⁷¹ Thirdly, and perhaps related to the previous issue, is the problem of isolating the preferences of other actors. To test the Court's success in commanding the civil service, we need to identify cases where the Government has contested this command. The Court's success is only meaningful if it has overcome resistance from the Government; otherwise, it is simply acting as a rubberstamp, or at best an agenda setter. Finally, we need to be sure that the Court's order is within the capacity or competence of the civil service for the purposes of implementation. If the order itself is not implementable, then it would be wrong to think that the Court was unsuccessful because it did not control the "sword" or the "purse" per se.

To address these issues, I have identified certain cases involving high-level "political corruption"¹⁷² as the relevant test subjects. A corruption matter makes for a good case study because compliance is generally easy to measure in these cases. The Court's key objective in these cases is to ensure the recovery of money and a fair investigation/filing of charges against those involved. The fulfilment of these objectives can typically be mapped easily. They also raise fewer questions of timing or for that matter competence. Law enforcement agencies routinely investigate financial crime – investigating public corruption should be no different. Importantly, high-level political corruption cases will typically invite resistance from the Government, perhaps more so when compared with any policy based decision. Corruption cases not only raise

¹⁷¹ See Martin Shapiro, *The Supreme Court Speaks...and What Happens--The Impact of the Supreme Court: Chapter 4*, 23 J. Legal Educ. 77 (1970), p. 81

¹⁷² I use the word "political corruption" to signify issues where a member (e.g. Cabinet Minister) of the Government is directly accused of monetary corruption i.e. he or she has gained a direct and illegal personal monetary benefit by abusing political office. In this sense, the definition of political corruption is narrower than abuse of power or nepotism.

public opinion and reputational concerns for the accused members of the Government, they can also lead to criminal charges. The stakes are, therefore, very high. Indeed, as the first chapter of the dissertation noted, in my sample disobedience of the Court's directions was most often noted in corruption matters.

For the purposes of testing compliance, I have identified the following three cases which implicated members of the Government at the highest level and, in turn, invited extensive disobedience: (i) the National Reconciliation Ordinance implementation case,¹⁷³ which called for, among other things, the re-opening of money laundering and embezzlement cases against the then incumbent President Zardari; (ii) the Hajj corruption case,¹⁷⁴ which raised direct allegations of corruption against a Federal Minister and also indirectly implicated the Prime Minister; and (iii) the rental power plant scam case,¹⁷⁵ which directly implicated a Federal Minister who went on to become the Prime Minister. In each of these cases, the Court passed over twenty orders. So along with executive resistance there was a fair bit of follow-up from the Court. Admittedly, these cases chiefly called upon civil servants connected with law enforcement agencies (for instance, officials working in the National Accountability Bureau, the Police and the Federal Investigation Agency), to comply with the Court's orders. However, the Court's impact on their behavior should similarly apply to civil servants working in other Divisions and Ministries since they carry roughly the same terms and conditions of service as these agencies. What follows is a discussion of how the Court countered resistance from the executive in three cases involving high-level political corruption.

¹⁷³ SMC 4 of 2010

¹⁷⁴ SMC 24 of 2010

¹⁷⁵ HRC No. 7734-G of 2009

(i) *The NRO Implementation Case*

On October 5th, 2007, General Pervez Musharraf brought into force the National Reconciliation Ordinance, 2007 (“NRO”).¹⁷⁶ The overt object of the NRO was to provide protection to politicians and civil servants who had been allegedly politically victimized and charged for various crimes between January 1, 1986, and October 12, 1999.¹⁷⁷ The NRO, however, was not motivated by Musharraf’s political altruism. As many observers have reported, this law was a product of lengthy negotiations between the Pakistan Peoples’ Party (PPP) led by Benazir Bhutto and Musharraf. Bhutto had essentially conditioned her return to Pakistan and support for Musharraf on the closure of various criminal cases against her, her husband and numerous other PPP workers.¹⁷⁸ And, as the list of NRO beneficiaries later confirmed, almost 97% of the people who benefited under this law belonged to Sindh¹⁷⁹ – the center of the PPP’s voting base and power.

The NRO was immediately challenged before the Supreme Court. Among others things, it was argued that the law’s selective amnesty scheme violated the fundamental right of equality enshrined under the Constitution. The challenge was strong, but would not be given a fair hearing for at least another year. In November, 2007, Musharraf declared a state of emergency and forced Chaudhry and his loyal cohort of judges out of office.¹⁸⁰ Musharraf

¹⁷⁶ See *National Reconciliation Ordinance: Supremely divisive law called NRO revisited*, The Express Tribune (Jan 17, 2012), available at: <https://tribune.com.pk/story/322744/national-reconciliation-ordinance-supremely-divisive-law-called-nro-revisited/>

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ See Adil Najam, *The Politics of NRO: Beneficiaries List Released*, All Things Pakistan (Nov 22, 2009) available at: <https://pakistaniat.com/2009/11/22/pakistan-nro-beneficiaries/>

¹⁸⁰ See *General (r) Pervez Musharraf v. Nadeem Ahmed Advocate*, Civil Review Petition Nos. 328 & 329 Of 2013 In Constitution Petition Nos. 8 & 9 Of 2009

resigned a year later and, under tremendous public pressure, all of the deposed judges were restored to office by March 2009.¹⁸¹ The very same year, on December 16th, the NRO was declared as being unconstitutional.¹⁸² The Court additionally ordered that all cases, enquiries, and investigations, which had been withdrawn or terminated under the NRO, stood revived and should be pursued by the relevant authorities.¹⁸³ Critically, the Court wanted to Government to re-open and pursue a money laundering and embezzlement case that had been filed in Switzerland against Benazir Bhutto and the now incumbent President Zardari.¹⁸⁴ The Court also felt that it couldn't trust the NAB to diligently pursue these cases and so ordered it to submit periodical reports to a specified monitoring cell which was to be established at the Supreme Court.¹⁸⁵ Similar monitoring cells were ordered to be constituted in each of the provincial High Courts.¹⁸⁶

Following the judgment, the NAB sprang into action and requested the Ministry of Interior to place the names of 248 people on the country's Exit Control List, effectively prohibiting these people from leaving the country.¹⁸⁷ On the recommendations of the Court,

¹⁸¹ See Nick Schifrin, *Pakistani Chief Justice Iftikhar Chaudhry Reinstated*, ABCnews (March 16, 2009), available at: <http://abcnews.go.com/International/story?id=7094949>.

¹⁸² See *Dr. Mubashir Hassan, etc. v. Federation of Pakistan* (PLD 2010 SC 265)

¹⁸³ *Ibid.*

¹⁸⁴ The case related to kickbacks allegedly paid by two Swiss Companies, Cotecna & Sgs, in relation to contracts granted to them by the Government of Pakistan. The case was filed in Switzerland and led to the Swiss Government freezing certain accounts of Benazir Bhutto and Asif Ali Zardari. In the 1990s, the Attorney-General of Pakistan requested that the Government of Pakistan should made a civil party in those proceedings. After the promulgation of the NRO, another letter was sent to the Swiss authorities by the then Attorney-General for Pakistan, Malik Muhammad Qayyum, for withdrawal of proceedings against Zardari and Bhutto.

¹⁸⁵ See Paragraph 14 of Order dated December 16, 2009, passed in *Dr. Mubashir Hassan, etc. v. Federation of Pakistan* (Const. Petitions 76-80 of 2007 and 59 of 2009)

¹⁸⁶ *Ibid.*

¹⁸⁷ See *248 bigwigs' names put on ECL*, The News (Dec 18, 2009), available at: <https://www.thenews.com.pk/archive/print/668447-248-bigwigs-names-put-on-ecl>

the NAB also dismissed its Prosecutor General and Deputy Prosecutor General.¹⁸⁸ The Chairman, NAB, also tendered his resignation.¹⁸⁹ All seemed well until the Chief Justice came across a news report which mentioned that a beneficiary of the NRO, Ahmed Riaz Sheikh,¹⁹⁰ had been appointed as the head of the Economic Crimes Wing of the Federal Investigation Agency.

On March 29th, 2010, the Chief Justice (taking suo motu notice of Riaz's appointment) ordered the NAB and the Federal Government, among others, to ensure compliance with the letter and spirit of the NRO verdict (which *inter alia* required resumption of cases against NRO beneficiaries and not their appointment to senior executive positions!)¹⁹¹ For the purposes of my main argument, this order is interesting from two perspectives. Firstly, it demonstrates how the Court can effectively monitor compliance by relying upon independent media sources. Secondly, it confirms the interest of the Court in ensuring the propriety of appointments to key executive positions. The focus of this suo motu case, however, was not simply the appointment of Ahmed Riaz Sheikh, which the Court was quick to declare as unlawful; the Court also wanted the NAB to ensure the accountability of all those who were responsible for any such illegal appointments, as well as pursue cases against the illegal appointees. Moreover, the Court wanted the Government to take active steps towards re-opening cases against President Zardari. This direction above all others would become the real point of contention between the Court and the Government in the coming months.

¹⁸⁸ See *NAB Chairman Naveed Ahsan resigns*, Dawn News (Feb 24, 2010), available at: <https://www.dawn.com/news/522017>

¹⁸⁹ *Ibid.*

¹⁹⁰ Before the promulgation of the NRO, Ahmed Riaz Sheikh had been sentenced to 14 years rigorous imprisonment and was also dismissed from a Government job in 2002.

¹⁹¹ See Order dated April 26, 2012 in SMC 4 of 2010, para 6.

All relevant Government functionaries, including the Attorney General and the Secretary, Ministry of Law and Justice, were ordered to appear before the Court and submit compliance reports, specifically in relation to the resumption of the Swiss cases against President Zardari. On April 1st, 2010, the Court was informed that the NAB had written a letter to the Swiss authorities in this reference, but the Court remained unsatisfied – it wanted the Government to follow the same protocol and process which it had adopted while withdrawing these cases.¹⁹² Since, the matter related to communication between two sovereign States, the Court also wanted this communication to be routed directly through the Federal Government. This effectively required the approval of the Prime Minister, who it should be noted had been elected to this office on the PPP’s ticket (President Zardari was the Chairman of this party). What followed, therefore, were numerous months of back and forth between the Federal Government and the Court.

The Court kept pressing the relevant executive officials to ensure compliance. Senior executive functionaries were summoned to Court on a day-to-day basis for reporting progress and they were quickly running out of excuses for non-compliance. The then Attorney General, Anwar Mansoor Khan, was the first to resign.¹⁹³ In his letter of resignation he openly declared that the Ministry of Law and Justice and Human Rights (“Law Ministry”) was not cooperating with him and that he could not fulfil his duty absent this cooperation.¹⁹⁴ The focus of the Court naturally shifted to this Ministry and so not surprisingly, the next person to resign was

¹⁹² Ibid., para 7

¹⁹³ Ibid., para 8

¹⁹⁴ The AG had openly declared before the Court that “*he did his best to have access to the record of the case lying with Ministry of Law, Justice & Parliamentary Affairs, but Mr. Babar Awan, Minister of the Ministry, was not allowing him to lay hands on the same for one or the other reason.*” Ibid., para 7

the then Secretary of this Ministry, Aqil Mirza.¹⁹⁵ Wary of the political pressure which was preventing civil servants from rendering compliance, the Court summoned the Law Minister himself.

On May 25th, 2010, the then Law Minister, Babar Awan, appeared before the Court and submitted that his Ministry had prepared and presented a summary to the Prime Minister which related to the implementation of the Court's directions.¹⁹⁶ The Court was not satisfied and required the production of the relevant summary and all internal opinions of the Law Ministry. Through this process, the Court came to the conclusion that the Law Ministry had actually advised the Prime Minister to effectively ignore the Court's directions. The Court, however, went on to openly declare that this opinion was invalid and that a new summary should be circulated to the Prime Minister, which required implementation of the Court's directives.¹⁹⁷ The Government still kept delaying the matter. Accordingly, on September 20th, 2010, the Law Secretary was summoned by the Court and specifically directed to send a revised summary to the Prime Minister by the very next day. The Secretary complied, but this summary too did not meet the expectations of the Court; through it the Prime Minister was advised to delay implementation of the Court's directives, at least for the time that President Zardari was in office (the Ministry had taken the position that the Constitution provided immunity to the President and that this should be respected).¹⁹⁸

¹⁹⁵ While Mirza cited health reasons as a cause of his resignation, it should be noted that his resignation coincided with when he was due to appear before the Court and justify non-implementation of the NRO verdict. See Nasir Iqbal, *Swiss cases: SC asks former law secretary to appear on Friday*, Dawn News (May 14, 2010), available at: <https://www.dawn.com/news/535669>

¹⁹⁶ See Order dated April 26, 2012 in SMC 4 of 2010, para 10

¹⁹⁷ *Ibid.*, para 11

¹⁹⁸ *Ibid.*, para 61

In the political arena, the Government was taking the position that it was not implementing the Court's directives because a review petition relating to the NRO verdict was pending before the Court. The Court, therefore, started hearing the review petition and temporarily suspended the NRO implementation proceedings.¹⁹⁹ Though the NRO order still held the field, the Court's attention switched to the review matter and other aspects of the NRO verdict, specifically as they related to the illegal appointments of NRO beneficiaries (such as Ahmed Riaz Sheikh). At one stage, the Court ordered that two NRO beneficiaries be arrested and taken into custody from the Court premises.²⁰⁰ At another hearing, the Court heard from officers within the NAB who had complained that their superiors were hampering the investigation.²⁰¹ The Court quickly moved to address their concerns. Additionally, the Court admitted a petition which challenged the Government's appointment of Deedar Hussain, as the Chairman of the NAB. Hussain was known to be quite close to President Zardari and it was clear that his appointment was made in a bid to influence the various corruption cases against the political leadership, including those stemming from the NRO. Within a matter of six months, however, the Court defeated this move. It set aside Hussain's appointment as the Chairman, NAB, for being unlawful.²⁰²

¹⁹⁹ Ibid., para 11

²⁰⁰ See Nasir Iqbal, *Adnan Khwaja, Brig Imtiaz go to jail from SC*, Dawn News (Sep 22, 2010), available at:

<https://www.dawn.com/news/564289>

²⁰¹ Deputy Prosecutor General, Raja Aamir Abbas, submitted before the Court that the Acting Chairman of the NAB had deprived him of access to the relevant record and was thereby interfering with the investigation. See *SC orders fresh summary for Swiss cases reopening*, The Nation (Sep 22, 2010), available at: <https://nation.com.pk/22-Sep-2010/sc-orders-fresh-summary-for-swiss-cases-reopening>

²⁰² See Qaiser Zulfiqar, *Accountability chief sent packing*, The Express Tribune (Mar 11, 2011), available at: <https://tribune.com.pk/story/130501/sc-declares-nab-chairmans-appointment-illegal/>

On November 25th, 2011, the Court finally dismissed the review petition, which was filed against the NRO decision, and ordered the Government “*to comply with the judgment dated 16.12.2009 in letter and spirit without any further delay.*”²⁰³ To the Court’s dismay, however, the Government proceeded with disobedience. The NAB also refused to proceed in the matter of Ahmad Riaz Sheikh, among others, essentially finding that his illegal appointment lacked criminal intent. Given this persistent disobedience, the Court passed an order outlining six different routes it could take to address the willful disobedience by the Government.²⁰⁴ These options included: (i) issuance of contempt notices to the Prime Minister, the Federal Law Minister, as well as the Federal Law Secretary; (ii) recording a finding that the Prime Minister, among others, was not “honest”, which would essentially affect his ability to remain a Member of Parliament;²⁰⁵ (iii) constitution of a commission by the Court which could directly implement its directions; (iv) providing the Government an opportunity to argue the defense of Presidential immunity, which had so far not been formally raised before the Court; (v) recording a finding of “misconduct” on part of the Chairman, NAB, and directing his removal from office; and (vi) exercising judicial restraint and essentially leaving the matter to the “*better judgment of the people.*” This order captured the frustration of Court and also a sense of defeat (especially the last option), but it also provided an overview of the tools the Court had at its disposal to get an order implemented.

Following this order, the NAB, at least, started showing some seriousness in pursuing cases against the NRO beneficiaries. The Chairman of the NAB also submitted an unconditional

²⁰³ See *Federation of Pakistan v. Dr. Mubashir Hassan, etc.* (PLD 2012 SC 106)

²⁰⁴ See Order dated January 10, 2012 in SMC 4 of 2010

²⁰⁵ Article 62 of the Constitution sets out the various qualifications required for becoming a Member of Parliament. One of these qualifications is that person “*is sagacious, righteous and non-profligate, honest and ameen, there being no declaration to the contrary by a court of law.*”

apology to the Court, which was accepted.²⁰⁶ The matter of reopening the Swiss cases against the President, however, remained a sticking point for the Court and so on January 16th, 2012, it proceeded to issue a show-cause notice for contempt of court to the Prime Minister. Over the course of the next three months, the Court heard this matter over twenty times and ultimately found that the Prime Minister was guilty of contempt of court.²⁰⁷ While the law permitted a maximum sentence of six months, the Court only symbolically sentenced him to imprisonment till the rising of the Court (a sentence which lasted a total of 37 seconds, according to some accounts).²⁰⁸ The Court, however, noted that the real consequence of his conviction may actually be his disqualification as a Member of Parliament and that this was a “*mitigating factor*” in his sentencing.²⁰⁹

Article 63 (g) of the Constitution states that a conviction for, “*acting in any manner, prejudicial to the... integrity or independence of the judiciary of Pakistan,*” shall lead to the disqualification of a Member of Parliament. This Article, however, also prescribes a defined procedure for disqualification. If any question arises relating to the disqualification of a Member, the Speaker (who at the time had also been elected by the PPP) of the National Assembly is required to refer this question to the Chief Election Commissioner, who in turn is required to refer this matter to the Election Commission for a firm decision.²¹⁰ Prime Minister Gilani did not resign following his conviction, despite calls for doing so from the opposition. And on May 25th,

²⁰⁶ See *Nab Chief Apologizes, Supreme Court Accepts*, The Pakistan Today (Jan 17, 2012), available at: <https://www.pakistantoday.com.pk/2012/01/17/nab-chief-apologises-supreme-court-accepts/>

²⁰⁷ See Order dated April 26, 2012 in SMC 4 of 2010, para 72

²⁰⁸ See Nasir Iqbal, *37-second contempt punishment causes confusion: Govt, allies decide to challenge verdict: Down but not out*, Dawn News (April 26, 2012), available at: <https://www.dawn.com/news/713711>

²⁰⁹ See Order dated April 26, 2012 in SMC 4 of 2010, para 72

²¹⁰ See Article 63 (2) of the Constitution

2012, the Speaker too refused to refer the matter of his disqualification to the Chief Election Commissioner.²¹¹ It appeared, at least for the time being, that the Court's efforts had failed. But the Court did not budge.

The Chaudhry Court entertained a petition challenging the Speaker's ruling and within a month it found that the Speaker had acted unlawfully.²¹² The Court held that the Speaker had no discretion in the matter and that the Prime Minister had effectively been disqualified from office from the date of his conviction for contempt of court. The Election Commission of Pakistan was directed to simply issue the notice of disqualification, which it did a few hours later: Prime Minister Gilani was finally shown the door for refusing to implement the Court's directions. The issue of fully implementing the NRO verdict, however, remained.

The new Prime Minister, Raja Pervez Ashraf, was also loyal to the President and initially resisted the Supreme Court's demand of implementation. The Government also simultaneously moved to amend the law relating to contempt of court. The new law (the Contempt of Court Act, 2012), would provide greater protection to holders of public offices, such as the Prime Minister, from contempt of court.

²¹¹ See Irfan Ghauri, *The final word?: Speaker refuses to disqualify PM*, The Express Tribune (May 25, 2012), available at: <https://tribune.com.pk/story/383974/the-final-word-speaker-refuses-to-disqualify-pm/>

²¹² See Jon Boone, *Pakistan's prime minister Yousuf Raza Gilani disqualified by supreme court*, The Guardian (June 19, 2012), available at: <https://www.theguardian.com/world/2012/jun/19/pakistan-prime-minister-yousuf-gilani-disqualified>

The Court quickly moved to declare the new law as being unconstitutional.²¹³ It also issued a contempt notice to Prime Minister Ashraf.²¹⁴ Under immense pressure, the Prime Minister finally succumbed and a month later agreed to formally write to the Swiss authorities for re-opening the relevant cases against the President.²¹⁵ The Court, however, was still not satisfied. It wanted the Government to only send a letter, the text of which had been approved by the Court. And so, finally, after revising four separate drafts of the letter, the Court agreed to a version which had been proposed by the Government.²¹⁶

The NRO decision required the Government to re-open cases against senior political functionaries, including the incumbent President. Unsurprisingly, the Court faced extensive disobedience; however, after almost three years of continuous struggle, it got what it wanted. The Court forced the Government to re-open cases against the President, who also happened to be the Chairman of the ruling party.²¹⁷ While the Government succeeded in delaying this consequence for a long time, this cost it a Prime Minister, an Attorney General, two Chairmen of

²¹³ See *SC declares Contempt of Court Act 2012 illegal*, The News (Aug 04, 2012) available at: <https://www.thenews.com.pk/archive/print/624228-sc-declares-contempt-of-court-act-2012-illegal>

²¹⁴ See Declan Walsh and Salman Masood, *New Pakistani Premier Faces Contempt Notice on Corruption Inquiry*, The New York Times (Aug 08, 2012), available at: <http://www.nytimes.com/2012/08/09/world/asia/raja-pervez-ashraf-faces-contempt-charges-in-pakistan.html>

²¹⁵ See *NRO Case: Govt to withdraw Malik Qayyum's letter*, The Pakistan Today (Sep 18, 2012), available at: <https://www.pakistantoday.com.pk/2012/09/18/nro-case-govt-to-withdraw-malik-qayyums-letter/>

²¹⁶ See Nasir Iqbal, *NRO case: SC approves draft presented by Naek, review petition withdrawn*, Dawn News (Oct 11, 2012), available at: <https://www.dawn.com/news/755757>

²¹⁷ Some might suggest that the struggle between the Court and the Government was nothing but an ego war. After all, the Swiss Government ultimately held that it would not open cases against President Zardari, despite having received a letter from the Government requesting the re-opening of these cases (in accordance with the Court's directions). See Mohsin Ali, *Swiss refuse to reopen Zardari graft case*, Gulf News (Feb 10, 2013), available at: <http://gulfnews.com/news/asia/pakistan/swiss-refuse-to-reopen-zardari-graft-case-1.1144587>

the NAB, and a Federal law Secretary. Some of these functionaries resigned willingly (perhaps under the threat of public humiliation), whereas others were forcibly driven out of office by the Court. Public data is limited to fully determine the fate of all NRO beneficiaries and, in particular, whether any action was taken against them (the Court appears to have lost interest in the case once the Swiss letter was written). However, some news reports do suggest that by December 2012, the NAB had submitted references in the matter relating to the illegal appointments of Ahmed Riaz Sheikh and other NRO beneficiaries; it also appeared to be pursuing these cases vigorously.²¹⁸

(ii) *The Hajj Corruption Case*

The Pakistani Government facilitates thousands of Muslim pilgrims each year who travel to Makkah for the rite of *Hajj*. In 2010, a number of news outlets began reporting various instances of corruption and mismanagement in the *Hajj* arrangements which had been made by the Government that year. Some Parliamentarians, like Senator Khalid Mehmood Soomro, personally appealed to the Chief Justice to investigate the matter. In addition, Prince Bander Bin Khalid Bin Abdul Aziz al-Saud, a member of the Saudi royal family, sent a letter to the Court (addressed to the Chief Justice) alleging corruption on the part of the Pakistani officials who had made the relevant accommodation arrangements for the pilgrims. Initially, the Court only sought comments from the Secretary of Religious Affairs and the Ministry of Foreign Affairs.²¹⁹

²¹⁸ For instance, in December, 2012, the NAB issued summons for the former Prime Minister Gilani to appear before it and provide his statement in the case pertaining to the appointment of Adnan Khawaja (a NRO beneficiary), as the Managing Director of the Oil and Gas Company Limited. See *Adnan Khawaja appointment case: NAB summons Gilani*, Dawn News (Dec 04, 2012), available at: <https://www.dawn.com/news/768833>

²¹⁹ This order is interesting in that through it the Court is also coordinating with the Foreign Office. It states in relevant part as follows: “...*This issue seems to be serious and may cause bad name for our Government. Call for comments from Secretary, Religious Affairs and this matter*”

However, the Court's probe expanded drastically after news broke suggesting that the Director-General for Hajj Operations, Rao Shakeel Ahmed, had been appointed to his office in violation of the relevant rules and with the specific object of facilitating corruption. Accusations of direct involvement were hurled against a serving Federal Minister as well as against the Prime Minister.

The Hajj corruption scandal was formally registered as a suo motu case on December 12th, 2010.²²⁰ Based on the Court's first few orders, it seems that the following two issues or objectives were key for it: i) compensating the pilgrims for their suffering; and ii) ensuring a fair investigation of the *Hajj* scam. The first issue was relatively easy to resolve. The Court ordered the payment of compensation to each pilgrim and the Government quickly complied. Within a month of the initiation of the case, the Secretary, Religious Affairs, submitted before the Court that an arrangement had been made to disburse SR 700 to the pilgrims.²²¹ The second issue, however, remained a source of contention for the Court and the Government.

From the very onset of the case, the Court was not satisfied with the manner Waseem Ahmed, the then Director General ("DG") of the Federal Investigative Agency ("FIA") was

be also brought into the notice of Foreign Affairs." See Order dated October 19th, 2010 in SMC 24 of 2010

²²⁰ It is interesting to note that the Court also refers to the personal experience of a judge, as another source for taking the suo motu action. The order mentions that while performing *Hajj* a number of pilgrims approached Justice Khalil-ur-Rehman Ramday and complained of the ill treatment they had received. Justice Ramday conveyed his experience and some of the written complaints to the Chief Justice for further action. This is noteworthy since it shows how the personal experience of justices in Pakistan can also inform the Court's agenda and be employed for monitoring purposes. See Order dated November 11th, 2013 in SMC 24 of 2010, paras 7-9

²²¹ See Order dated November 11th, 2013 in SMC 24 of 2010, para 9. The Court also ordered the Secretary to procure (for the Court's perusal) a comprehensive report from all banks which had managed the disbursement. The Court, it appears, was really getting in the weeds and did not want to leave any loophole.

handling the investigation. The Court first ordered Ahmed to depute a senior officer to lead the investigation. The investigation at the time was being headed by a BPS Grade 16 officer, who, in the Court's opinion, was too junior to pursue this sort of investigation.²²² Ahmed complied and assigned the matter to a senior officer. The Court was still not satisfied and saw Ahmed himself as a hindrance to the investigation. So the Court proceeded to order that Ahmed should disassociate himself from the investigation entirely.²²³ In compliance with the Court's directives, the Government ordered that Syed Jawed Ali Shah Bokhari, a senior police officer, would (instead of Ahmed) supervise the workings of the FIA in relation to this investigation. It is interesting to note that his official notification of transfer specifically stated that he was to *“report progress/seek further instructions from Supreme Court of Pakistan in the next hearing fixed on 20th January 2011.”*²²⁴

The Court was still irked by Ahmed's presence in the FIA, who as the DG of the entire organization could indirectly influence the outcome of the investigation. Of particular concern for the Court was Ahmed's status as a retired civil servant who had been appointed on contract to serve as the DG, FIA. From the Court's perspective, the nature of Ahmed's contractual employment could weaken his resolve to rule against the Government. The Court wanted to see the FIA being headed by an officer who had the security of tenure, among other things, and so it started pressurizing the Government to justify the re-employment of all retired civil servants. The Court sought records of any such contractual civil servants; subsequently, it also issued notices to these employees.²²⁵ In pursuance of the Court's directions, the Government removed a number

²²² Order dated July 29th, 2011 in SMC 24 of 2010, para 9

²²³ See Order dated January 20th, 2011 in SMC 24 of 2010, para 2

²²⁴ See Order No.7/138/2010-FIA dated January 17th, 2011, issued by the Government of Pakistan, Ministry of Interior.

²²⁵ See Order dated January 20th, 2011 in SMC 24 of 2010, paras 4-6

of contract employees; however, Ahmed, among others, was retained on the basis that he was dealing with some important matters of national security which required his supervision.²²⁶ The Court was irked by the Government's response; sensing the Court's fury, and perhaps the damage to his reputation, Ahmed resigned.²²⁷

As the *Hajj* corruption investigation was making progress, the Government made its next move. All of a sudden, the lead investigator, Hussain Asghar, was transferred to a different location in a different department.²²⁸ As the Court noted in one of its orders, after the transfer of Asghar all progress in the Hajj corruption case came to a halt.²²⁹ The Court was not pleased with this action and ordered that Asghar should be immediately transferred back to the FIA and assigned to continue his work on the *Hajj* Corruption case.²³⁰ The Government would not budge, but the Court maintained its pressure on Sohail Ahmed, the then Secretary, Establishment Division, and also the main civil servant responsible for notifying transfers and appointments of Federal civil servants. While the transfer of senior civil servants (like Asghar) requires the approval of the Prime Minister, under the direction of the Court, Sohail Ahmed issued a notification which recorded the immediate transfer of Asghar back to the FIA.²³¹

The Government did not appreciate Sohail Ahmed's move to implement the Court's directives. The Prime Minister immediately ordered that he be transferred and made OSD,²³²

²²⁶ See Order dated March 11th, 2011 in SMC 24 of 2010, para 3

²²⁷ See *DG FIA Waseem Ahmed resigns from post*, Dawn News (Apr 06, 2011), available at: <https://www.dawn.com/news/618754>

²²⁸ See Order dated July 29th, 2011 in SMC 24 of 2010, para 13

²²⁹ *Ibid.*, para 14

²³⁰ *Ibid.*, para 15

²³¹ *Ibid.*, para 16

²³² See *Establishment secretary caught in crossfire*, Dawn News (Jul 26, 2011), available at: <https://www.dawn.com/news/647225>

which as mentioned earlier is a form of punishment for civil servants: their portfolio is taken away and they are effectively suspended from service. The Court immediately recognized the motive behind this move and also its possible impact on other civil servants. The Court noted that:

“If such acts are allowed to continue, it will have serious impact on the officials/authorities and will send message to them that if they comply with orders of Supreme Court without seeking prior approval of the Competent Authority, they will be posted out or they shall be proceeded against departmentally. Moreover, it would discourage upright, honest and committed officers as well. Therefore, under these circumstances, this Court cannot leave such officers at the mercy of the Executive to deal with them in a manner they like.”²³³

Accordingly, it ordered that the notification placing Sohail Ahmed as OSD was not sustainable in law. Ahmed was ordered to be re-posted either as the Secretary Establishment or be given *“any other assignment commensurate with his status, performance, ability and work [experience] etc., as early as possible, but not later than a period of 7 days.”²³⁴* The Government complied and posted Ahmed as the Secretary, Narcotics Division, within a matter of two days.²³⁵

Hussain Asghar had been officially posted back to the FIA, but perhaps under pressure from the Government, he refused to accept his responsibility as the lead investigator for the *Hajj* scam.²³⁶ This also irked the Court. The Court ordered the initiation of departmental proceedings against Asghar for refusing to follow the Court’s directions. As a consequence of the Court’s directions, Asghar was suspended from his position.²³⁷ When Asghar finally budged under the

²³³ See Order dated July 27th, 2011 in SMC 24 of 2010, para 6

²³⁴ See Order dated July 29th, 2011 in SMC 24 of 2010, para 40

²³⁵ See Zahid Gishkori, *SC Order Compliance: Sohail Ahmed made narcotics’ division boss*, The Express Tribune (Aug 01, 2011) available at: <https://tribune.com.pk/story/221849/sohail-ahmed-appointed-secretary-narcotics-control/>

²³⁶ See Order dated November 11th, 2013 in SMC 24 of 2010, paras 20-21

²³⁷ Ibid.

Court's pressure and accepted responsibility for the investigation, the Court ordered that he be reinstated to his old position.²³⁸ The Government complied.²³⁹

With Asghar and his team back on the investigation, it appears that things moved forward. The Court in one of its final orders notes that nearly all of the accused persons were arrested.²⁴⁰ Ahmed Faiz, who was one of the primary accused, was also repatriated back to Pakistan and arrested.²⁴¹ The investigation team even festered the courage to summon the former Prime Minister Gilani in connection with the illegal appointment of Rao Shakeel Ahmed.²⁴² The Court appeared to be satisfied with the progress and stopped regularly hearing the matter after issuing a comprehensive order in December 2013. In this order, the Court also directed the FIA to, among other things, take “*strict action against all those persons including politicians, officers and others in echelons of power, who interfered with and hampered the investigation.*”²⁴³ There is, however, nothing on the Court record which suggests that this was done. Nonetheless, it is clear that once the Court took a backseat, things moved very slowly. Thus, after Chaudhry's retirement, when the Court examined the case's progress in 2015, it was angered to note that even after five years the final charge sheets had not been submitted.²⁴⁴ The Court proceeded to

²³⁸ See *Ex-investigation officer in Haj case reinstated, SC told*, The News (Sep 27, 2012), available at: <https://www.thenews.com.pk/archive/print/387558>

²³⁹ *Ibid.*

²⁴⁰ See Order dated November 11th, 2013 in SMC 24 of 2010, para 32

²⁴¹ See Hasnaat Malik, *Hajj scam: Accused deported from Saudi Arabia after four years, FIA tells SC*, The Express Tribune (Sep 12, 2014), available at: <https://tribune.com.pk/story/761419/hajj-scam-accused-deported-from-saudi-arabia-after-four-years-fia-tells-sc/>

²⁴² See *Hajj corruption case: FIA summons Yousaf Raza Gilani, son*, The Express Tribune (Nov 14, 2012), available at: <https://tribune.com.pk/story/465520/hajj-corruption-case-fia-summons-yousaf-raza-gilani-son/>

²⁴³ See Order dated November 11th, 2013 in SMC 24 of 2010, para 41.

²⁴⁴ See *SC grills FIA in Hajj corruption case*, The Pakistan Today (Feb 03, 2015), available at: <https://www.pakistantoday.com.pk/2015/02/03/sc-grills-fia-in-haj-corruption-case/>

issue contempt notices to the relevant FIA officials.²⁴⁵ As a result, the former Minister for Religious Affairs, Hamid Saeed Kazmi along with Rao Shakeel, among others, were charged and even sentenced by a special trial court.²⁴⁶ It is, however, interesting to note that recently they were acquitted by the Islamabad High Court which while accepting their appeal found that the “*FIA had failed to collect any substantial evidence to link the accused with the offence.*”²⁴⁷

The *Hajj* corruption case directly implicated a Federal Minister, and indirectly the Prime Minister. And for this reason, perhaps, the Government did not make it easy for the Court to achieve compliance, at least in so far as the corruption investigation was concerned. However, the Court made important inroads in the case by capturing (so to speak) the FIA and its main officers who been charged with the investigation. Under the threat of humiliation, it first drove the DG, FIA, to resign. It then assumed direct control of the investigation by having all key officials report case progress directly to it. When the Government reacted by penalizing these officials, the Court defended them and also had their transfer orders revoked. Till the time the Court remained interested in the case (and it certainly did lose interest following Chaudhry’s retirement), the investigation made progress; ultimately under the Court’s pressure, charges were also filed against the main accused in the case.

²⁴⁵ Ibid.

²⁴⁶ See *Hajj corruption case: Hamid Kazmi sentenced to 16 years in prison*, The Nation (June 03, 2016), available at: <https://nation.com.pk/03-Jun-2016/haj-corruption-case-hamid-kazmi-sentenced-to-16-years-in-prison>

²⁴⁷ See Rizwan Shahid, *Hajj corruption case: FIA wasted time, money and resources: IHC*, The Express Tribune (Mar 24, 2017), available at: <https://tribune.com.pk/story/1364235/hajj-corruption-case-fia-wasted-time-money-resources-ihc/>

(iii) *The Rental Power Plants Scam*

Pakistan is one of the most energy-deprived countries in the world, so much so that the nation plans power outages based on the demand-supply gap. Specific areas in Pakistan regularly experience over twelve hours of these planned power outages a day.²⁴⁸ Since the establishment of power plants takes time and requires investment, in 2008, the Government agreed to procure electricity from some mobile power plants on a short-term basis.²⁴⁹ Electricity sold by rental power plants (“RPPs”) was often more expensive than long-term immovable plants, but the Government overtly justified this as a short-term emergency measure.²⁵⁰

In 2010, two Members of the Parliament (from the opposition) separately appealed to Chief Justice Chaudhry to investigate the use of RPPs by the Government.²⁵¹ They alleged that RPP’s were unnecessary to meet the country’s energy demand, and also a significant source of corruption.²⁵² The Court admitted the applications submitted by these Parliamentarians as a suo motu case and over the course of the next two years investigated the RPP scam as well as the broader issue of power outages in the country. In 2012, the Court provided its first detailed order in the case. The order dealt with a variety of issues, but for our purposes three sets of directions are particularly noteworthy. First, the Court found the policy of RPPs to be ill-conceived,²⁵³

²⁴⁸ See Ahmed Fraz Khan, *Power shortage leads to 12-18 hours of loadshedding*, Dawn News (Apr 11, 2014), available at: <https://www.dawn.com/news/1099086>

²⁴⁹ See Syed Ovais Akhar, *The sad saga of rental power plants*, Pakistan Today (Apr 07, 2012), available at:

<https://www.pakistantoday.com.pk/2012/04/07/the-sad-saga-of-rental-power-plants/>

²⁵⁰ Ibid.

²⁵¹ See Order dated March 30th, 2012 in Human Rights Case No .7734-G/2009 & 1003-G/2010, paras 2-3

²⁵² Ibid.

²⁵³ For instance, the Court noted that: “*The RPPs mode of generation of electricity has proved a total failure and incapable of meeting the demand of electricity on a short term basis. The cost of electricity so produced is on very high side and is not commensurate with the provisions of*

among other things, the Court noted that reliance on RPPs was both expensive and unnecessary, given that the existing energy generation capacity in the country was sufficient to meet the demand. Second, the Court found that the award of contracts and payments to the RPPs were not in accordance with the public procurement rules.²⁵⁴ As a consequence of this assessment, the Court rescinded all RPP contracts and ordered the recovery of fees paid to these private companies.²⁵⁵ Third, the Court concluded that the manner in which the RPP contracts were awarded and enforced made out a *prima facie* case that the relevant Government functionaries, including various former and serving Federal ministers, were involved in corrupt practices. The Chairman of the NAB was accordingly directed to proceed against all such persons and submit fortnightly reports to the Court.²⁵⁶

The Court, it appears, achieved compliance in relation to the first two sets of directions with little resistance. Contracts of various RPPs were rescinded and the NAB took concrete steps

section 7 of the Act, 1997. . . Thus, it is clear violation of the rights guaranteed to the citizens in terms of Articles 9 & 24 of Constitution and the Regulation of Generation, Transmission and Distribution of Power Act, 1997.” See Order dated March 30th, 2012 in Human Rights Case No .7734-G/2009 & 1003-G/2010, para 84

²⁵⁴ The Court made a number of observations in this reference. What particularly irked the Court was that many of these projects were commissioned without feasibility studies. Moreover, the payment terms were changed after the public bidding had concluded. For instance, many RPPs were given a mobilization advance equivalent to 14% of the total amount due under the contract; only 7% was proposed and agreed under the bidding documents.

See Order dated March 30th, 2012 in Human Rights Case No .7734-G/2009 & 1003-G/2010, paras 77-79, 84

²⁵⁵ The court also noted that many of the RPP producers were actually in breach of contract. For instance, certain power producers had failed altogether to achieve commercial operations, or achieve it on time. Similarly, the Court noted that certain RPPs were generating electricity well below their maximum potential and in contravention of the understanding under which they were commissioned.

²⁵⁶ See Order dated March 30th, 2012 in Human Rights Case No .7734-G/2009 & 1003-G/2010, para 84

towards recovering money paid to these companies.²⁵⁷ This is not to say that the Court did not push the NAB to make the relevant recoveries. At one point, for instance, the Court gave strict instructions to the Chairman, NAB, to ensure that the assets of the RPPs remain in the country unless or until all payments were cleared; in the event of non-compliance and resultant loss, the Chairman was to be held personally liable.²⁵⁸ The use of RPPs also became controversial and the relevant projects were scrapped for the time being.²⁵⁹ As expected, however, the pursuit of accountability was fraught with non-compliance; more so, because among the persons accused by the Court of corruption was Raja Pervez Ashraf, the former Minister of Water and Power, who by June, 2012, had been sworn in as the Prime Minister of Pakistan.

After noting on several occasions that the reports being submitted by the NAB were non-satisfactory, in September 2012, the Court proceeded to issue contempt notices to the Chairman, NAB, and seven other NAB officials.²⁶⁰ The contempt notices appear to have had the desired effect, at least on the junior officers. The investigation officers assigned to the case recommended to the Chairman, NAB, that references should be filed against a number of persons, including the then Prime Minister Ashraf.²⁶¹ The Chairman, it appears, was not pleased

²⁵⁷ Within a relatively short period of time, NAB was able to recover almost PKR 13 billion (approximate USD 120 million). See Syed Irfan Raza, *NAB to file reference in Rs22bn RPP scam*, Dawn News (May 07, 2013), available at: <https://www.dawn.com/news/812368>

²⁵⁸ See Faisal Farooq, *NAB will be responsible if power company goes without paying liabilities: Supreme Court*, News Pakistan (Nov 26, 2012), available at: <http://www.newspakistan.pk/2012/11/26/nab-responsible-power-company-paying-liabilities-supreme-court/>

²⁵⁹ See Catriona Nicol & Joseph Dyke, *Energy Sector And Legal Considerations: Pakistan*, McNair Chambers, p.49, available at: https://www.mcnairchambers.com/client/publications/2016/Energy_Sector_and_Legal_Considerations.pdf

²⁶⁰ See Order dated September 14, 2012 in H.R.C. No.7734-G of 2009

²⁶¹ See Order dated January 17, 2013 in H.R.C. No.7734-G of 2009, para 4

with this conclusion and did not accept the recommendations. Moreover, he ordered that the relevant investigation officers should be removed from the case.²⁶²

The Court took up the matter again in January 2013 and was irked by the progress in the case. It ordered the immediate approval of references against the accused persons and also their arrest.²⁶³ The Chairman, NAB, was ordered to personally submit a compliance report on these points to the Court. He flatly refused to comply on the basis that there was insufficient evidence to file the reference or to arrest the Prime Minister.²⁶⁴ Needless to say, the Court was not satisfied by this response; in particular, it drew upon its detailed judgment from 2012 and cited it as being sufficient grounds for pursuing cases against the accused persons.²⁶⁵ Since the NAB had mentioned insufficient evidence as the cause of its refusal, the Court deemed it appropriate to examine the evidence collected by the NAB. It ordered the production of all investigation files related to the case since its inception.²⁶⁶ It was clear that the Court was not going to back down.

While the conflict between the Chairman, NAB, and the Court was underway, Kamran Faisal, one of the principal investigators in the case who had also recommended the filing of

²⁶² It is interesting to note that the Chairman NAB actually removed the relevant officers on the pretext that the Supreme Court was not happy with their performance and that they had been issued contempt notices. The Court expressed its reservations on this point and declared that it had never asked the Chairman to remove these officers. In fact, the Court investigated this issue at length to determine why its name had been wrongly used to remove these officers and who was responsible for this action. See Order dated January 17, 2013 in H.R.C. No.7734-G of 2009, paras 4-10

²⁶³ See Order dated January 15, 2013 in H.R.C. No.7734-G of 2009, para 7

²⁶⁴ It is interesting to note that the Police did, however, attempt to arrest some of the accused persons and the names of the key accused, except for the Prime Minister, were also placed on the Exit Control list to forestall their escape from the country. This shows, at the very least, how civil servants may react differently to the same order.

²⁶⁵ See Order dated January 17, 2013 in H.R.C. No.7734-G of 2009, para 13

²⁶⁶ *Ibid.*, para 14

charges against the Prime Minister, was found dead in his house.²⁶⁷ Initial reports suggested that Faisal had committed suicide, but his family contested this. Reports also indicated that Faisal was under immense pressure and had requested the Court to exclude him from the investigation in the RPP case.²⁶⁸ Suspecting foul play, the Court took suo motu notice of Faisal's death and ordered that an investigation should be conducted in the matter.²⁶⁹ The Court also directed the formation of an independent medical board to determine Faisal's cause of death. It was later concluded that Faisal had in fact been murdered.²⁷⁰

The Chairman, NAB, also took this opportunity to go on the offensive. From blatant refusal to obey the Court's directions, he proceeded to publicly attack the supervisory role taken by the Court in relation to the NAB. Towards the end of January 2013, the Chairman sent a letter to the President (which was later also released to the media) stating, in relevant part, as follows:

“The clear line between the recognized authority of the Supreme Court to monitor NAB investigations to the limited extent of ensuring fair investigation, and itself becoming involved in guiding investigations, appears to be becoming breached as a norm as the elections near. Contempt notices, verbal orders that differ from written orders, and insufficient time to prepare numerous progress reports, are placing extreme pressure on NAB personnel who appear before the Honorable Judges. There is even a danger that NAB personnel could lose their independence and are unable to carry out their investigations in an independent manner due to the pressure being exerted on them by the Honorable Supreme Court to proceed along lines which seem to be desired by the SC. In relieving this pressure, to safeguard their jobs, and so as not to displease the Honorable Court, there is danger of unfair investigation being resorted to. . .The need to allow the Honorable SC to be diverted from its prime roles as the final Appellate and Constitutional Court may need to be addressed since ability to take Sua Moto notice of human rights cases can become an open license to undermine government. . .Should

²⁶⁷ See Munawer Azeem & Syed Irfan Raza, *NAB officer investigating RPP scam found dead*, Dawn News (Jan 18, 2013), available at: <https://www.dawn.com/news/779761>

²⁶⁸ Ibid.

²⁶⁹ See *NAB officer's death: Kamran Faisal's death not ordinary says SC*, The Express Tribune (Jan 25, 2013), available at: <https://tribune.com.pk/story/498916/nab-officers-death-kamran-faisals-death-not-ordinary-says-sc/>

²⁷⁰ See *Kamran Faisal case: Supreme Court declares NAB investigator's death as murder*, The Express Tribune (Nov 23, 2013), available at: <http://fp.brecorder.com/2013/11/201311231257160/>

these issues not be addressed expeditiously, I will regretfully be forced to tender my resignation."²⁷¹

The President did not (and possibly could not) do much after receiving this letter. The Chairman, NAB, did not resign, as indicated in his letter. The Supreme Court also did not back down; instead, it reasserted its role by issuing another contempt of court notice to the Chairman.²⁷² A couple of months later the Chairman, NAB, was removed from office by the Court on the grounds of having been illegally appointed.²⁷³

Before the scheduled election in May 2013, Prime Minister Ashraf requested the Court to form a commission for investigation into the matter. He asserted that an independent commission was required to clear his role in the RPP scam and that he never influenced the NAB investigation in any way. The Supreme Court rejected his request and issued a show notice to him for contempt of court.²⁷⁴ The Court was of the view that its judgment in the RPP case had reached finality and that the PM's letter was nothing but another attempt to influence the Court.²⁷⁵ As a consequence, Ashraf submitted an unconditional apology to the Court.

²⁷¹ See Asad Kharal & Zahid Gishkor, *Alleged interference: Hitting out at judiciary, NAB chief threatens to quit*, the Express Tribune (Jan 29, 2013), available at: <https://tribune.com.pk/story/500126/alleged-interference-hitting-out-at-judiciary-nab-chief-threatens-to-quit/>

²⁷² See *SC issues contempt notice to Chairman NAB*, Geo News (Jan 31, 2013), available at: <https://www.geo.tv/latest/55223-sc-issues-contempt-notice-to-chairman-nab>

²⁷³ The timing of this order is quite interesting. The relevant petition challenging his appointment was pending for almost two years, but was not given a serious hearing for long. See *SC declares NAB chairman Fasih Bukhari's appointment null, void*, The Express Tribune (May 28, 2013), available at: <https://tribune.com.pk/story/555458/sc-declares-nab-chairman-fasih-bukharis-appointment-null-void/>

²⁷⁴ See *RPP case: SC issues contempt of court notice to Raja Pervaiz Ashraf*, Geo News (Mar 28, 2013), available at: <https://www.geo.tv/latest/85635-rpp-case-sc-issues-contempt-of-court-notice-to-raja-pervaiz-ashraf>

²⁷⁵ See *Raja Pervaiz issues unconditional apology over contempt of court*, The Express Tribune (Mar 21, 2013), available at: <https://tribune.com.pk/story/552328/raja-pervaiz-issues-unconditional-apology-over-contempt-of-court/>

With a new Government in place and the appointment of a new Chairman, NAB, the Supreme Court was finally successful in having references filed against the various persons it had accused of corruption, including the former Prime Minister Ashraf.²⁷⁶ These cases are, however, still pending before the accountability courts. It is also interesting to note that in 2015 the new Government decided to revive certain RPPs; in taking this step it also fully acknowledged (and reportedly complied with) the limitations set out in the Court's 2012 opinion.²⁷⁷ Perhaps fearing public controversy, the Government also chose to rebrand the projects as "short-term independent power producers," instead of the now infamous RPPs.²⁷⁸

Achieving compliance in the RPP case was extremely difficult for the Court, especially considering that the Chairman, NAB, a Government appointee, refused to honor or seriously enforce the Court's directives. The RPP case is, however, still an excellent example of how the Court can work around roadblocks within the bureaucracy and achieve some measure of compliance. By issuing contempt notices to the relevant officials in the NAB, the Court, at the very least, succeeded in capturing some junior officers (who even agreed to file references against an incumbent Prime Minister). When one of these officers was allegedly murdered, the Court itself took the lead in investigating the matter; by doing so, it so to speak assured the remaining officers that justice would be served and that the Court would protect them. To counter interference from the Chairman, NAB, the Court directly entertained a challenge to his

²⁷⁶ See Asad Kharal, *Naudero-II RPP case: NAB files reference against ex-PM Ashraf*, The Express Tribune (Nov 07, 2013), available at: <https://tribune.com.pk/story/628378/naudero-ii-rpp-case-nab-files-reference-against-ex-pm-ashraf/>

²⁷⁷ See Shahbaz Rana, *Short-term solution: Govt to revive three rental power plants*, The Express Tribune (Jan 10, 2015), available at: <https://tribune.com.pk/story/819735/short-term-solution-govt-to-revive-three-rental-power-plants/>

²⁷⁸ Ibid.

appointment, and later pushed him out of office. After much delay, ultimately the Court succeeded in having references filed against the relevant accused persons, including a former Prime Minister. Compliance was indeed not easy, but could the Court have achieved what it did without the tools described earlier: probably, no.

IV. PUBLIC SUPPORT FOR “CAPTURING” THE CIVIL SERVICE

That the Court was successful (at least partly) in controlling the executive and securing compliance, does not mean that the Government did not attack the Court. After all, if the judiciary attempts to capture the executive, we can expect a similar attempt from the executive in relation to the judiciary. And this was indeed the case. We have already noted earlier how Chaudhry was unconstitutionally removed from office by the military dictator Musharraf. The Government’s resentment for the Court’s increasingly active role did not end with Musharraf’s departure. Once restored to office, Chaudhry was stronger than ever before, and if the three cases discussed above are any indication, he was going after all the political bigwigs. As a result, perhaps, in a span of three years (2010-2013) there were numerous attacks on the Court, including an attempt to: (i) slash the Chief Justice’s authority to make judicial appointments;²⁷⁹

²⁷⁹ The 18th Amendment to the Constitution purported to change the way the judges of the superior courts were appointed. Whereas previously the Chief Justice was effectively the sole decision maker in the appointment process, through the constitutional amendment the judicial appointment process was broken down into two tiers. Nominations would first be processed by a ‘Judicial Commission’ comprising the Chief Justice, some senior judges, the law minister and representatives of the Bar Council. Recommendations of the Judicial Commission would then need to pass muster before a ‘Parliamentary Committee’ comprising members of Government and the opposition. See *Analysis: Five Years Of The 18th Constitutional Amendment: Federalist Imperatives On Public Policy And Planning*, UNDP Pakistan Report, available at: http://www.pk.undp.org/content/pakistan/en/home/library/hiv_aids/development-advocate-pakistan--volume-2--issue-1/analysis--five-years-of-the-18th-constitutional-amendment--feder.html

(ii) curtail the Court's power to punish for contempt of court;²⁸⁰ and (iii) place financial pressure on the Court.²⁸¹ Suffice it to note these attempts were mostly unsuccessful.²⁸² And while there are various factors why the Court was successful in repelling these attacks,²⁸³ one thing is clear: the Court had public opinion on its side.²⁸⁴

The high levels of public support for the Court are initially hard to explain. After all, one would expect that a Court which is so frequently violating notions of separation of powers would not find favor with the public. And lack of public awareness for judicial decisions cannot alone explain this anomaly. While the public may have been unaware of particular judicial decisions, it should not be immediately assumed that they were utterly clueless about the Court's role as a whole. In fact, the Government made it a point to highlight 'judicial overreach' by the Court in both national and international media.²⁸⁵ Furthermore, incidents like the letter (quoted earlier)

²⁸⁰ This was discussed earlier in the context of the NRO decision.

²⁸¹ In 2012, the Government attempted to summon the Court's key administrative officer (the Registrar) before the Public Accounts Committee ("PAC") of the Parliament for the purposes of scrutinizing the expenses of the Court. Perhaps the PAC wanted to embarrass the Court by publicly highlighting any malfeasance/mismanagement in judicial expenditures. See *SC suspends PAC notice summoning registrar*, Dawn.com (Jan 01, 2013) available at: <https://www.dawn.com/news/775490/sc-suspends-pac-notice-summoning-registrar>

²⁸² See Chapter I of this dissertation for a discussion on how the Court defeated the various Parliamentary attacks against it.

²⁸³ Consider, for instance, chapter III of this dissertation which discusses how the Court has benefited from the civil-military imbalance in Pakistan.

²⁸⁴ For instance, during the tenure Chief Justice Chaudhry various public surveys revealed high levels for public support for him: "*In 2011, Justice Chaudhry was ranked as the most popular person in Pakistan – above any politician and celebrity. In August 2012, respondents were asked to comment on the performance of Justice Chaudhry: 53% noted that it was good or very good and only 13% felt that it was bad or very bad. In another survey respondents were asked whether they would extend the tenure of the Chief Justice if they had the power to do so. In response, 47% said yes, while 35% did not support such a move and 18% did not respond.*" See Qazi, *supra* note 114, at 312

²⁸⁵ See, for instance: Anita Joshua, *Pakistan's judiciary faces criticism for 'overreach'*, The Hindu (Feb 11, 2012), available at: <http://www.thehindu.com/opinion/op-ed/pakistans-judiciary-faces-criticism-for-overreach/article2880066.ece>

written by the Chairman, NAB, to the President (complaining that the Court was going beyond its “recognized authority”) were also widely reported and discussed. Therefore, it is difficult to argue that the public was not aware of what the Court was doing. Broad-based public awareness of the Court’s role can perhaps even be gauged from the success of the Human Rights Cell itself (see Table 11). When Chaudhry stood deposed in 2008, only 81 applications were filed. However, the Cell quickly picked steam upon his restoration in 2009; by 2010, almost 60,000 applications were filed in the Cell. It is also interesting to note that upon Chaudhry’s retirement and the elevation of a less activist Chief Justice, the numbers started plummeting again. People, therefore, were clearly aware that the Court under Chaudhry was doing something different.²⁸⁶

Table 11 – Year-wise Institution/Disposal Statistics for the Human Rights Cell (01.01.2008 to 31.08.2015)

Year	Institution	Disposal
2008	81	81
2009	9879	3095
2010	59878	51756
2011	48388	47024
2012	42999	45334
2013	41648	21025
2014	29372	38908
2015	16966	17538

Source: SCP Records

Different, however, does not mean wrong. And this, in essence, should explain the anomaly. Why should we assume that just because the public may be aware that the Court is capturing, so to speak, the civil service, that it will also think that this measure is wrong? Firstly,

²⁸⁶ The popularity of the Cell contrasts sharply with other Federal bodies that are specifically tasked with tackling maladministration. For instance, between the years 2005-2008, the Federal Ombudsman’s office received in total less complaints than the Cell received in roughly a year. The Federal Ombudsman, it should be noted, has been tasked with addressing issues of maladministration since 1983 (years before the creation of the Cell). Statistics relevant to the Federal Ombudsman’s office can be accessed at: <http://www.mohtasib.gov.pk/wafaqimoh/userfiles1/file/publications/Annual-Reports-2008.pdf>

it must be appreciated that widespread condemnation of an alleged violation of the separation of powers requires both knowledge and broad-based agreement about the appropriate institutional boundaries, which is often not possible. Even among scholars, there is much disagreement on what the separation of powers should look like or for that matter what powers legitimately may fall within the exclusive domain of a particular institution.²⁸⁷ Moreover, given that the Supreme Court is the final arbiter on constitutional questions – a role which the public, by and large, accepts²⁸⁸ – it can typically change institutional boundaries with both authority and legitimacy. Therefore, people may treat the Court’s ‘encroachment’ as simply a valid exercise of judicial power. At the very least, we should not expect a uniform response from the public to what may amount as ‘judicial overreach’ for some people.

Secondly, even if we assume that the public (or some section thereof) may accept an action as judicial overreach or encroachment, we should not immediately expect condemnation. Political context is important, as always. There are numerous examples all over the world where unconstitutional actions (such as the displacement of democratic regimes by military dictators or local rebellions) have been welcomed and supported by the public at large.²⁸⁹ All coups in

²⁸⁷ See, for instance: Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000)

²⁸⁸ See Gibson *supra* note 19. It should be noted that this role is also largely accepted by the public in Pakistan. In my 2016 public opinion study conducted by Gallup Pakistan, we found that the majority of the respondents (approximately 50%) believed that the Supreme Court has the last say when there is a conflict over the meaning of the Constitution.

²⁸⁹ Take, for instance, the recent (2013) military coup in Egypt which was broadly supported by the public.

See *Egypt’s coup: the second time around*, *The Economist* (Jul 6, 2013), available at: <https://www.economist.com/news/briefing/21580533-egyptian-army-widespread-popular-support-has-ended-presidency-muhammad-morsi>

Interestingly enough, even in the U.S., there is a significant percentage of the population which would back a military coup. See John Feffer, *The Surprising Popularity of Military Coups*, *Foreign Policy in Focus* (July 20, 2016), available at: <http://fpif.org/bring-in-the-military/>

Pakistan, for instance, have been bloodless and were initially even openly celebrated by some people on the streets.

The constitutionality of an action needs to be divorced from its public acceptability. Where representative institutions are non-functional and unpopular (as has been the case in Pakistan)²⁹⁰ the public may welcome change and progress; howsoever it may be achieved. It should also be noted that most dictatorships rely upon the Supreme Court to add legitimacy to their actions;²⁹¹ why should we not expect this ‘legitimizing’ role to apply to the Court’s own ‘unconstitutional’ actions. The Pakistani Court has since Chaudhry’s tenure remained one of the most popular public institutions;²⁹² one should, therefore, think that it would be able to transfer some of this legitimacy to its rulings, especially since the Government is unpopular and not trusted by the public.²⁹³

Robinson, who has conducted an extensive study of the expanding role of the Supreme Court of India, found that the various shortcomings of the Indian Government created the space

²⁹⁰ The World Justice Project’s Rule of Law Index, for instance, ranks Pakistan as having one of lowest perceptions of accountability, worse than Nepal, Afghanistan and India. See *The Rule of Law in Pakistan*, The World Justice Project, available at: <https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/rule-law-pakistan>

²⁹¹ See, generally: Peter H. Solomon, *Courts and Judges in Authoritarian Regimes*, 60 *World Politics* 1 (2007), pp. 122-145

²⁹² For instance, my 2016 Gallup study (discussed below) revealed high levels of support for the Court in comparison to other state institutions. On a national level, only 14% percent of the respondents reported as having “very much” respect for the police. This figure was 35% for the Parliament and 47% for the Court. Similarly, respondents noted a high level of trust and confidence in the Chief Justice of Pakistan, especially when compared to other Constitutional office bearers. For instance, 49% of the respondents expressed a lot of confidence in the Chief Justice; for the President of Pakistan only 22% of the respondents reported this level of trust and similarly for the Prime Minister this figure was 26%.

²⁹³ *Ibid.*

for the Court's expansion.²⁹⁴ This is certainly the case in Pakistan. But the explanation needs to go further. It also needs to accommodate the supportive role of public opinion, among other factors, which makes this expansion possible. The Court can only fill the void left by the Government because the public accepts and (as I posit) supports it. The thousands of applications addressed to the Court's Human Rights Cell and numerous appeals to the Chief Justice through the media to take suo motu actions, were active signals to the Court that a considerable number of people wanted it to take a broader role in governance. In these circumstances, the widespread disobedience of the Court's orders (see Table 1 – Chapter I) provided the Court both a reason to capture the civil service and favorable public opinion to support the move. After all, if the perceived sincere efforts of the Court to provide better service delivery were being frustrated by a seemingly corrupt and inefficient regime, intuitively one would think that there would be greater support for transferring more powers from the Government to the Court.

To test public support for the Court's expanding role I conducted a survey in conjunction with Gallup Pakistan. The findings of this recent (2017) survey suggest that there is widespread support for a more authoritative (and perhaps also insular) Court, especially where the Court's orders are perceived as being disobeyed by the Government.

For the survey, a nationally representative sample of more than 1800 respondents was divided into two separate groups.²⁹⁵ One group – the treatment group – was read out the following introduction before being asked specific questions:

²⁹⁴ See Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash. Uni. Global Studies Law Rev. 1 (2009)

²⁹⁵ The survey was conducted with more than 1800 men and women statistically selected (stratified random sampling) from all four provinces of Pakistan and comprised a cross section of age and socio-economic classes. The results of the survey were compiled in a report which is

“Last year the Supreme Court ordered the Government to make a major policy change. The Government has not implemented the Court’s order, despite repeated directives from the Court. Some critics suggest that the Court’s directive was beyond its power. Others however believe that many decisions of the Supreme Court that may be beneficial for the public, like this one, are being routinely disobeyed by the Government. Now I am going to ask you some questions about the Supreme Court.”

The introduction was designed keeping in view the narrative various media outlets may create about any major policy decision delivered by the Court i.e., some will support it, and others will criticize it. In addition, I wanted to emphasize that orders of the Supreme Court are persistently disobeyed by the Government. The control group, on the other hand, was simply told that they were “going to be asked a number of questions about the Supreme Court of Pakistan.” The object was to determine the manner in which perceptions of disobedience may affect both the legitimacy and breadth of authority of the Court. The results are presented in Figures 7-11 below.

Figure 7 presents public support for a Court order which would provide the Chief Justice the power to appoint senior civil servants. This is a crucial carrot still retained by the Government (albeit, as discussed earlier, the Court has attempted to water down executive discretion in this matter). In designing this question, I had anticipated that support for the Chief Justice’s role in making these appointments would be high, specifically if it was highlighted that political influence plays a role in these appointments (which has been stressed in various opinions of the Court). I also expected that respondents who perceived that Court orders were being disobeyed (and who otherwise distrusted the Government) would report higher levels of support for the Chief Justice’s authority to appoint senior civil servants. This was indeed the case: 52% of the respondents in the treatment group said that they would support the Court’s

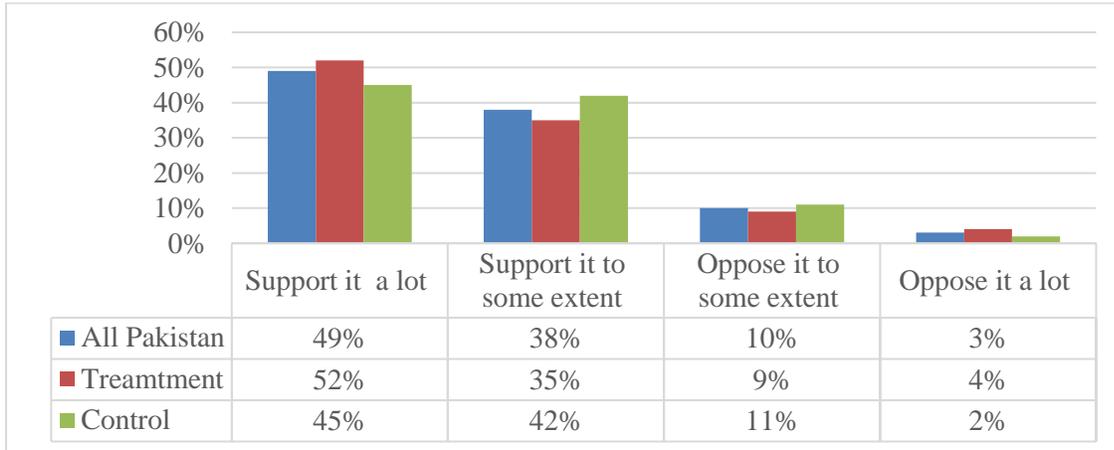
presently not publicly accessible, but is available on file with the author for review. The survey was conducted in the Urdu language, which is the national language of Pakistan. The text of the survey has been translated in English for the purposes of this dissertation.

decision a lot, compared to 45% of the respondents in the control group. Support overall for the judicial decision was also strikingly high with 87% of the respondents stating that they would support the Court's decision a lot or, at least, to some extent.

Figure 8 presents public support for a Court's decision that changed the investigation team for a case because it was not satisfied with the police report submitted to it. This power has previously been exercised by the Court, especially in cases involving political corruption, some of which were also discussed in the previous section. In designing this question, I expected high levels of support for the Court's decision, especially where there was a perception that judicial orders were being disobeyed. The data generally do report high levels of support for the Court's decision; however, unexpectedly the treatment group reported slightly lower levels of support than the control group. Perhaps the treatment group expressed less approval for the decision because it also thought that the decision was incomplete and wanted the Court to go even further (e.g., by punishing the relevant police official). Importantly, however, differences of opinion between the control and treatment group were statistically non-significant. And even the control group reported high levels of support for the Court's order – 93% stated that they would support the decision a lot, or at least to some extent.

Figure 7 - Public Support for the Chief Justice’s Authority to Appoint Senior Executive Functionaries

Question: Some say that political influence plays a major role in the appointment of senior executive functionaries like the Head of Police (IG). Would you support the Supreme Court if it orders that all senior civil servants are appointed by the Chief Justice instead of the Prime Minister?

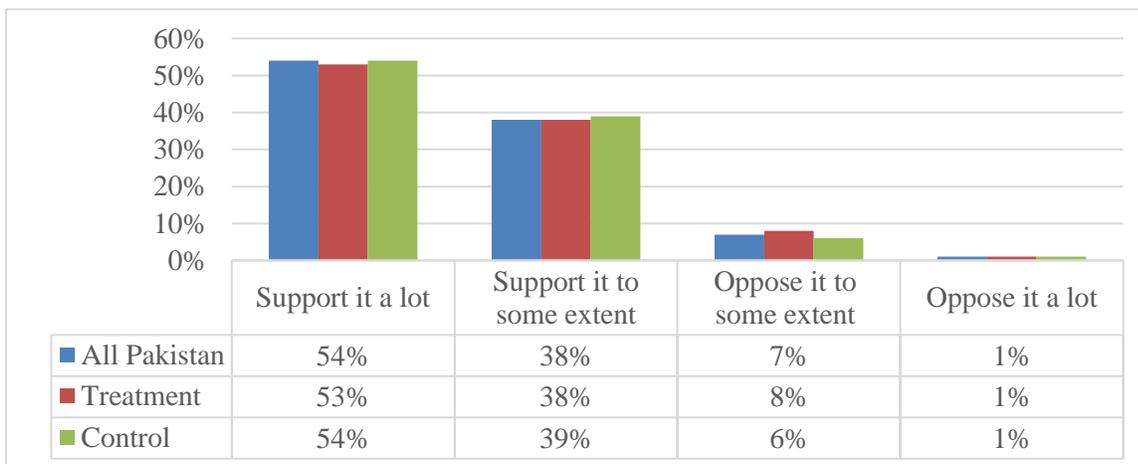


Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences of opinion between control and treatment groups is statistically significant (P = 0.021)

Figure 8 – Public Support for the Court’s Authority to Supervise Investigations

Question: In a case involving political corruption, the Supreme Court was not satisfied with the report of the police official designated by the Government and ordered that a different team selected by it should carry out the investigation. Some say that this order amounted to interference with the responsibilities of the Government, while others say that it may lead to an impartial investigation. Do you support the Court’s decision?



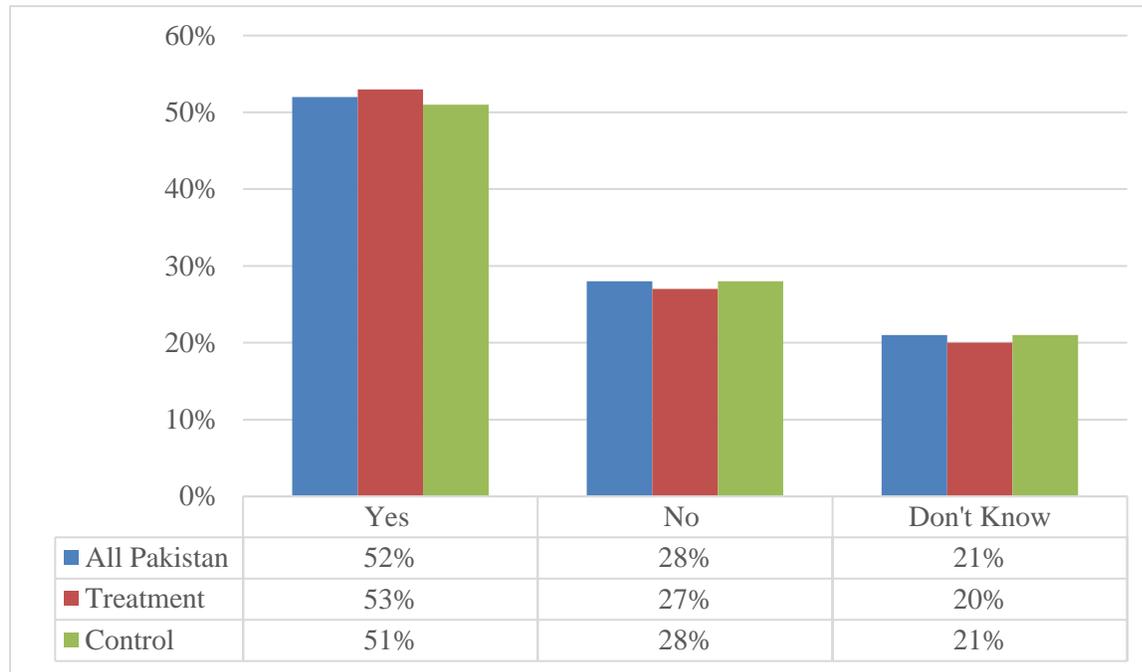
Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences of opinion between control and treatment groups is statistically insignificant (P = 0.324)

Figure 9 presents public knowledge about the Court's power to dismiss civil servants who have disobeyed its orders. The Court has previously, though rarely, removed government servants from their current positions for disobedience, but has not dismissed a civil servant altogether on this basis. Arguably, the Court does not possess this power and has certainly not claimed that it does; it still relies upon the internal procedures of the civil service for disciplinary matters like suspension or removal from office. Nevertheless, I expected a lot of people to think that the Court has the authority to dismiss civil servants directly. I hypothesized that the public will likely be unaware of discrete issues of constitutional authority/interpretation and may (under this condition of imperfect information) attribute powers to the Court based on inference. Prime Minister Gilani, if one recalls from the previous section, was disqualified from office because of his conviction for contempt of court. This was a decision which was also widely reported; therefore, intuitively, at least, the public was likely to be influenced by this event in making its assessment of the Court's powers. I did not expect any differences between the control and treatment groups since the question was testing their knowledge of a particular power of the Court, not support for it. The results confirmed my intuition. The majority of respondents (>50%) in both groups believed that the Court had the authority to dismiss civil servants for disobedience. Almost 20% of the respondents did not know the answer to the question. This data, thus, provides an excellent example of the relative public ignorance of the Court's powers and also how a broadly legitimate institution can be perceived to command more power than it has.

Figure 9 – Public Support for the Court’s Authority to Dismiss Government Servants for Disobedience

Question: Can the Supreme Court dismiss any government officer that disobeys its orders?



Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

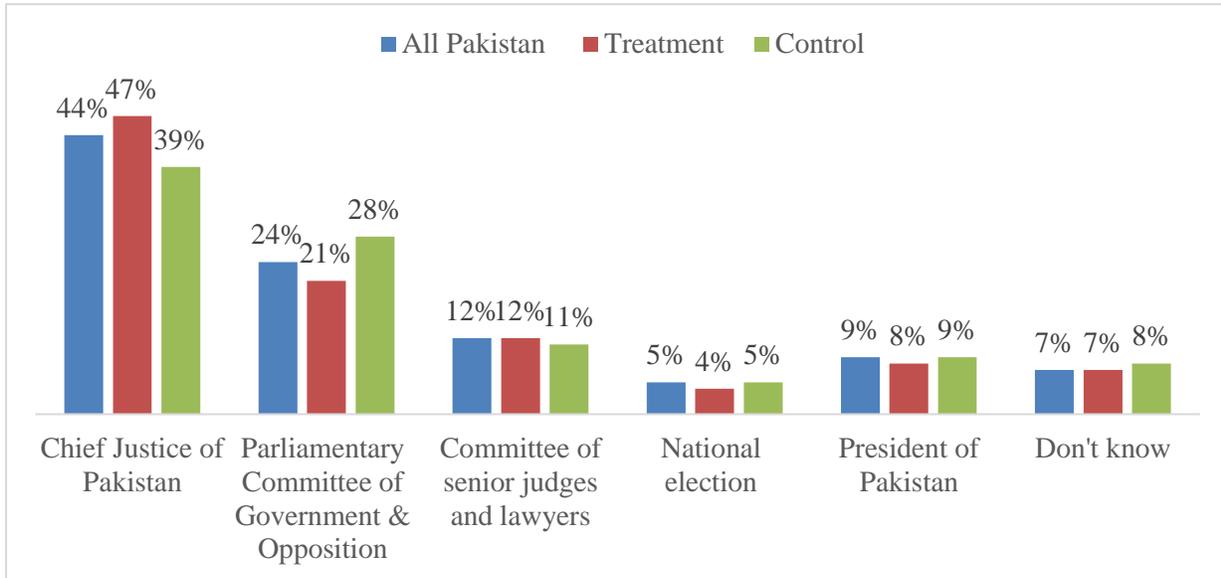
Note: Differences of opinion between control and treatment groups is statistically insignificant ($P = 0.605$)

I also wanted to check the extent to which the public believed that the Court should be able to enjoy self-accountability. My expectation was that if the public supported the Court exercising greater authority over the executive, then they would equally be willing to provide another institution/body the power to appoint and remove judges. The idea being that while the public may have a limited understanding of the formal separation of powers enshrined in the Constitution, they may still believe in some form of checks and balances. And in deciding the appropriate forum which should serve as a check on the judiciary, the public is likely to be influenced by the legitimacy and respect for that institution. Thus, if respondents were given the impression that court orders are being disobeyed, they would be less likely to trust the Government (and perhaps also more likely to trust the Court) with this authority.

Figures 10-11 present the survey's results. As expected, compared to the responses given in earlier questions, a significantly lower number of respondents (in both groups) report as supporting self-accountability by judges. However, the numbers are still strikingly high. 47% of the respondents in the treatment group would want the Chief Justice to exercise the power of appointment of judges, compared to 39% for the control group. Similarly, 44% of the respondents in the treatment group would want the Chief Justice to exercise the power of removal of judges, even in instances of corruption, which is also significantly higher than the same response (39%) for the control group. Critically, as predicted, the differences in responses recorded for both questions can be directly attributed to the lower trust the treatment group expresses in the Parliamentary Committee. For instance, in relation to the appointment of judges, 28% of the respondents in the control group expressed trust in the Parliamentary Committee to do this job, compared to 21% of the respondents in the treatment group. A perception of disobedience, thus, appears to have a direct impact on the trust the public expresses in the Government to sincerely monitor the appointment and conduct of judges. The differences in opinion between the control and treatment groups are also statistically significant.

Figure 10 – Public Support for Providing the Chief Justice the Authority to Appoint SC Judges?

Question: Please tell us who among the following should have the power/Authority to appoint Supreme Courts Judges?

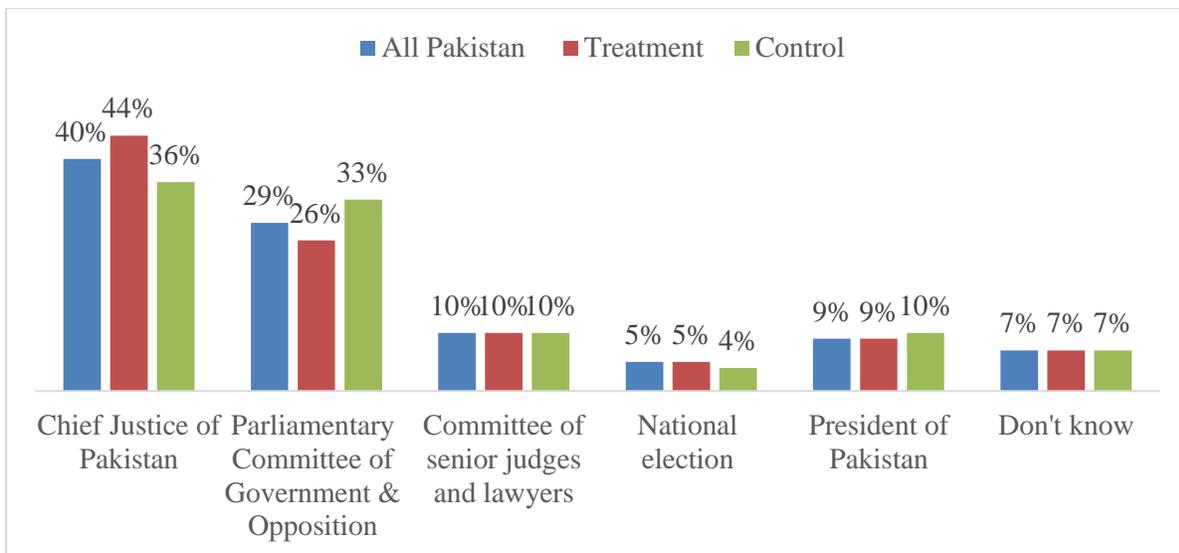


Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences of opinion between control and treatment groups is statistically significant (P = 0.007)

Figure 11 – Public Support for Providing the Chief Justice the Authority to Remove SC Judges?

Question: Who should have the power/ Authority to remove/fire/disqualify judges of the Supreme Courts on the charges of corruption?



Source: *Public Opinion on Supreme Court in Pakistan*. Gallup Pakistan (unpublished report)

Note: Differences of opinion between control and treatment groups is statistically significant (P = 0.005)

The data presented in Figures 10-11 is also interesting from another angle: it provides support for providing more authority to the Chief Justice, than he or she currently enjoys under Pakistan's constitutional framework. Judges it should be noted can only be removed by the Supreme Judicial Council, a body comprising five judges including the Chief Justice of Pakistan.²⁹⁶ Similarly, while previously judges were practically appointed by the Chief Justice alone, the judicial appointment mechanism was revamped in 2010. Presently two bodies – a Judicial Commission and a Parliamentary Committee – share responsibility (nominally at least) for the appointment of judges.²⁹⁷ While knowledge of these constitutional provisions cannot be presumed for the public, the data does show that they prefer greater centralization of authority in an institution/person that they respect. This could also help explain (in part at least)²⁹⁸ why even after repeated attempts, the Pakistani parliament has been unsuccessful in completely taking away the judiciary's control over the appointment of judges.²⁹⁹

²⁹⁶ See Article 209 of the Constitution

²⁹⁷ While the role of the Parliamentary Committee has been watered down by the Court through a number of its opinions, it still exists on paper.

²⁹⁸ Chapter III of this dissertation discusses, in particular, the role of this army in protecting (albeit indirectly) the Court.

²⁹⁹ Even though the Parliament enacted the 18th Constitutional Amendment to exercise more parliamentary control over the appointment of judges, it has largely been unsuccessful. The Court was quick to respond to this attack when the Amendment was challenged before it. The Court recommended that the Parliament make certain changes to the Amendment in view of preserving the independence of judiciary. Critically the Court sought to remove the veto power of the Parliamentary Committee. The Parliament passed another Constitutional Amendment accepting some of the recommendations of the Court, but rejecting others. The Court, however, in clear defiance to the Parliament simply got what it wanted by interpreting the 19th Amendment in a manner which served its interests. In essence, the Court effectively took away the Parliamentary Committee's power to veto recommendations of the Judicial Commission. It stated that only the Judicial Commission had the power to review the competency of a person to become a judge and that if the Parliamentary Committee disagreed with the Commission's recommendations, it should provide its reasons in writing. Additionally, the Parliamentary Committee's decision could be challenged and overturned by the superior courts. Judges, therefore, still retain primacy in the judicial appointment mechanism. See Saroop Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, 1 Lums Law Journal 1 (2013)

CONCLUSION

The judiciary may have been conceived to be the “least dangerous” branch of the State, but as the experience of the Pakistani Supreme Court suggests, it should not be assumed to be completely powerless. The Pakistani Supreme Court has in recent years demonstrated how courts can attempt to control the “sword”³⁰⁰ and the “purse” or, at the very least, disrupt the control which the Government exercises over these instruments of power. Bureaucrats or civil servants hold the key to this control and the Pakistani Supreme Court made a concerted attempt to influence their decision making in two crucial ways. Firstly, the Court attempted to create a more independent and politically neutral bureaucracy. By insisting on objective criteria in matters concerning the appointments, promotions, and removals of civil servants, it tried to reduce the control the Government exercises over civil servants. As a result, Pakistani civil servants were arguably freer to follow judicial directives. Related to this development, the Court also impressed upon civil servants that they could not follow illegal orders of the Government (thereby reducing the chances that they would have to obey directives which call for ignoring the Court’s orders). Secondly, the Pakistani Supreme Court moved to take on a more active supervisory role over civil servants. By directly summoning and hearing from senior civil servants, it increased the possibility of compliance. With the reputation of civil servants directly at stake, they were likely to be more motivated to implement the Court’s directives. The Court also threatened (and even punished) recalcitrant civil servants with contempt of court, among other disciplinary measures; in turn, pushing them towards compliance. Above all, the Court

³⁰⁰ Arguably, even the Pakistani Government does not exercise complete control over the “sword” of the State i.e. it exercises very little control over the military as compared to say the police or other law enforcement agencies. And the Court has certainly been able to exploit this civil-military imbalance for its own advantage, as chapter 3 of this dissertation explores in greater detail.

sought to rely upon preferential wrinkles within the bureaucracy to secure compliance by directly utilizing the expertise of senior civil servants, among others, who were sympathetic to (and crucial for achieving) the Court's objectives.

The cases considered in Section III provide a snapshot of the Pakistani Supreme Court's success in using the tools described above. Admittedly, these cases and the Pakistani Court's experience, in general, have been defined by a unique context: a politically insulated and popular judiciary that was pitted against a weak and somewhat ineffective Government. Nonetheless, this study does provide important insight for any observer seeking to understand the limits of the judiciary's authority. After all, the Pakistani Supreme Court was facing a hostile executive and extensive disobedience; and it managed to overcome part of the resistance against it by both using, and nullifying, the tools deployed by politicians to control civil servants in Pakistan.

All key members of the executive, including the Prime Minister, appeared before the Court and explained their conduct in person. Based on their written compliance reports and verbal responses to questions from the bench, they received both the Court's fury and, less often, its praise. The widespread reporting of the Court's treatment of executive functionaries had clear reputational effects. For instance, as I noted earlier, during the implementation of the NRO verdict, several senior functionaries (like the Attorney General) resigned because they couldn't satisfy the Court. For them, perhaps, resignation was a better option than being continuously battered by the Court. At other instances, the Court itself moved to remove loyal appointees of the Government. The Court also succeeded in having specified persons lead investigations and gather facts for the Court's perusal. It also successfully blocked attempts by the Government to transfer or remove officers who chose to comply with the Court's directions. Where all else failed, the Court aggressively utilized its contempt powers to push compliance. And perhaps

anticipating the problems associated with the implementation of a jail sentence for contempt of court, it developed a punishment which proved to be an essential deterrent for ambitious politicians – direct disqualification for holding any public office.

That the Court was successful in acquiring some measure of control of the bureaucracy, is clear from the language of the letter written by the Chairman, NAB, to the President of Pakistan, which was discussed in Section III. The Chairman appeared to be quite unnerved due to his waning control over the NAB; at least some of his subordinates, under pressure from the Court, were following the Court's directives rather than his orders. It is also important to highlight that the Court's directions in these cases were (for the most part) not policy based. So it is not as if civil servants were obeying the Court's directions because of their ideological agreement with the Court's policy objectives. Nor could they typically use the Court's orders as a basis to secure more funding. In fact, in many of these cases, these officials appear to have initially disobeyed the Court's directions, only to change their conduct later. Thus, it is clear that the Court managed to break away (or win over) at least some civil servants from political control.

The effects of the Court's interventions on nullifying political control of the bureaucracy outside specific cases is less clear and requires more study. There is indeed some evidence to suggest that deference to the whims and wishes of political masters is still pervasive among civil servants. For instance, when the Panama Leaks scandal first broke out, none of the relevant government agencies, including the NAB, the Federal Revenue Board, the SEC and the State Bank, took notice of the incident.³⁰¹ The issues raised by Panama Leaks included tax evasion and

³⁰¹ See Hasnaat Malik, *Panamagate case: Top court grills NAB, FBR for not probing Sharif family*, The Express Tribune (Feb 21, 2017), available at:

money laundering by some of the most powerful people in the country, and this was perhaps enough to keep all regulatory agencies at bay. Similarly, in 2015, when the Supreme Court assessed the broader performance of the NAB, it quickly discovered the agency's lack of effort in pursuing any of the major scams it was tasked to investigate.³⁰² To avoid embarrassment, it appears, the Bureau even tried to hide its incompetence/complacency from the Court.³⁰³

To be fair, it is perhaps too early to study the broader impact of the Court's intervention on the civil service. Given the history of political control over the bureaucracy, as noted in Section I, it will take time to change the mindset of civil servants; especially since many senior servants may owe their current positions to political connections and nepotism. The salience of political influence in the appointment, promotion, and transfers of civil servants has also not been completely eradicated. For instance, in promotion matters, the Government has sought to retain its discretionary powers in one form or another, despite clear directions from the Court to frame an objective policy which is in accordance with the Court's directives. As a result, over the past few years, the Court has repeatedly moved to strike down numerous promotion orders which

<https://tribune.com.pk/story/1334064/panamagate-case-top-court-grills-nab-fbr-not-probing-sharif-family/>

³⁰² The Court took suo motu notice of the performance of the NAB in various cases and ordered it to submit a list of all mega corruption cases which were being investigated by it. It quickly discovered that many of these cases had been pending for years and ordered that a one-man commission be formed to inquire, among other things, why these cases had been pending for a long time and what progress had been made. See *NAB submits revised list of mega corruption cases before SC*, Dawn News (Jul 13, 2015), available at:

<https://www.dawn.com/news/1194194>

³⁰³ 29 cases were not included in the original list and these were only disclosed to the Court when a journalist highlighted that certain mega corruption cases were missing from the list submitted in Court. See *NAB submits additional list of 29 mega corruption cases to SC*, The News (Jul 29, 2015), available at:

<https://www.thenews.com.pk/print/13833-nab-submits-additional-list-of-29-mega-corruption-cases-to-sc>

are not seemingly objective.³⁰⁴ Similarly, the Government has in disregard of judicial directives, continued to retain civil servants on contract along with offering its favorite civil servants special positions on a deputation basis.³⁰⁵ These orders are also from time to time being set aside by the Court.³⁰⁶

Nonetheless, there is room for hope, especially from within the civil service. Disgruntled civil servants have stood up to political oppression and have successfully used the Court as a shield against the abuse of political power.³⁰⁷ Much of what will happen in the future, therefore, depends on the continued eagerness of civil servants to challenge their political masters and the continued willingness of courts to protect and, as appropriate, punish them.³⁰⁸ Be that as it may, even in the short-term, one can expect the Court to play a dominant role in social governance,

³⁰⁴ See, for instance: Malik Asad, *CSB applied controversial promotions formula after it was set aside by IHC*, Dawn News (March 20, 2017), available at: <https://www.dawn.com/news/1323741>

³⁰⁵ See, for instance: *People on deputation: Supreme Court's orders remain unimplemented*, The Express Tribune (Apr 26, 2016), available at: <https://tribune.com.pk/story/1091706/people-on-deputation-supreme-courts-orders-remain-unimplemented/>

³⁰⁶ See, for instance: Terence J Sigamony, *Civil servants on deputation can't be absorbed in GDA: SC*, The Nation (Nov 21, 2017), available at: <https://nation.com.pk/21-Nov-2017/civil-servants-on-deputation-can-t-be-absorbed-in-gda-sc>

³⁰⁷ Recently, for instance, the Inspector General of Police in Sindh, A.D. Khawaja, allegedly refused to follow certain illegal directives of the Sindh Government. As a result, the Sindh Government sought to transfer him. Khawaja refused to budge and challenged the Government's directives on the basis of the precedent set in the *Anita Turab* case. The matter went all the way up to the Court and the Court held in favor of Khawaja. See Haseeb Bhatti, *A.D. Khawaja to continue working as Sindh police chief, directs SC*, Dawn News (Jan 18, 2018), available at: <https://www.dawn.com/news/1383723>

³⁰⁸ Even during Chaudhry's tenure, the Court was somewhat soft in so far as punishing civil servants for disobedience is concerned. Thus, there were various instances where contempt notices were issued, but the same were withdrawn after the relevant civil servant issued an unconditional apology. Some cases are still pending. It can be argued that perhaps in a bid to build an alliance with the civil service, the Court was going easy on civil servants. But going forward, the Court may need to exercise its disciplinary powers more aggressively, if it really seeks to command the civil service.

especially in policy areas that are not at odds with the Government's interests.³⁰⁹ This is more so because the public appears to be highly supportive of the Court acquiring greater and greater control of the executive.

In Section IV, I considered the results of a recent (2017) public survey which suggests that the majority of the populace appears to trust the Court with greater responsibility in terms of appointing, removing and transferring civil servants. The public also appears to favor centralization of power. Thus, an overwhelming number of respondents in my survey did not require greater checks over the Court, even as it moved to acquire more power over the other branches of the State. Whether this tremendous vote of confidence in the Court is due to the paltry performance of the Government, a misunderstanding of the separation of powers, or a general level of satisfaction with the Court's performance, one thing is clear: if the Court moves to acquire greater control of the civil service, it will have the support of the public. Additionally, in this struggle, if the Government starts disobeying the Court's orders, public support for according greater powers to the Court may only increase. It is almost as if the executive in

³⁰⁹ While this chapter has explored the ability of the Court in achieving compliance in matters where the political elite is hostile to the Court's objectives, one can imagine a host of issues where the interests of the Government and the Court are aligned (or at least, the Government is indifferent). For these issues, the Court can, at the very least, play the role of a powerful agenda setter for executive action by directing the bureaucracy. For instance, in 2011, the Supreme Court issued an order declaring that transgender persons should be treated as equal citizens in Pakistan and towards this end it directed the Government to provide them with national identity cards, which recorded a third gender. Measuring any changes in the wider treatment of the transgender community in Pakistan is a difficult process; however, it is clear that as a result of this judgement the Government issued national identity cards recording a third gender and even sought to provide a quota to the transgender community for certain public sector jobs. These changes, it should be noted, have also been accomplished without much resistance from the Government. See Rabail Baig, *A first for Pakistan's third gender*, Foreign Policy (Mar 30, 2012), available at: <http://foreignpolicy.com/2012/03/30/a-first-for-pakistans-third-gender/>

Pakistan finds itself in quicksand; the more it struggles, the faster it sinks, at least in the eyes of the public.

Scholars should, therefore, consider measuring the question of the broader impact the Court has had on the civil service in a few years; and perhaps also with a comparative focus. For instance, in recent years the Supreme Court of India has apart from entertaining various social governance issues, also taken a deep interest in reforming the civil service. In 2013, it passed an extensive order promising widespread changes in the civil services, including: (i) creation of an independent Civil Services Board for the management of transfers, postings, inquiries, process of promotion, reward, punishment and disciplinary matters; (ii) the guarantee of fixed minimum tenure; and (iii) the obligation to bring verbal orders down to writing, thereby creating an effective chain of accountability.³¹⁰ On a narrow level, the Indian Supreme Court has also for long claimed the power to monitor and supervise civil servants, especially in political corruption matters.³¹¹ The Indian Supreme Court has even taken the step to reform the country's anti-corruption body – the Central Bureau of Investigation (“CBI”) – by explicitly ordering a number of changes (such as changing the appointment process for the Director of the CBI and providing him or her operational independence).³¹² The Pakistani Supreme Court, therefore, may not be the lone exception to Hamilton's general claim about the judiciary being the weakest branch of the State. A comparative study may be in order to decipher the conditions under which other courts may similarly aspire to acquire this power; this would be particularly desirable if we find that the

³¹⁰ See *T.S.R.Subramanian & Ors vs Union Of India & Ors* (Writ Petition No. 82 of 2011)

³¹¹ See Arghya Sengupta, *Anti-Corruption Litigation in the Supreme Court of India*, Open Society Foundations (2016), available at:

https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-2-sengupta-20160202_0.pdf

³¹² *Ibid.*

Indian and Pakistani courts have been successful in politically insulating the civil service. Time, of course, will be the judge of this.

CHAPTER III: JUDICIAL STRATEGY AND THE PAKISTANI SUPREME COURT'S ALLIANCE WITH THE MILITARY

The previous chapters of this dissertation have noted (in part) the remarkable authority of the Pakistani Supreme Court. But what explains the Court's power, especially given its historical subservience to the executive? This chapter explores how the Court has been able to leverage the delicate balance of civil-military relations to build and maintain its power. In essence, the armed forces of Pakistan – the true sword of the State – functions as an independent institution, which is largely not subject to executive control. The judiciary, therefore, can and has (especially in recent times) relied upon the army to protect its institutional independence. The military as an institution has also not been threatened by the Court's activism; indeed, the Court may have propelled the military's interests in some ways.

This chapter qualitatively and quantitatively analyzes all of the Court's suo motu cases and reported judgments from the years 2005-2015 to demonstrate that the Court was on an institutional level deferring to the military's core prerogatives. The Court's strategy of military deference may appear, at first at least, to be somewhat ill-advised (given the military's historic role in subverting judicial independence); however, this strategy makes sense when one considers the Pakistani political context.

INTRODUCTION

Recently, the tropical islands of Maldives were hit by a strange political storm. The Supreme Court of Maldives ordered the release and re-trial of a group of opposition politicians,

including former President Mohamed Nasheed.¹ The ruling also reinstated the membership of a number of legislators, effectively providing the opposition the law-making majority in Parliament. The incumbent President Yameen was, however, unwilling to accept any of this. He swiftly declared a state of emergency and ordered the arrest of two Supreme Court justices.² The country's police commissioner, who had agreed to enforce the Court's directive, was also sacked.³ President Yameen, supported by his Attorney General and the Chief of Army Staff, got what he wanted a few hours later – the remaining three judges of the Supreme Court issued a statement to the effect that their earlier order had been revoked "*in light of the concerns raised by the President.*"⁴

As the Maldivian emergency measures unfolded, speculation grew in Pakistan: would the Government similarly fire and arrest Chief Justice Saqib Nisar who had with his own brand of judicial activism become a major irritant for the Government? In 2017, the Pakistani Court under his leadership had disqualified and removed from office Nawaz Sharif who had been elected as Prime Minister for the third time.⁵ At the time, his political party – the Pakistan Muslim League – maintained a majority in the country's National Assembly. The Chief Justice was also aggressively utilizing the Court's suo motu jurisdiction to highlight poor governance and

¹ See *Maldives Supreme Court does U-turn after arrests*, BBC News (Feb 07, 2018), available at: <http://www.bbc.com/news/world-asia-42965723>

² *Ibid.*

³ See *Maldivian President sacks two police chiefs in 48 hours*, News Asia (Feb 03, 2018), available at: <https://newsin.asia/maldivian-president-sacks-two-police-chiefs-48-hours/>

⁴ See BBC News, *supra* note 1

⁵ See Hasnaat Malik, *Panamagate saga ends: Prime Minister sent packing*, The Express Tribune (Jul 28, 2017), available at: <https://tribune.com.pk/story/1468452/supreme-court-set-panamagate-verdict/>

corruption.⁶ Needless to say, Chief Justice Nisar was a consistent cause of embarrassment (and pain) for the Government.

To be sure, Nisar's actions were not unprecedented. In many ways, the incumbent Chief Justice appeared to be following the footsteps of Iftikhar Muhammad Chaudhry, who during his tenure (2005-2013) as Chief Justice, initiated hundreds of suo motu actions.⁷ Chaudhry was notorious for publicly hounding members of the Government, including senior bureaucrats and cabinet members.⁸ In 2012, under his leadership, the Court also removed the then Prime Minister, Yousuf Raza Gilani, from office after convicting him for contempt of court.⁹ His political party – the Pakistan Peoples' Party (PPP) – was leading the opposition in Parliament at the time Sharif was removed from office. Judicial power, thus, has sharply wounded (at some point) Members among both the treasury and opposition benches of the Parliament. And they are united (to an extent at least) in their criticism of, and resolve to curtail, judicial activism.¹⁰ However, they have been largely unsuccessful in meeting this objective.

⁶ The Court can of its own motion admit any issue or controversy for hearing under what has come to be known as its "suo motu" jurisdiction. There is no requirement for standing, ripeness or for that matter even a petitioner. In 2017, alone, Chief Justice Nisar is attributed as having admitted thirty-four cases in the Court's suo motu jurisdiction (all of which concerned in some manner executive action). See Masood Rehman, *CJP took 34 suo motu notices in 2017*, Daily Times (Dec 25, 2017), available at: <https://dailytimes.com.pk/166739/cjp-took-34-suo-motu-notices-2017/>

⁷ See Table 2, Chapter I

⁸ Ibid.

⁹ See Jon Boone, *Pakistan's prime minister Yousuf Raza Gilani disqualified by supreme court*, The Guardian (Jun 19 2012), available at: <https://www.theguardian.com/world/2012/jun/19/pakistan-prime-minister-yousuf-gilani-disqualified>

¹⁰ Recently, Bilawal Bhutto-Zardari – leader of the PPP – is reported to have said that "*judicial activism must be lessened and the judiciary should do its work and let politicians work. If we [politicians] are bad or failed then masses have power to reject us through vote.*" See

By some measures, this alliance against judicial power can perhaps be traced to 2010 when the Pakistani Parliament unanimously passed a constitutional amendment which sought to, among other things, abridge the Chief Justice's power to appoint judges of the superior courts.¹¹ Through the 18th Constitutional Amendment, Parliament expressly provided an active role for legislators in the appointment mechanism for judges. However, their efforts failed miserably. Under the threat of the Court striking down the Amendment, Parliament passed another Constitutional Amendment which sought to address some of the Court's reservations.¹² The Amendment strengthened the influence of judges in the judicial appointment mechanism; however, legislators still had a dominant role.¹³ The Court was unsatisfied, so it proceeded to interpret the Constitution in a manner which practically eradicated the possibility of legislators exercising any meaningful control over judicial appointments.¹⁴

Muhammad Hussain Khan, *Bilawal says 'judicialisation of politics' not good for democracy*, Dawn News (Apr 02, 2018), available at: <https://www.dawn.com/news/1398967>

¹¹ Whereas previously the Chief Justice was effectively the sole decision maker in the appointment process, through the Amendment the judicial appointment process was broken down into two tiers. Nominations would first be processed by a 'Judicial Commission' comprising the Chief Justice, some senior judges, the law minister and representatives of the Bar Council. Recommendations of the Judicial Commission would then need to pass muster before a 'Parliamentary Committee' comprising members of Government and the opposition. See Hussain Zaidi, *New method of judges' appointment*, Dawn News (Jan 01, 2011) available at: <https://www.dawn.com/news/595422>

¹² Ibid.

¹³ Ibid.

¹⁴ See Saroop Ijaz, *Judicial Appointments in Pakistan: Coming Full Circle*, 1 Lums Law Journal 1 (2013) (In *Munir Bhatti v. the Federation of Pakistan*, the Court effectively took away the Parliamentary Committee's power to veto recommendations of the Judicial Commission. It held that only the Judicial Commission had the power to review the competency of a person to become a judge and that if the Parliamentary Committee disagreed with the Commission's recommendations, it should provide its reasons in writing. Additionally, the Parliamentary Committee decision could be challenged and overturned by the superior courts.)

Other attacks on the judiciary have met a similar fate. Thus, when the Parliament moved to curtail the Court's power to punish government officials for disobedience of judicial orders, the Court quickly moved to strike this law down for being unconstitutional.¹⁵ The Court has also blatantly rejected any attempt by the Parliamentary Public Accounts' Committee to exercise fiscal oversight and control of the Court's expenditures.¹⁶ Criticism of the Court's actions has often met an iron fist in the form of contempt charges and gag orders on the media. Recently, the Court even proceeded to sentence a Senator from the ruling party to one-month imprisonment for "scandalizing" the judiciary.¹⁷

Presumably, part of the reason that the Government has been unable to control the Court is its inability to dismiss recalcitrant judges – the power to remove judges of the superior courts is constitutionally entrusted to a Supreme Judicial Council (SJC) that is manned entirely by judges.¹⁸ Be that as it may, this constitutional provision has hardly proved to be a barrier to the forced removal and suspension of judges in the past. In March 2007, for instance, Chief Justice Chaudhry was suspended and practically removed from service by then-President Pervez

¹⁵ On July 12th, 2012, the Contempt of Court Act, 2012, was passed. The Contempt Act introduced a number of changes to the law relating to contempt of court. Critically, it (i) introduced a number of defenses which could be raised by public officials; and (ii) provided a right of appeal against any conviction and a mandatory suspension of the sentence. The Contempt Act was challenged before the Court and less than a month later it was struck down for being unconstitutional. See *Baz Muhammad Kakar & another v. Federation of Pakistan* (Constitution Petition 79 of 2012)

¹⁶ See *SC suspends PAC notice summoning registrar*, Dawn.com (Jan 01, 2013) available at: <https://www.dawn.com/news/775490/sc-suspends-pac-notice-summoning-registrar>

¹⁷ See Hasnaat Malik, *Nehal Hashmi sentenced to one month jail time in contempt of court case*, The Express Tribune (Feb 01, 2018), available at: <https://tribune.com.pk/story/1623555/1-nehal-hashmi-sentenced-one-month-jail-time-contempt-court-case/>

¹⁸ See Article 209 of the Constitution of Pakistan, 1973

Musharraf.¹⁹ A few months later Musharraf declared a state of emergency which led to the illegal removal of numerous judges of the superior courts.²⁰ Musharraf's actions were also not unprecedented – since Pakistan's inception, at two separate occasions, the judiciary has been purged of dissenters without issue.²¹ So what explains the rise of what appears to be an omnipotent judiciary? And why hasn't the Government been able to curtail and control judicial power?

Some may argue that the Government has avoided taking any unconstitutional action against judges since democracy has returned to Pakistan. Indeed, the judicial purges described earlier were carried out by military dictators and not civilian leaders. However, this explanation ignores both the direct and indirect attacks launched against the judiciary during Pakistan's "democratic" history. In the 1990s, for instance, the judiciary was the constant target of political and, at times, physical attacks. Perhaps the most notorious incident in this reference was the 1997 riot caused at the Supreme Court building by supporters of Nawaz Sharif.²² Through his political maneuvering, Sharif also succeeded in dividing the Court. A majority of Supreme Court judges admitted a challenge to Shah's appointment as Chief Justice and Shah was ultimately shown the

¹⁹ See Griff Witte, *Ousted Chief Justice Speaks Out in Pakistan*, The Washington Post (Mar 29, 2007), available at:

<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032802069.html>

²⁰ See *General (r) Pervez Musharraf v. Nadeem Ahmed Advocate* (Civil Review Petition Nos. 328 & 329 Of 2013 in Constitution Petition Nos. 8 & 9 Of 2009)

²¹ See *The PCO and its victim judges*, Dawn News (Jan 07, 2008), available at:

<https://www.dawn.com/news/841674/pco-and-its-victim-judges>

²² The Court was hearing a contempt petition against Sharif who at the time assumed the office of Prime Minister and had conflicted with the then Chief Justice Sajjad Ali Shah on a variety of issues. See Raymond Bonner, *Protest Disrupts Contempt Case Against Pakistan Premier*, The New York Times (Nov 29, 1997), available at:

<https://www.nytimes.com/1997/11/29/world/protest-disrupts-contempt-case-against-pakistan-premier.html>

door.²³ Democracy, therefore, has little to do with respect for judicial autonomy, at least in the context of Pakistan: the expansion (and preservation) of judicial power in Pakistan requires a more meaningful explanation.

For some political fragmentation may provide the answer.²⁴ A fragmented political elite may not be able to align itself sufficiently to take action against the judiciary, in turn providing it the space for judicial independence and authority. And undoubtedly one would find considerable political fragmentation in Pakistan, especially with the rise of the Pakistan Tehreek-e-Insaf (PTI) which has arguably become the second largest (and perhaps the most vocal) party in opposition.²⁵ The PTI, along with other political parties, have frequently knocked the Court's door as a petitioner and have thereby provided the Court with the political support and leverage to rule against the Government. However, this explanation too in of itself cannot wholly account for judicial power in Pakistan.

²³ The judges essentially held that since Shah was not the most senior justice of the Supreme Court at the time of his appointment as Chief Justice (a convention at the time), he was unlawfully appointed as Chief Justice. It should, however, be noted that this convention had not always been followed and that Shah had been appointed as Chief Justice in 1994 (and was already in his third year as Chief Justice) when this challenge was entertained. See *Bitter memories of 1997 contempt case against Sharif*, The News (Jan 19, 2012), available at: <https://www.thenews.com.pk/archive/print/619617-bitter-memories-of-1997-contempt-case-against-sharif>

²⁴ See John Ferejohn, Frances Rosenbluth, and Charles R. Shipan, *Comparative Judicial Politics in The Oxford Handbook of Comparative Politics*, Charles Boix & Susan C. Stokes (Eds.), Oxford: Oxford University Press (2007), pp. 727-751; Mark A. Graber, *Constitutional Political in an Active Voice in Consequential Courts: Judicial Roles in Global Perspective*, Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan (eds.), Cambridge: Cambridge University Press (2013), pp. 371-374; Maryam S. Khan, *Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*, 28 *TEMPLE INT'L & COMP. L.J.* 2, pp. 286-287

²⁵ See Ayesha Mulla, *Broadcasting the Dharna: Mediating "Contained" Populism in Contemporary Pakistan*, 11 *International Journal of Communication* (2017), pp. 4184-4185

As noted earlier, the 18th Constitutional Amendment, which the Court practically struck down, was passed unanimously by Parliament. In addition, both the Public Accounts Committee and the newly formed Parliamentary Committee on Judicial Appointments are bi-partisan in nature and have at different junctures expressed their dissatisfaction with the positions taken by the Court. The Committee on Judicial Appointments has even publicly lamented that it is a mere “rubber stamp,” which could only confirm (and not reject) the nominations sent by the Judicial Commission.²⁶ One can also conceive other court curbing measures which similarly reduce judicial power without necessarily increasing the Government’s control over the judiciary. For instance, the Parliament could pass a law which declared that all decisions in suo motu cases by the Supreme Court were appealable to a special bench of the Court; alternatively, it could even propose the creation of a new distinct constitutional court which would be manned by judges appointed by a bi-partisan committee (or even the Senate directly). More directly, the Government can simply disregard the Court’s verdict on judicial appointments. Disobeying court orders is not unknown in Pakistan, where the Government has on various occasions openly disobeyed judicial orders on issues that did not even provide for bi-partisan support.²⁷ The question is: why did it not exercise this option here? Was Parliamentary sovereignty simply not an issue worth fighting for?

²⁶ See *Lawmakers seek meaningful role in judges’ appointment*, Dawn News (Oct 30, 2015), available at: <https://www.dawn.com/news/1216315>

²⁷ For instance, the PPP led Government persistently disobeyed the Court’s directives to file corruption/money laundering references against President Zardari, among others, as ordained in the *Dr. Mubashir Hassan* case (PLD 2010 SC 265). Widespread disobedience was also observed in relation to the orders passed in Hajj Corruption case (SMC 24 of 2010) and the rental power scam case (Human Rights Case No .7734-G/2009 & 1003-G/2010). See Chapter II of this dissertation for more details in this reference.

Perhaps the Government was deterred by public opinion which has been overwhelmingly in favor of the Court.²⁸ Public support, after all, translates into votes and politicians are swayed by votes. From the time when the Court was stormed by supporters of Sharif, the Court, and especially the office of the Chief Justice, has become salient amongst the Pakistani public.²⁹ Thus, forcibly removing judges or changing their appointment mechanism may be construed as an attack on judicial independence (arguably in a manner which is distinct from mere disobedience in cases concerning political corruption). Recent public opinion data from Gallup Pakistan also corroborates this position to an extent.³⁰

²⁸ See Georg Vanberg, *Legislative-Judicial Relations: A Game Theoretic Approach to Constitutional Review*, 45 *American Journal of Political Science* 2 (2001): 346–347; James L. Gibson, Gregory A. Caldeira, and Vanessa Baird, *On the Legitimacy of National High Courts*. 92 *American Political Science Review* 2 (1998), 343–358; Walter Murphy and Joseph Tannenhaus, *Publicity, Public Opinion, and the Court*, 84 *Northwestern University Law Review* (1989–1990), 985–1023.

²⁹ In commenting on this dynamic, I have earlier noted the following interesting (and relevant) statistics which were retrieved from the Gallup Pakistan Public Opinion Archives: *In 1997, respondents were asked about who was right in the infamous Prime Minister Nawaz Sharif and Chief Justice Sajjad Ali clash, which ultimately culminated in a full blown attack on the Supreme Court and the subsequent removal of Justice Shah. Almost half (47%) of those surveyed supported Prime Minister Sharif's stance whereas only 20% were in favor of the Chief Justice. Conversely, public opinion was considerably in favor of the Chief Justice during the Chaudhry-Musharraf clash in 2007, which too resulted in the temporary removal of Justice Chaudhry: 67% of the respondents who had heard or read about the charges leading to Justice Chaudhry's dismissal (which included corruption, nepotism, etc.) thought that the President had made a bad decision. People also appear to be largely satisfied with the performance of Justice Chaudhry. In 2011, Justice Chaudhry was ranked as the most popular person in Pakistan – above any politician and celebrity. In August 2012, respondents were asked to comment on the performance of Justice Chaudhry: 53% noted that it was good or very good and only 13% felt that it was bad or very bad. In another survey respondents were asked whether they would extend the tenure of the Chief Justice if they had the power to do so. In response, 47% said yes, while 35% did not support such a move and 18% did not respond. See Asher A. Qazi, *Suo Motu: Choosing Not to Legislate*, in *Politics and Jurisprudence of the Chaudhry Court*, Moeen H. Cheema & Ijaz S. Gilani (Eds.), Islamabad: Oxford University Press (2015), pp. 311–312*

³⁰ For instance, the public generally appears to trust the Chief Justice in matters concerning the appointment and removal of judges (including any judges who be accused of corruption). See Figures 10 and 11 for more details in this reference.

Public opinion surely carries considerable weight as an explanatory variable for the rise of judicial power in Pakistan. The Court has been able to fill the void left by the Government chiefly because the public has supported it. The Court's supportive public constituencies, especially in the media and the legal community, also routinely come to the Court's defense. However, public support is arguably not enough to deter every attack against the judiciary. In fact, where elected leaders are persistently uncertain about the extent to which they would be able to complete their term in office, they may care less about public opinion and more about staying in power.³¹ As Helmke notes, "*the larger the threat of losing office looms, and the more a leader believes the court can help ameliorate that risk, the more attractive capturing and weaponizing the court becomes.*"³² And one would indeed find evidence of such political instability in Pakistan, where prior to 2013 not even one elected Government had completed its term in office. The Pakistani judiciary, it should be noted, has also played a central role in both legitimizing military interventions and sanctioning the constitutional dissolution of Parliament. In these circumstances, I argue, political leaders in Pakistan may be more motivated to capture the judiciary (since it can increase their chances of staying in power), even if it means losing the confidence of the electorate – a second term in office, after all, seems like a luxury when leaders hardly get to complete one term.

One would also find that the Pakistani Government has repeatedly ignored public opinion in the past, in so far as the judiciary is concerned. In 2007, when Chaudhry was forcibly removed

³¹ See Gretchen Helmke, *The Puzzle of Purges: Presidential Instability and Judicial Manipulation in Latin America*, Presented at the 'Defending Human Rights in Times of Constitutional Crises' conference in Chicago, May 18-19, 2018 (on file with author) (Helmke discusses how Presidential instability in Latin America has actually incentivized the executive to undermine judicial independence and capture courts)

³² *Ibid.*, 2

from office, the judiciary (and particularly Chaudhry) had already gained public recognition and admiration.³³ However, this did not deter Musharraf from doing what he felt was necessary for remaining in power. Admittedly, Chaudhry's removal from office and the subsequent declaration of emergency triggered nation-wide protests, but these protests too were initially unsuccessful in reinstating Chaudhry and his loyal cohort of judges. In fact, even after the gradual return of democracy through the 2008 elections and the resignation of Musharraf, the newly elected PPP Government was slow to respond to the widespread demand of restoring the deposed judges. Nearly all political parties in opposition clubbed their resources together and started to march towards the capital to ensure that this demand was met.³⁴ Still, the Government was unfazed. It was then, in the midst of the crisis, that the Chief of the Army Staff, Gen. Ashfaq Parvez Kayani, reportedly met with President Zardari to let him know that soldiers of the Pakistan army would not be deployed to disperse the protestors.³⁵ Considering the lack of support of the military and the inability of the civilian police to handle the crisis, the President finally budged and agreed to restore Chaudhry and the remaining deposed judges.

The story of Chaudhry's restoration is telling from many perspectives. It is certainly true that Chaudhry's high public approval ratings enabled a powerful alliance of journalists, lawyers, and members of civil society, among others, to protest for a just and popular cause.³⁶ However, what influenced the ultimate decision to restore judges wasn't so much the protests – protests

³³ See *supra* note 29

³⁴ For a historical account of the “lawyers movement” which started after Chaudhry's removal see, generally: Muneer Malik, *The Pakistan Lawyer's Movement: An Unfinished Agenda*, Islamabad: Pakistan Law House (2008)

³⁵ See Jane Perlez, *Pakistan Avoids Pitfall, but Path Ahead Is Unclear*, *The New York Times* (Mar 16, 2009), available at: <https://www.nytimes.com/2009/03/17/world/asia/17pstan.html>

³⁶ See Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 *Law & Social Inquiry* 985 (2010)

happen all the time, often without success – but the inability of the Government to handle and disperse the protestors. Importantly, General Kayani’s decision to not support the Government (unlike perhaps in the case of Maldives) was central to this determination. It is through this often ignored fact that, I posit, we can build some understanding of the expansion of judicial power in Pakistan.

This chapter argues that the Pakistan Supreme Court has been able to leverage the delicate balance of civil-military relations to build and maintain its power. In essence, the armed forces of Pakistan – the true “sword” of the State – functions as an independent institution or organ of the State, which is largely not subject to executive control.³⁷ The judiciary, therefore, can and has (especially in recent times) relied upon the army to protect and defend its institutional independence, even where such independence is being exercised in a manner which is contrary to the interests of the elected Government. This general argument is explored in this chapter as follows.

Section I will briefly contextualize the relationship between the elected Government and the Pakistani army. It will trace the origins of the civil-military imbalance and the steps the military has taken to entrench its power on the Pakistani political scene. Particularly, it is argued, that even after the lapse of a military dictatorship, the military manages to safeguard its institutional prerogatives by maintaining pressure on the Government through a number of actors like the Supreme Court. Section II will debunk the myth of an omnipotent Pakistani judiciary and particularly the idea that Chief Justice Chaudhry’s removal and subsequent restoration marked

³⁷ See, generally, Mazhar Aziz, *Military Control In Pakistan: The Parallel State*, New York: Routledge (2008); Ayesha Jalal, *The State of Martial Rule: Pakistan’s Political Economy of Defense*, Lahore: Sange Meel (1995)

the establishment of a Supreme Court which would meaningfully challenge the military. A quantitative and qualitative analysis of all of the Court's suo motu cases (N=190) and reported judgments (N=698) from the 2005-2015 period confirms that the Court has never really damaged the military's core prerogatives, despite having been provided several opportunities to do this. A court which was interested in challenging the military would have: pushed for accountability (especially of the military high command which supported Musharraf); constrained the extensive powers and interests of the military (especially the constitution of military courts and military businesses with special concessions); and facilitated civilian control over the military. Yet one finds that the Court more often not: simply refused to entertain serious challenges to the military's interests; narrowly tailored its decisions against the military, when it did entertain any such challenge; and purposely chose not to pursue compliance (including by way of indicting military officials for contempt) of any adverse decisions. In fact, in some cases the Court actually protected and furthered the military's interests.

Lastly, Section III considers the strategic rationale behind the Court's support for the military establishment, as compared to the elected Government. While for some, the Pakistani Court's choice may seem odd (i.e., why would it support the army considering its historical repression of judicial independence), this decision makes strategic sense given Pakistan's political context. A judicial-military alliance, I argue, made sense for the Court given that: (i) the public has consistently held the military in high esteem as compared to the elected Government (making the latter an easy target); (ii) the Court and the military share a number of institutional characteristics which makes cooperation between them easier; (iii) attacking the Government allows the Court to influence state policy on a broader scale, in turn enabling it to develop

supportive constituencies; and (iv) the Court can effectively contain any threat of retaliation from the Government.

It should be noted at the onset that I will not attempt (in any way) to make a normative assessment of the Court's strategy. One may well argue that the Court's actions undermined democracy and created further space for the military. My primary concern, however, is exploring the institutional strategy of the Supreme Court (between the years 2005-2015) that has effectively created a new political equilibrium (at times described as a "judicial martial law") in Pakistan.³⁸ It is in this limited sense that I conclude by noting that a military coup is unlikely in the near future (all else remaining equal of course); whether the equilibrium itself is desirable is another issue altogether.

I. CIVIL-MILITARY RELATIONS IN PAKISTAN: BACKGROUND AND CURRENT SETTING

Since Pakistan's independence from colonial rule in 1947, the country has witnessed four distinct periods of martial rule (1958-1969, 1969-1971, 1977-1988, 1999-2008). Indeed, until very recently (2013), Pakistan had not even seen one duly elected Government complete its term of office.³⁹ Much of Pakistan's history, therefore, has been defined (and continues to be defined) by martial dominance.

³⁸ See *This is nothing short of judicial martial law, says Nawaz Sharif*, Samaa News (Apr 23, 2018), available at: <https://www.samaa.tv/pakistan/2018/04/this-is-nothing-short-of-judicial-martial-law-says-nawaz-sharif/>

³⁹ See Declan Walsh, *Making History in Pakistan Simply by Serving a Full Term*, The New York Times (Sep 8, 2013), available at: <https://www.nytimes.com/2013/09/09/world/middleeast/zardari-of-pakistan-ending-his-presidency.html>

Civil-military relations in Pakistan today are a product of this history, which can be broadly divided into three distinct periods: (i) the formative period (1947-1958), which planted the seeds of martial dominance and a weak government; (ii) periods of direct military rule (1958-1969, 1969-1971, 1977-1988, 1999-2008), which further expanded military power; and (iii) periods of civilian rule (1971-1977, 1988-1999, 2008-present) when the military retreated from intervening in the political sphere directly, but still largely preserved its power by exploiting a weak government. What follows is a brief discussion of these respective periods.

(i) *The Formative Period: Setting the foundation for martial dominance and a weak government (1947- 1958)*

There are various works which seek to identify the causes of the civil-military power imbalance we see today in Pakistan.⁴⁰ And many of them would trace the origins of this imbalance to the very independence of Pakistan. At the time Pakistan was created, the political

⁴⁰ To name a few: Mazhar Aziz, *Military Control In Pakistan: The Parallel State*, New York: Routledge (2008) (arguing in part that the military intervenes to remove any civilian government that is perceived to be undermining the military's institutional interests); Ayesha Siddiq, *Military Inc.: Inside Pakistan's Military Economy*, New York: Oxford University Press (2007) (Siddiq argues that the military's dominance in Pakistani politics has led the development of distinct economic interests which provide the armed forces, especially its senior officer class, a powerful incentive to intervene in politics on a continuing basis); Ayesha Jalal, *The State of Martial Rule: Pakistan's Political Economy of Defense*, Lahore: Sange Meel (1995) (Jalal considers in part some of the external factors, particularly the role played by the U.S, which contributed to the civil-military imbalance); Aqil Shah, *The Army and Democracy: Military Politics in Pakistan*, Cambridge: Harvard University Press (2014) (Shah attributes the authority of the Pakistani army to the various internal and external threats which Pakistan faces); Philip Oldenburg, *India, Pakistan, and Democracy: Solving the Puzzle of Divergent Paths*, New York: Routledge (2010) (Oldenburg studies the ascendancy of the Pakistani army from a comparative standpoint and identifies various factors that contributed to the development of a democracy in India and an autocracy in Pakistan.)

leadership mostly lacked governance experience,⁴¹ did not have sufficient local support,⁴² and can be said to have been deeply divided.⁴³ Yet they were required to deal with a variety of unfavorable socioeconomic conditions which would have given any Government a tough time, let alone an inexperienced and divided one.⁴⁴ The difficulties facing the Pakistani polity were only compounded by the poor decisions made by its leaders. While hindsight vision is certainly

⁴¹ Few leaders of Pakistani movement had actual experience of running a State or for that matter any government service. Even in terms of building social cohesion, the Muslim league and the movement for Pakistan largely relied upon the charisma and appeal of individual leaders such as Mohammad Ali Jinnah. Jinnah's death in 1948 – only a year after independence – was a major blow to the nation building project in Pakistan. Shortly afterwards, Pakistan suffered another setback as veteran politician and the first Prime Minister of Pakistan, Liaqat Ali Khan, was assassinated. See Stephen P. Cohen, *The Idea of Pakistan*. Washington, DC: Brookings Institution (2004), pp. 5-7

⁴² See Oldenburg, *supra* note 40; See also: Deepak Pandey, *Congress-Muslim League Relations 1937–39: 'The Parting of the Ways'*. *12 Modern Asian Studies* 4 (1978), pp. 629-654. (The Muslim League which led the struggle for independence in Pakistan was a fairly young party, especially when compared to the Congress Party in India. Before independence, the Congress Party also appeared to be remarkably successful in building its organization, capacity and appeal in the local populace. For instance, in the 1937 elections the Congress Party secured a sweeping victory in five major provinces of united India; The Muslim League, on the other hand, performed poorly even in the Muslim majority provinces of Bengal and the Punjab).

⁴³ The Pakistani political leadership was deeply divided on even some of the basic issues concerning the State. For instance, was the newly created State going to be “Islamic” or “Secular” in nature? Even today there are no clear answers to this question. In addition, the Pakistani populace was also strongly divided on ethnic lines. Early decisions by the Pakistani political leadership only exasperated these differences. For instance, Jinnah ordered that Urdu (a language spoken at the time by a minority of the population) be declared as a national language, thereby undermining the status of other more popular regional languages such as Bengali. Jinnah also ordered a military operation in Baluchistan, when the ruler of the region refused to join the Pakistani Federation. In many ways this decision planted the roots of resentment among an entire region than now constitutes the largest province in Pakistan. See Naghman Chaudhry, *Pakistan's First Military Coup: Why Did the First Pakistani Coup Occur and Why Does it Matter?* The NPS Institutional Archive (2012), pp. 9-10, available at: <http://hdl.handle.net/10945/6773>

⁴⁴ The manner in which Pakistan's boundaries were drawn, independence expedited and resources distributed, was arguably unfair. Pakistan also lacked a central infrastructure and had to deal with a variety of problems, including thousands of incoming refugees (which formed almost 10% of the population). It is also important to highlight that from a geographical perspective, Pakistan was divided in two wings (separated on land by India's hostile territory), which increasingly had less cause to stay united. *Ibid.*, 8-10.

20/20, scholars do refer to some political decisions which proved to be disastrous for the establishment of a strong and stable civilian government. For instance, the desire of the Pakistani leadership to prefer the centralization of power as opposed to recognizing legitimate claims for regional autonomy furthered ethnic divisions and made the nation-building project all the more difficult.⁴⁵ Similarly, Jinnah's decision to send troops to Kashmir created in many ways the foundation of the security state.

For what it's worth, the civilian leadership was hardly provided the opportunity to learn from its mistakes, consolidate its power and implement a long-term vision of growth. At independence, Pakistan inherited an extremely well-trained and powerful bureaucracy, which effectively hindered the development of strong political leadership. Between the years 1947-1958, seven Prime Ministers were dismissed at the behest of the powerful bureaucracy.⁴⁶ Perhaps the most critical assault came at the hands of Governor General Ghulam Muhammad – another career civil servant – who dissolved the Constituent Assembly of Pakistan before it even had the opportunity to present the country's first constitution.⁴⁷ The exercise of nation-building and the resolution of political differences through democratic means was, therefore, in a sense killed in the cradle.

⁴⁵ Shah, for instance, finds that the political leadership of Pakistan in pursuit of this centralized power “*sacked noncompliant civilian cabinets (1953), delayed constitution making, disbanded Parliament when it crafted a federal democratic constitution (1954), and ultimately amalgamated the provinces of West Pakistan into ‘one unit’ to create parity with East Pakistan (1955-1956)*”. It is not surprising to find that as a result of these decisions internal dissension flourished. See Aqil Shah, *The Military and Democracy*, in *Pakistan at the Crossroads: Domestic Dynamics and External Pressures*, Christophe Jaffrelot, Ed. New York: Colombia University Press (2016), pp. 27

⁴⁶ See Chaudhry, *supra* note 43, at 103

⁴⁷ *Ibid.*, 45

Where there was much cause for the Government to be weak, there were similarly many factors which contributed to the strength of the armed forces. Pakistan's foray with India over Kashmir in 1948 created an environment of insecurity that very early on provided a firm basis for a militarized State.⁴⁸ This fear or insecurity was compounded by the public position of the Indian Congress Party which viewed the creation of Pakistan as merely a "*temporary recession of certain territories . . . which would soon be reabsorbed.*"⁴⁹ Pakistan was also threatened on its western border, given the extremely antagonistic position taken by Afghanistan. Afghanistan not only refused to recognize Pakistan as a sovereign state but also considered Pakistan's North-Western Frontier Province to be an integral part of its territory.⁵⁰ Investing in a strong and modern military was, therefore, considered to be a key objective for the new State, even as it struggled for resources.⁵¹ According to some estimates, between the years 1947-1958 approximately 60% of Pakistan's Federal expenditure was dedicated to defense.⁵² Also, during this period (and for some time after as well) the army received considerable technical and financial assistance from the United States, which heavily influenced the operational ability of the Pakistani military as well as its identity and confidence.⁵³

The military was also provided significant control and autonomy over the way it framed and spent its budget. This autonomy was partly the result of the position taken by the bureaucracy vis-à-vis the military (the latter being treated like a partner that civil servants could

⁴⁸ See Shah, *supra* note 45, at 40

⁴⁹ See Chaudhry Mohammad Ali, *The Emergence of Pakistan*, Lahore: Research Society of Pakistan (1975), pp.175

⁵⁰ See Chaudhry, *supra* note 43, at 13

⁵¹ See Jalal, *supra* note 40, at 49-51

⁵² See Chaudhry, *supra* note 43, at 54

⁵³ For the United States, the Pakistani military was an important and strategic ally that it preferred to work with in a bid to reduce the influence of the Soviet Union. Siddiqi, *supra* note 40, at 71

work with to control the political leadership) and partly the product of decisive military leadership.⁵⁴ Either way, it hindered to a great degree the ability of civilians to oversee and control the armed forces.⁵⁵

It is also important to highlight that unlike the civilian leadership which was inexperienced, incompetent and divided, the rank and file within the army was united, efficient and deeply professional.⁵⁶ In a sense, the Pakistani army provides an interesting example of how Huntington's "objective control" or "professionalism" is in of itself an insufficient condition for producing civilian control of the military.⁵⁷ On the contrary, the professional status of the Pakistani army only distanced it from the political leadership by inculcating a sense of military superiority.⁵⁸ This sense of military superiority was ingrained in the military in part due to the

⁵⁴ Ayub Khan, the then Commander & Chief of the armed forces, is reported to have insisted on this autonomy. During the 50's, he was also inducted in the Federal Cabinet as the Minister of Defense. In the years that followed, the army continued this practice of controlling the Ministry of Defense, which is formally tasked with oversight of the armed forces. *Ibid.*, 70-71

⁵⁵ See Jeanne Kinney Giraldo, *Defense Budgets, Democratic Civilian Control, and Effective Governance*, in *Who Guards the Guardians and How*, Thomas C. Bruneau and Scott D. Tollefson, eds. Austin: University of Texas Press (2006), pp. 178–184. (Giraldo argues that civilian control of the military requires, among other things, a civilian led defense budget formulation process as well as monitoring mechanisms which can ensure that the relevant funds are expended in a manner which accord with the priorities set by the civilian government)

⁵⁶ Command and control of the armed forces of Pakistan vests in the Chief of Army Staff (COAS) whose control over the army has generally not been questioned from within. Thus, while there have been internal coup attempts within the army, none of these have been successful. In fact, the army intelligence itself played a leading role in both discovering and controlling these internal coups. Insubordinate officers were also court martialed and sentenced swiftly. On the other hand, all coups attempts which were led from the top by the COAS were successful. See Chaudhry, *supra* note 43, at 38

⁵⁷ See, generally: Samuel P. Huntington, *Soldier and the State: The Theory and Politics of Civil-Military Relations*, Cambridge: Harvard University Press (1957) (Huntington argues, in part, that instead of placing legal restrictions on the military's autonomy – a form of "subjective control" – politicians should utilize the more efficient method of keeping the military out of politics i.e. building an army of specialists who are trained to be distinct from other professions, have an established hierarchy, and are not subject to political meddling)

⁵⁸ Finer who has been one of Huntington's earliest critics also makes this point in context of civil-military relations generally. For him what's more critical for civilian control over the

incompetence of the civilian Government itself, which consistently called it in to resolve riots, engage in law-enforcement and assist in various socio-economic activities.⁵⁹ Indeed, martial law by Pakistan's first military dictator, General Ayub Khan, was only implemented at the invitation of the then President Iskandar Mirza.⁶⁰ Khan, who only a few days later displaced Mirza and assumed full control, publicly lamented the state of affairs and held politicians completely responsible for it; for him, politicians who were willing to "*barter the country for personal gains*" had to be stopped and, if necessary, imprisoned.⁶¹ The public welcomed the coup, the bureaucracy facilitated it, and the judiciary legitimized it – an example was set and the path paved for military interference in the future.

military is the military's "disposition" towards such control i.e. the extent to which the military believes in the principle of civilian supremacy. Professionalism can undermine this disposition since an autonomous and efficient military can start distinguishing between its duties to the nation from its duties to the elected government of the day. In addition, a professional army can develop the mindset that it can do a better job than the civilian government (what Finer refers to as "military syndicalism"). This in turn makes it jealously guard its autonomy and also more suspect to overthrowing the civilian government. See Samuel E. Finer, *The Man on Horseback: The Role of The Military in Politics*, New York: Routledge (2017), pp. [60-62]

⁵⁹ See Chaudhry *supra* note 43, at 47-49

⁶⁰ Mirza's invitation was preceded by a deep political and economic crisis which also demonstrated the inability of the Government to deal with the problems facing the new State. *Ibid.*, 52

⁶¹ See Murtaza Haider, *What they never tell us about Ayub Khan's regime*, Dawn News (Nov 01, 2016), available at: <https://www.dawn.com/news/1293604>. This sense of military superiority and heightened patriotism among the armed forces of Pakistan strongly reverberates in the public explanation of every coup experienced in Pakistan since Khan. Cohen sharply captures this attitude of the army in the following quote from one of Pakistan's senior military officers:

We intervene because the politicians and civilian bureaucrats are corrupt and inefficient. We are incorrupt and selected on the basis of merit and the best of us reach higher ranks, whereas the civilians need no formal education to attain higher bureaucratic appointments and their selection is based on political reasons, rather than merit. See Cohen, *supra* note 41, at 126

(ii) *Direct Military Rule and the Expansion of Military Power (1958-1969, 1969-1971, 1977-1988, 1999-2008)*

Every time the military has assumed the mantle of Government directly, it has used its position to both expand the ambit of its authority and counter (or more aptly weaken) opposition – whether such resistance is institutional (for example from the judiciary) or political (for instance from civil society and political parties).

During the formative period discussed above, the military was called upon to perform various duties connected with the civilian government, but these responsibilities were always thrust upon it on an ad-hoc basis. There was no permanent absorption of civilian functions or entrenchment of civilian institutions by the military. Military rule changed that, and it has done so in a lasting way.

Each successive military regime infiltrated the bureaucracy. Ayub Khan dismissed hundreds of civil servants; the remaining by and large choose to cooperate with him.⁶² Zia institutionalized the entry of military officers directly in the civil service – a practice which exists to date.⁶³ And Musharraf designated military officers to supervise and train civil servants directly, quite apart from the dozens of military officers who were given high profile Government portfolios.⁶⁴ Military regimes have also drawn senior military officers to bodies like the National Security Council (NSC), which is responsible for advising the Government on high-level issues of national security and foreign policy. And as is mostly the case, these institutional

⁶² See *Reforming Pakistan's Civil Service*, International Crisis Group Asia Report (Feb 16, 2010), at p.3, available at: https://www.ecoi.net/en/file/local/1018101/2107_1307533836_neu.pdf

⁶³ See Saeed Shafqat, *Pakistani bureaucracy: crisis of governance and prospects of reform*, 38 *Pakistan Development Review* 4 (1999), p. 1003

⁶⁴ See Crisis Group Report, *supra* note 62, at 9-10

arrangements have been difficult to weed out even after the tenure of a military dictator ends. In a sense, therefore, the high command of the military almost always retains (and seeks to maintain) a formal place on the policy table.

The judiciary too was captured by military dictators, albeit in a less direct way. Ayub Khan was notorious for rigorously interviewing each candidate for the superior judiciary.⁶⁵ Zia went a step further. When the judiciary started asserting the right of judicial review, he moved to both completely strip it of any jurisdiction to do so and also purged the judiciary of any dissenting voice by requiring all judges to take a fresh oath of allegiance under the Provisional Constitutional Order.⁶⁶ Any judges who failed to do so were removed from office. Musharraf utilized this tactic twice: once when he declared martial law and then again when he was facing challenges from an activist judiciary.⁶⁷ These actions have overtime had two significant effects on the Pakistani judiciary. First, it affected its composition in an enduring way.⁶⁸ Second, it instilled in the judiciary a real appreciation (or more aptly fear) for the power of the armed forces, which in turn benefits from this perception even in times of civilian rule.

Each military regime also brought with it a distinct legal framework and structure for government, which was conducive for its interests and the centralization of power but highly

⁶⁵ See Muhammad Azeem, *Law, State and Inequality in Pakistan: Explaining the Rise of the Judiciary*, Singapore: Springer (2017), pp. 95

⁶⁶ *Ibid.* 137

⁶⁷ See *General (r) Pervez Musharraf v. Nadeem Ahmed Advocate*, Civil Review Petition Nos. 328 & 329 Of 2013 In Constitution Petition Nos. 8 & 9 Of 2009

⁶⁸ Each time a military dictator has purged the judiciary in Pakistan, it has left the institution staffed by judges, who are loyal or somewhat sympathetic to military interests. These judges stay in the system till they retire and as they become senior (and eventually take the position of Chief Justice), come to play a greater role in the appointment of new judges (who are likely to be ideologically closer to the incumbent judges and, as a result, generally deferent to military interests).

damaging for political interests. This was accomplished in part by abrogating or suspending, as the case may be, the Constitution; an action that was almost always legitimized by the judiciary, which also provided the dictator the unilateral right to amend the Constitution.⁶⁹ Military dictators used their broad powers to, among other things, ban political parties and student unions,⁷⁰ introduce qualifications for the Membership of Parliament,⁷¹ and reserve superpowers (such as the right to dissolve an elected assembly) for the office of the President.⁷² Since many of these changes were constitutionally protected (as a condition for lifting martial law),⁷³ they were difficult to roll back and continue to influence Pakistani politics.⁷⁴

Under the garb of accountability, military dictators also arrested and suppressed political workers.⁷⁵ Musharraf, for instance, specifically created the National Accountability Bureau to

⁶⁹ See Aziz Huq, *Mechanisms of Political Capture in Pakistan's Superior Courts*, 10 Yearbook of Islamic & Middle Eastern Law 1 (2006), pp 22

⁷⁰ See Paula Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan*, Cambridge: Cambridge University Press (1995), pp. 80-85, 172-183

⁷¹ Ayub Khan enacted the Public Offices (Disqualification Order) 1959, whereby politicians found guilty of misconduct by a special tribunal could be barred from holding public office for a period of 15 years. *Ibid.*, 79

Zia went further and introduced a set of fairly broad qualifications for becoming a Member of Parliament. See Saad Rasool, *Distilling Eligibility and Virtue: Articles 62 and 63 of the Pakistani Constitution*, 1 Lums Law Journal 1 (2013), pp. 41-43

⁷² This power was provided by Article 58 (2) (b) of the Constitution. For an overview of how this power has been historically used and adjudicated upon by the superior courts see: Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under the Pakistani Constitution and Its Discontents*, 23 Arizona Journal of International and Comparative Law 3 (2006)

⁷³ See Articles 270A-AAA of the Constitution

⁷⁴ Particularly enduring has been the impact on the country's political culture. The military government stifled genuine political opposition and at the same time nurtured a political support base which could be called upon to support it. Thus, during Zia's regime, the religious right was put into service for his political goals. Similarly, during Musharraf's regime, the PML (Q) was created to provide a democratic face to the military government. Dictators go away but their loyalists remain active on the political scene long after they are gone. See Hasan Akbar, *The Rise of the King's Party*, Newline (2002), available at:

<http://newlinemagazine.com/magazine/the-rise-of-the-kings-party/>

⁷⁵ See Newberg, *supra* note 70, at 163, 192.

curb corrupt practices. The Bureau was staffed mostly by retired or active army officials and was given a broad mandate to pursue public corruption.⁷⁶ Many politicians and bureaucrats were and still are, hounded by this law.

It should not be surprising to find that the military used its expanded space and institutional reach to propagate its interests. Thus, the military as an institution remained a top priority in budget allocations and government expenditure during the tenure of military dictators, almost always at the cost of the development of civilian institutions.⁷⁷ Similarly, the military created external alliances that would ensure its continued relevance, regardless of whether they were beneficial for the country as a whole.⁷⁸ Importantly, each military regime invested deeply in the economic interests of the armed forces as well as its members by creating a vast network of businesses and foundations controlled (directly and indirectly) by the military.⁷⁹ These corporate interests provide the military a powerful incentive for retaining power; they also inform the perception of the military in society, as well as its self-perception. Many may, for instance, rely upon the profitability of military businesses as evidence of the army's efficiency and ability to handle civilian affairs, further boosting the sense of military superiority.⁸⁰ Also, military

⁷⁶ See Sumaira Samad, *Combating Corruption: The case of the National Accountability Bureau, Pakistan*, 3 JOAAG 1 (2008), pp. 93-94

⁷⁷ Siddiqi, for instance, shows that between the years 1981-2005, the total amount of defense expenditure was always more than the combined government expenditure on health and education. See Siddiqi, *supra* note 40, at 163

⁷⁸ Shah, for instance, notes how “*the military’s ‘clientalistic’ ties to the United States have repeatedly reinforced the military’s praetorian propensity.*” See Shah, *supra* note 45, at 29 In this reference, particularly costly for the nation has been the army’s support for the ‘mujahideen’ during the Afghanistan-Soviet war. By supporting ‘jihad’ in Afghanistan, in return for military support from the U.S, the military facilitated the spread of a vicious ideology that fueled violence against minorities, intra-sect conflict, and even a revolt against the State.

⁷⁹ See Siddiqi, *supra* note 40, at 116-128

⁸⁰ Persistent failures of the civilian government to provide efficient service delivery, make many people yearn for military rule. For instance, General Ayub Khan’s reign is often referred to as the “golden period” or “decade of development” in Pakistani history which led to the country’s

businesses have allowed the armed forces to establish a kleptocratic network which involves at various levels numerous political and economic actors. And since these persons rely upon the military for this unfair resource distribution, they both facilitate and encourage military power.⁸¹

All of these measures continue to inform Pakistani politics (and especially civil-military relations) long after the military has ceded direct control of the Government.

(iii) *Civilian Rule and The Preservation of Military Power (1971-77, 1988-99, 2008-present)*

Given the conditions of Pakistan during the formative period and the periodic expansion of military power during military regimes, as discussed earlier, one would not be surprised to find that civilian rule is the exception rather than the norm in Pakistan. Indeed, one may reasonably question why military rule is not perpetual? In this reference, it is perhaps most interesting to note that the surrender of political power by military dictators has largely been voluntary. Now it is certainly the case that the circumstances under which they resign are not entirely of their choosing, but it is equally true that martial law in Pakistan has never been overcome by counter-coups or bloody revolutions.⁸²

modernization and industrial development (even though this period also accompanied high levels inequality in the distribution of wealth). See Ishrat Hussain, *The Role of Politics in Pakistan's Economy*, 63 *Journal of International Affairs* 1 (2010), pp. 304; Richard Lieby, *Pakistan nostalgic for military rule*, *The Financial Times* (Jul 04, 2012), available at:

<https://www.ft.com/content/4a966a98-c5f0-11e1-a3d5-00144feabdc0>

⁸¹ See Siddiqa, *supra* note 40, at 14-17

⁸² This is not to say that there haven't been popular movements against military dictatorships. Public protests were noted during the tenure of every military regime, which too utilized a number of tactics to disperse the protestors including by way of arresting political leaders, launching counter movements and suppressing the freedom of speech and the media. No public protest or movement was, however, successful in removing a military dictator by force or violent means.

The military's extrication from politics has in a sense always been self-directed.⁸³ In times of crisis and political opposition, military dictators, it appears, have stepped down because their main support base – the military institution – has ceased to back them.⁸⁴ This fact is important as it helps in distinguishing a military dictators' direct role in politics from the military institution. For instance, public opinion may be against a military dictator, but it may still favor the army.⁸⁵ Importantly, the strength and interests of the military as an institution may be very

⁸³ See generally: Aqil Shah, *Constraining consolidation: military politics and democracy in Pakistan (2007–2013)*, 21 *Democratization* 6 (2014), 1007-1033 (Shah argues that there is a structural differentiation between the “military government” and the “military institution” and that this differentiation in part allows “the institutional military to delink itself from the discredited dictatorship and exit on its own terms”)

⁸⁴ Ayub Khan resigned from his position as President in 1969, partly in response to the widespread protests against his rule and partly due to his ailing health. However, his resignation wasn't a sign of the army's waning influence in any manner; this is best judged from the fact that when he resigned, he simply handed over power to Gen. Yahya Khan, the then Chief of Army Staff. Ayub was gone, but the army wasn't. Yahya Khan reigned for the next two years. The army's humiliating defeat in East Pakistan, however, put considerable pressure on him to step down, especially from the armed forces. For instance, The New York Times reported in 1971 that the military, and especially the Air Force, threatened Khan with a coup in case he refused to step down. See Malcom W. Browne, *Pakistan Asserts President Yahya is Quitting Today*, The New York Times (Dec 21, 1971), available at: <https://www.nytimes.com/1971/12/20/archives/pakistan-asserts-president-yahya-is-quitting-today-top-government.html>

Gen. Zia was assassinated in 1988 and the country proceeded to hold elections in accordance with the schedule announced shortly before his death. Musharraf also lost support of the army, specifically its middle to junior ranking officers. As Aqil Shah notes, “another five years of Musharraf's “military” presidency did not have a strong constituency among members of the officer corps, already demoralized by fighting “Washington's” war on terror on their own soil.” See Shah, *supra* note 45, at 29-33

⁸⁵ By way of an example, General Musharraf's approval ratings plummeted sharply between the years 2002-2007. In 2002, 76% of the country opined that Musharraf was having a good influence on the country. This figure dropped to 34% by July, 2007. By some measures, Musharraf's approval ratings in Pakistan were even lower than Al Qaeda leader Osama bin Laden. In contrast, the army's approval ratings remained high during Musharraf's tenure and afterwards. In 2007, 70% of the population expressed trust in the army as an institution, with the figure rising each year (except for a brief period in 2011). In 2009, less than a year after Musharraf's resignation, as many as 86% of the respondents surveyed thought that the army was a good influence on the country. See *Poll: Bin Laden tops Musharraf in Pakistan*, CNN (Sep 11, 2007), available at: <http://www.cnn.com/2007/POLITICS/09/11/poll.pakistanis/>; Richard Wike,

different from those of the military dictator (who may even no longer be the Chief of the Army Staff at the time of the power transition).⁸⁶ Therefore, this distinction between the military dictator and the military institution must be appreciated, if we are to fully understand why even after a military dictator steps down the military is able to preserve its power. Quite simply, the dictator goes away, but the military (and its expansive network as discussed above) stays on. Be that as it may, this is not to say that there have been no attempts by civilians to make the military subservient.

From time to time, civilian rulers do try to curtail the authority and space provided to the military, especially when they are popular and in a position of strength vis-à-vis the military. Bhutto, for instance, came to power with an extremely popular mandate. This was also a time when the military was in retreat; it had suffered a humiliating defeat in the 1971 war with India and was also blamed for alienating the Bengalis and surrendering in East Pakistan.⁸⁷ Bhutto used this momentum to bring forth various changes in the structure of the armed forces to control its

Musharraf's Support Shrinks, Even As More Pakistanis Reject Terrorism... and the U.S., Pew Research Center (Aug 08, 2007), available at: <http://www.pewglobal.org/2007/08/08/pakistanis-increasingly-reject-terrorism-and-the-us/>; *Pakistani Public Opinion*, Pew Research Center (Aug 13, 2009), available at: <http://www.pewglobal.org/2009/08/13/pakistani-public-opinion/>; *Public trust in performance of Army has risen since 2008, except for a slight decline in 2011*, Gallup Pakistan (Dec 24, 2014), available at: <http://gallup.com.pk/public-trust-in-performance-of-army-has-risen-since-2008-except-for-a-slight-decline-in-2011/>

⁸⁶ Musharraf, for instance, resigned as the Chief of Army Staff by the end of November, 2007, but still continued to hold power as the President of Pakistan. See Carlotta Gall, *Musharraf resigns as army chief*, The New York Times (Nov 28, 2007), available at: <https://www.nytimes.com/2007/11/28/world/asia/28iht-28pakistan-resigned.8509070.html>

⁸⁷ The President of Pakistan even constituted a Judicial Commission, headed by the Chief Justice of Pakistan, to investigate "*the circumstances in which the Commander, Eastern command, surrendered and the members of the Armed Forces of Pakistan under his command laid down their arms and a cease-fire was ordered along the borders of West Pakistan and India and along the cease-fire line in the State of Jammu and Kashmir.*" Only a supplementary version of the report was, however, ultimately released to the public which can be accessed at: http://img.dunyanews.tv/images/docss/hamoodur_rahman_commission_report.pdf

influence.⁸⁸ In particular, Bhutto created the Federal Security Force (FSF) – a well trained and equipped paramilitary force – with the object of both diluting the influence of the military in managing internal security, as well as providing him protection against any possible coup attempt.⁸⁹

The military as an institution, however, remained strong and autonomous – the rank and file of the army were still solely answerable to the Chief of Army Staff. Thus, during the political crisis of 1977, when Bhutto was under siege from his opponents, various senior officers of the army simply refused to carry out Bhutto’s orders to fire at the demonstrators charging against his rule.⁹⁰ The impending political crisis provided the opportunity and ambition gave way: Gen. Zia-ul-Haq declared martial law and displaced Bhutto. According to some reports, at the time the army moved in to remove Bhutto, more than ten thousand soldiers of Bhutto’s elite FSF were in the capital; yet, not one challenged the army.⁹¹ Like before, the public too by and large welcomed the coup and the judiciary legitimized it.⁹²

Some argue that Bhutto lost the perfect opportunity to reign in the armed forces, implying in turn that he could have done more to strengthen civilian control of the army.⁹³ Equally,

⁸⁸ Among other things, he re-structured the command and control of the army to dilute the influence of the army chief, reduced the term of office for the army chief to three years, defined a role for the military in the Constitution, and provided a greater role to the Ministry of Defense (staffed by career bureaucrats) in relation to the supervision of the armed forces, including budget allocation. See Chaudhry, *supra* note 43, at 82

⁸⁹ *Ibid.*

⁹⁰ See Siddiq, *supra* note 40, at 81

⁹¹ See Raja Anwar, *The Terrorist Prince: The Life and Death of Murtaza Bhutto*, London: Verso (1997), pp. 17

⁹² See *Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan* (PLD 1977 SC 657)

⁹³ Siddiq, for instance, argues that Bhutto made the fatal mistake of treating the military as “junior power that could be controlled and utilized for promoting his interests, and so he allowed the army to regroup.” See Siddiq, *supra* note 40, at 80

however, some may argue that Bhutto did the most he could.⁹⁴ Given the institutional strength, authority and reach of the army, doing more would have completely alienated the military and perhaps even triggered a coup earlier than 1977. There is perhaps some weight to this argument. In the 1990s, for instance, Prime Minister Nawaz Sharif, who had been elected with a popular mandate, moved to consolidate his control over the State. He successfully weakened the Presidency and also created rifts in the Supreme Court.⁹⁵ When, however, he sought to remove the then Chief of Army Staff, General Pervez Musharraf, over a severe disagreement on foreign and defense policy (specifically the latter's decision to initiate the Kargil war with India without even informing the PM), the army reacted and Sharif was out.⁹⁶ It took the army a little less than a day to implement the coup – Musharraf did not even have to be in Pakistan to make it happen.

Notwithstanding what has been noted above, it should be emphasized that every attempt to curb the influence of the armed forces has not resulted in a coup; nor are coups the only recourse available to the military to restore the civil-military balance (or more aptly imbalance)

⁹⁴ Historian and Bhutto's biographer, Stanley Wolpert, for instance, is of the view that Bhutto was astutely aware of the army's position and strength. He was after all brought in by the army and they could also remove him, if he challenged military interests in any serious way. In addition, he finds that Bhutto himself was a realist driven by the security threat of India and also Afghanistan. Therefore, he was ideologically inclined to rearm and strengthen the army. In many ways, Bhutto was perhaps convinced that he could buy the army's loyalty; in particular, he had come to believe that General Zia (who he had promoted as Chief of Army Staff over six more senior Generals) would never take action against him. See Stanley Wolpert, *Zulfi Bhutto of Pakistan: His Life and Times*, Oxford: Oxford University Press (1993), pp. 236, 357-258

⁹⁵ Sharif removed the Presidential power to dissolve the Parliament which had been included in the Constitution by Gen. Zia through the 8th Constitutional Amendment. Sajjad Ali Shah, the then Chief Justice, took the drastic action of suspending the Amendment. The Court at the time was also seized with a corruption investigation against Sharif, a contempt case against him and also a tussle over who gets the last word in the appointment of judges to the superior courts. Sharif eventually succeeded in breaking the Court and Shah's fellow judges themselves declared his appointment as Chief Justice to be unlawful. See *supra* notes 22 & 23

⁹⁶ See Kamran Khan, *Army Seizes Control in Pakistan*, The Washington Post (Oct 13, 1999), available at: <http://www.washingtonpost.com/wp-srv/inatl/longterm/southasia/stories/pakistan101399.htm>

of power. Indeed, coups may not even be the military's weapon of choice. They are after all quite costly and can be best described as a last resort "nuclear" option.

Pakistan regularly trades hostilities with three of its four neighboring countries – two of which (Afghanistan and India) are in an active conflict with it. A coup, therefore, is undesirable for the military to the extent that an active role in politics distracts it from its operational duty of ensuring security – a task which it takes seriously.⁹⁷ Moreover, uncertainty accompanies a coup attempt. The military is acutely concerned about its public image: it considers itself to be a national savior, not a usurper. Indeed, for this very reason all military coups in Pakistan have been bloodless. It appears that the military intervenes when the public welcomes it and leaves when this is no longer the case.⁹⁸ Thus, each coup requires a degree of support (or low levels of opposition) from political parties, the bureaucracy, the judiciary, and even foreign countries.⁹⁹ In addition, the military leadership itself needs to be united and act with one force. Accurate knowledge about the policy positions of the various actors involved is tricky business. And while coup attempts by the military leadership in Pakistan have never failed, one can never be too

⁹⁷ For instance, General Kayani, Musharraf's successor as the Chief of Army Staff, took a number of measures to rebuild what was perceived to be a heavily demoralized and unfit army following Musharraf's regime. He declared 2009 to be the 'year of training' for the army (which succeeded the 'year of the soldier', a subtle dig at Musharraf who while in politics did not take care of the lower cadres in the army). Kayani also prohibited army officers from meeting politicians and recalled serving army officers and soldiers who had been deputed to civil departments. There was a clear idea that the involvement of army officers in politics had affected their capacity, which was all the more important given the several operations the army was tasked to lead against militants internally. See *Kayani is his own man*, Al-Jazeera (Feb 17, 2008), available at: <https://www.aljazeera.com/news/asia/2008/01/2008525184228237196.html>

⁹⁸ See C. Christine Fair, *Why the Pakistan Army is here to stay: prospects for civilian governance*, 87 *International Affairs* 87 (2011), pp. 576

⁹⁹ *Ibid.*, 572

sure.¹⁰⁰ So from the military's perspective, the best strategy is pre-emption i.e. controlling the political narrative before it controls the military.

In this reference, the military utilizes a number of actors and tools to dictate political priorities and especially to weaken the incumbent government. Its control over the country's vast intelligence network can stifle the civilian government's foreign policy.¹⁰¹ The army's reach in the bureaucracy can be used to both provide it vital information about Government objectives, as well to consolidate its own power. For instance, the fact that nearly every Secretary of the Ministry of Defense is from the military effectively ensures that no major policy decision affecting the armed forces can be taken without its knowledge and consent.¹⁰² The military also exercises considerable influence in the media, which can be used to both undermine the Government and strengthen a narrative which is conducive for the military's interests.¹⁰³ Constitutional provisions introduced by military dictators have also previously come in handy.

¹⁰⁰ See generally: Naunihal Singh, *Seizing Power: The Strategic Logic of Military Coups*. Baltimore: Johns Hopkins University Press (2014) (Singh's dataset includes the study of 471 coup attempts worldwide from 1950 to 2000, a great number of which failed. For him, coup attempts can be best understood as strategic "coordination games" where success is dependent to a great extent on the ability of coup-makers to make others believe that they will succeed)

¹⁰¹ The ISI is commonly linked with the direction and control of various terror and militant groups, especially in India and Afghanistan. See *Pakistan's intel agency ISI runs its own foreign policy, has connections with terror groups: US*, First Post (Oct 04, 2017), available at: <https://www.firstpost.com/world/pakistans-intel-agency-isi-runs-its-own-foreign-policy-has-connections-with-terror-groups-us-4107735.html>

¹⁰² See Shah *supra* note 45, at 16

¹⁰³ The military relies upon both a system of rewards and punishments to wield its influence over journalists and media houses. Recently, for instance, the military forced various cable operators to effectively block the country's most popular TV Station – Geo News. The military had apparently pressed the channel to "*cease favorable coverage of ousted Prime Minister Nawaz Sharif and stop any criticism of the Supreme Court and the "establishment"*". See Saad Sayeed, et al. *Exclusive: Pakistan TV channel returning to air after negotiations with military*, Reuters (Apr 18, 2018), available at: <https://www.reuters.com/article/us-pakistan-media-exclusive/exclusive-pakistan-tv-channel-returning-to-air-after-negotiations-with-military-sources-idUSKBN1HP2WV>

Thus, during the 90s, the military worked closely with the office of President,¹⁰⁴ leading to the dissolution orders of four elected Governments.¹⁰⁵ While the relevant constitutional provisions have since been removed (following the bi-partisan 18th Constitutional Amendment in 2010), the military can still use the Supreme Court for effectively changing the composition of the elected Government, as well as resolving concrete political issues.¹⁰⁶

Finally, and importantly, although marital law, as previously mentioned, is a last resort “nuclear” option, it is still an option and the Government knows this. The nuclear deterrent can deter. And the deterrence effect is all the more powerful when the Government is under attack and considered to be illegitimate.¹⁰⁷ Thus, on the political front, the military uses its wide network to create unrest and challenge the Government.¹⁰⁸ On the legal front, as of late, the Supreme Court appears to be doing the job for the military by initiating hundreds of suo motu cases that

¹⁰⁴ Pakistan has a parliamentary form of Government with executive powers being vested largely in a Prime Minister and the Cabinet. The Prime Minister is elected indirectly, through a vote in the National Assembly. The President is the ceremonial head of State who is elected by all the Provincial Assemblies and the Federal Parliament. Following the 18th Constitutional Amendment, the President’s role was further restricted. For all actions taken by the President, he or she must nominally act on the advice of the Prime Minister.

¹⁰⁵ See Siddique, *supra* note 72, at 634

¹⁰⁶ See Section III (iv) below for a discussion on how the Supreme Court can inform the composition of the Government by disqualifying Members of Parliament on constitutional grounds.

¹⁰⁷ For instance, one study finds that periods of stronger civilian control of the military in Pakistan are often associated with three factors: (i) a single locus of civilian political authority; (ii) a strong popular support base for the civilian government; and (iii) limited threats to military core interests. See Wesley C. Jenkins, *An Elusive Balance: Explaining Pakistan’s Fluctuating Civil-Military Relationship* (Dissertation), Georgetown University Library, available at: <https://repository.library.georgetown.edu/bitstream/handle/10822/553520/jenkinsWesleyChamberlin.pdf;sequence=1>

¹⁰⁸ For instance, the 2014 anti-government protests by the Pakistan Tehreek Insaaf led by Imran Khan have been linked to the army. See Dean Nelson and Javed Siddiq, *Imran Khan 'plotted with army to oust Nawaz Sharif', colleague claims*, The Telegraph (Sep 01, 2014), available at: <https://www.telegraph.co.uk/news/worldnews/asia/pakistan/11068811/Imran-Khan-plotted-with-army-to-oust-Nawaz-Sharif-colleague-claims.html>

publicly highlight political corruption, abuse of power, and executive incompetency;¹⁰⁹ and, as a result, discredit the Government.

The combined effect of the foregoing is that civilian governments are often too afraid to attempt any move which is against the military's interests or better yet they fail when they do make any such attempt. For instance, in 2008, when the Government attempted to extend civilian control over the Inter-Services Intelligence agency (ISI), it was forced to withdraw the official notification to this effect within a matter of hours.¹¹⁰ Similarly, in 2011, on the military's insistence, the Government was forced to "slow track" the process of granting India the Most-Favored-Nation Status.¹¹¹ More recently, the Government under Prime Minister Nawaz Sharif, was forced to provide Musharraf safe-passage abroad, effectively forestalling the possibility that he would be tried for treason.¹¹² That this was a bitter pill for the Government to swallow is evident from the fact that it was Musharraf who overthrew Sharif's Government, imprisoned him and his associates and eventually forced him and his family into exile for a number of years.

The civil-military imbalance as noted above also affects the mindset of the Government during any political crisis. With the army not under the effective control of the Government, behind every political stalemate and civil unrest, lies the possibility of a coup. Last year (2017), for instance, a Federal Cabinet Minister was forced to resign after extensive protests from the

¹⁰⁹ See Qazi, *supra* note 29, at 302

¹¹⁰ See Shah, *supra* note 83, at 1019

¹¹¹ *Ibid.*, 1021

¹¹² See *Nisar announces removal of Musharraf's name from ECL*, The Nation (Mar 17, 2016), available at:

<https://nation.com.pk/17-Mar-2016/nisar-announces-removal-of-musharraf-s-name-from-ecl>

religious right.¹¹³ While the Government was hesitant to accept fault, it was forced to do so once it was clear that the army would not come to its aid to quell the protests.¹¹⁴

It is in this context why, I argue, that the Government has also not been able to crush the highly expansionist view of judicial independence and authority taken by the Supreme Court over the past decade. Every crisis, and especially an institutional clash, provides space to the military and raises the possibility of a coup. And such intervention is all the more likely when the Supreme Court itself claims to exercise executive authority over the armed forces.¹¹⁵

Consider, for instance, what would happen if the Government tried to remove judges of the superior courts (including by way of a constitutional amendment), but the Court struck down any such order. The forced removal of judges is likely to trigger widespread protests, which in turn would be difficult to quell without the army's support; however, keeping this fact aside, could the Government even remove judges from their positions (say through the police), if the Court called in the army to provide it security?¹¹⁶ Alternatively, if the Government simply disobeyed the Court's order and failed to recognize the jurisdiction of a Court with "rogue" judges, the Court could always move to de-seat the Prime Minister, among others, for contempt

¹¹³ See Sofia Saifi, *Pakistan law minister resigns; blasphemy protests disperse*, CNN (Nov 27, 2017), available at: <https://www.cnn.com/2017/11/26/asia/pakistan-law-minister-resigns/index.html>

¹¹⁴ See *COAS asks PM Abbasi to tackle Islamabad protest 'peacefully'*, Dawn.com (Nov 25, 2017), available at: <https://www.dawn.com/news/1372807/coas-asks-pm-abbasi-to-tackle-islamabad-protest-peacefully>

¹¹⁵ Over the past few years, in the face of executive defiance, the Court has on several occasions publicized its constitutional prerogative to call into service any executive functionary or authority. For those who can read between the lines, this means the army. See Nasir Iqbal, *Supreme Court hints at invoking Article 190*, Dawn.Com (Aug 29, 2014) available at: <https://www.dawn.com/news/1128511>

¹¹⁶ It should be noted that the personal security escort of the Chief Justice includes members of the armed forces, the Pakistan Rangers, the Punjab Police and the Islamabad Capital Police, among other law enforcement agencies.

of court.¹¹⁷ And if the Prime Minister refused to step down, again the army could be called in to enforce the Court's directives.

These fact scenarios may be far-fetched, but they do help us think through the strategic options available to the relevant political actors in Pakistan. Admittedly, even the Court would ordinarily hesitate to call in the army; there is, after all, quite a bit of uncertainty attached to the idea of the military intervening at the Court's defense (and especially what would follow as a consequence).¹¹⁸ For this reason, perhaps, the Court manages routine disobedience by the Government through a number of other options,¹¹⁹ which to an extent also provide the

¹¹⁷ See Section III (iv) below for a discussion on how the Supreme Court has developed the authority to disqualify Members of Parliament for disobedience of judicial directives.

¹¹⁸ There is also a risk of the army not coming to the Court's aid. In 1997, for instance, when Chief Justice Sajjad Ali Shah was embroiled in a conflict with the Prime Minister, there was a looming threat that supporters of Sharif may physically attack the Court. According to some accounts, Chief Justice Shah wrote a letter to the then Chief of Army Staff requesting security for the Court, but the latter simply forwarded this request to the Ministry of Defense. As a consequence, the Chief Justice's request was denied; the rest is history. Be that as it may, it should be noted that the chances of this happening again are much lower now than before. Firstly, it should be noted that some recall the Chief Justice's letter as being addressed to the President and not to the Chief of Army Staff. If this is correct, then surely the Government was provided some latitude in declining the Court's request, which perhaps it would not have if the Chief Justice wrote to the Army Chief directly (as it may now). Secondly, the Court was not nearly as popular then, as it is currently. In fact, the majority of people expressly supported the Prime Minister Sharif when compared to the Chief Justice. Sharif it should be noted was also elected with an overwhelming mandate in 1997. His party alone commanded 2/3rds of the seats in Parliament. For the army then siding with a relatively unpopular Court against a popular Prime Minister may not have made strategic sense, especially given that at the time the Presidential powers of dissolving Parliament were still in play. The army, therefore, was less in need of the Court, as it could simply influence the President to meet its objectives. Lastly, at the time of the conflict, the Court itself was deeply divided. These divisions later drove the Chief Justice out of office as well. Supporting the Court, therefore, was not a good option, since it was not clear that the Court could follow through on a coherent strategy. Prior to the 1996 *Al-Jehad* case, politicians also played a critical role in the appointment of judges. As a result, the army perhaps also had less cause to trust the judiciary as a whole. See *supra* notes 22, 23, & 29

¹¹⁹ See Chapter II of this dissertation for an overview of how the Court has increased the probability of compliance by among other things changing the cost-benefit structure of civil servants.

Government wiggle room in cases which matter to it. An attack on the Court's independence may, however, be treated differently. The Court's response may be uncertain, but the risk of military intervention is real and can be of much consequence. In these circumstances, therefore, it makes sense that the Government would rather cede some space to the Court than the entire floor to the military.

II. THE COURT AND THE ARMY: MAPPING THE RELATIONSHIP (2005-2015)

The preceding section provided a brief history of civil-military relations in Pakistan leading up to what we see today. And in the context of this history, one can understand why the Government would be hesitant in taking action against the Court. After all, if the army comes to the Court's defense, there's no telling what would happen next (especially to those in the Government who defied the Court). This strategic calculus, however, assumes that there is a reasonable likelihood that the army would intervene and defend the Court. And any observer of Pakistani politics may legitimately question this claim. After all, one may wonder why the army would ever defend the Court when it was mostly due to its activism (under Justice Chaudhry's leadership) that General Pervez Musharraf was pushed out office.¹²⁰ For many, the fact that a majority of judges refused to ratify or back the military dictator was a golden moment in Pakistani history. It is celebrated, even by the Court, as a breaking point from its inglorious past

¹²⁰ On November 3rd 2007, following a highly charged confrontation between the Court led by Chief Justice Chaudhry and the executive under General Pervez Musharraf's dictatorship, a state of "emergency" was declared. Nation-wide protests ensued forcing Musharraf to lift the emergency, hold elections and eventually resign under the threat of impeachment from the newly elected Government. For a historical account of the "lawyers movement" which started after Chaudhry's removal see, generally: Muneer Malik, *The Pakistan Lawyer's Movement: An Unfinished Agenda*, Islamabad: Pakistan Law House (2008); also see Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 *Law & Social Inquiry* 985 (2010) (Ghais provides an interesting account of how judges, lawyers and the media co-operated to push Musharraf out)

of legitimizing coups and executive subservience.¹²¹ Why then would the military back these rogue judges?

To answer this question, one needs to consider the distinction drawn earlier between a military dictator and the military as an institution. The Court, following Chaudhry's appointment as Chief Justice in 2005, was mainly challenging Musharraf's authority and ability to govern, not the military institution itself. And in this reference it is also important to highlight that Chaudhry's actions were not entirely unprecedented either.

While military coups have been legitimized by the judiciary (including the 1999 coup which was validated by a Supreme Court bench that included Chaudhry), time and again the Pakistani Supreme Court has ruled against the policies and political interests of a military dictator. For instance, during Gen. Zia's tenure, the Supreme Court increasingly started exercising judicial review, including by way of overturning convictions awarded by military courts to civilians.¹²² As a result, in 1981, Zia purged the judiciary of dissidents by requiring all judges to take a fresh oath of allegiance under the Provincial Constitutional Order (PCO), failing

¹²¹ See, for instance, *Nadeem Ahmed, Advocate v. Federation of Pakistan* (Const. Petition 08 of 2009). The Court emphasizes this point on a number of occasions in the judgement, including the following:

117. We have waded through a momentous and inspirational period in Pakistan's constitutional history. If one were to distinguish a headline from a trend line in assessing change, the Movement launched was a pointer to a moral renaissance and augured well for the spiritual health of the nation. Never before has so much been sacrificed by so many for the supremacy of law and justice. The assertion of judicial conscience, the rise of a vibrant Bar, the emergence of a vigilant civil society imbued with a spirit of idealism, the bold and moral profile of an independent media and the support received from international civil society would ultimately strengthen constitutional democracy, stable political institutions and ensure an expanded enforcement of the rule of law.

¹²² See Newberg, *supra* note 70, at 174-179

which they were removed from office.¹²³ The PCO in a sense also extinguished judicial power by curbing the jurisdiction of courts in relation to matters of interest for the military regime.¹²⁴ Even the newly constituted judiciary, however, exercised judicial review, sometimes in meaningful ways.¹²⁵ Thus, in 1988, the Supreme Court declared that Zia's scheme of non-party based elections was unconstitutional; this, in turn, paved the way for Benazir Bhutto's return to politics and the PPP's ultimate electoral victory.¹²⁶ Similarly, even after Musharraf had removed Chaudhry and his loyal cohort of judges, a Supreme Court staffed by Musharraf appointees did make a number of rulings which were against his policies.¹²⁷

Pakistani courts have, therefore, not been entirely averse to challenging the policies of military dictators. And it is in a sense only natural for them to do so if they are to create any form of credibility. Military dictators in Pakistan, much like the rest of the world, have also permitted such contestation, albeit in limited ways.¹²⁸ And again much like the rest of the world when this contestation exceeds tolerable limits, the regime reacts, often in a harsh manner.¹²⁹ This is what

¹²³ Ibid., 180

¹²⁴ Ibid.

¹²⁵ Ibid., 194-195

¹²⁶ See *Benazir Bhutto v. Federation of Pakistan and another* (PLD 1988 Supreme Court 416)

¹²⁷ For instance, the Dogar Court struck down one of Musharraf's earlier (2002) orders which barred a person from contesting elections unless he or she was at least a graduate possessing a bachelor's degree. Musharraf's sought to restrict political participation, especially for some seasoned politicians who did not satisfy this requirement. The Court, however, found that this requirement infringed upon an individual's fundamental right to contest elections. See *Muhammad Nasir Mahmood and another v. Federation of Pakistan* (PLD 2009 SC 107)

¹²⁸ See Tamir Moustafa and Tom Ginsburg, *Introduction: The Function of Courts in Authoritarian Politics in Rule by Law: The Politics of Courts in Authoritarian Regimes*, Tom Ginsburg et al. (Eds.), Cambridge: Cambridge University Press (2008), pp. 4-7 (Courts may be allowed a degree of autonomy in military regimes for a number of reasons including: the establishment of social control, particularly by administering criminal law; providing the regime legitimacy; solving coordination problems; facilitating trade and investment; and implementing controversial policies)

¹²⁹ Ibid., 14-20

happened in Pakistan on November 3rd, 2007, when Musharraf once again suspended the Constitution and purged the judiciary.

The Proclamation of Emergency issued by Musharraf and his televised speech justifying it provide some insight on what could have motivated the General's actions. Consider, for instance, the following extracts from this speech:

All senior functionaries of the government have to frequently run to the courts, especially the Supreme Court, they are being sentenced, and they are being subjected to humiliation in these courts, which is resulting in their not taking any decisions. Around 100 suo moto cases are being processed in the Supreme Court and I have been told that there are thousands of applications lying to be taken up...And all these suo moto cases are concerned with the executive, the government departments. So now the system of governance stands paralyzed.

...

Now came the Presidential elections. Only a month has passed. During this a procedure was adopted fully according to the law and the constitution. The Election Commission gave a schedule under a time frame. The Chief Election Commissioner examined the nomination papers and these were accepted and then some references were filed, particularly against me that were taken up in the Supreme Court for consideration. Now there is no problem in it. It is a legal process. But then a seven—member bench was set up, later it was made into a nine—member bench, and later an eleven—member bench. The case was thus being prolonged, no decision was being taken and there was a situation of uncertainty.¹³⁰

Some extracts from the preamble to his Proclamation of Emergency are similarly insightful:

WHEREAS there has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth, in particular;

WHEREAS constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning, has weakened the writ of the government; the police force has been completely demoralized and is fast losing its efficacy to fight terrorism and intelligence agencies have been thwarted in their activities and prevented from pursuing terrorists;

¹³⁰ See <https://presidentmusharraf.wordpress.com/2007/06/02/musharraf-3-nov-emergency/>

*WHEREAS some judges by overstepping the limits of judicial authority have taken over the executive and legislative functions;*¹³¹

It is, thus, quite apparent that what perturbed Musharraf, in particular, was the Court's challenge to his own writ and style of governance, and especially its inquiry into his eligibility for re-election as the President while remaining the Chief of Army Staff.¹³² So Musharraf did what he could do to retain his power. While the text of his speech and the proclamation of emergency certainly do mention the debilitating security situation of Pakistan and the Court's alleged role in it, as I show below this was hardly accurate. The Court never really meaningfully challenged the security interests of the military or the State; Musharraf simply used them as an excuse to legitimize his actions in front of an audience which had been rampaged by terrorism. And given the widespread protests which ensued following Musharraf's actions, one can further assume that the public by and large also did not buy his narrative.

By the end of November 2007, Musharraf officially resigned as the Chief of Army Staff and with it terminated his formal command of the armed forces. Less than a year later Musharraf resigned as President under the threat of impeachment.¹³³ A few months later, Chaudhry and the remaining deposed judges were fully restored to office following widespread protests and a personal intervention by Gen. Ashraf Parvez Kayani, the then Chief of Army Staff.¹³⁴ Many

¹³¹ See *Text of Pakistan emergency declaration*, BBC News (Nov 3, 2007), available at: http://news.bbc.co.uk/2/hi/south_asia/7077136.stm

¹³² The Supreme Court had also by the summer of 2007 cleared the way for Nawaz Sharif's return to Pakistan, which was going to be a major stickler for Musharraf's regime. See Carlotta Gall, et al. *Pakistan Court Lets Exile Back to Run Again*, The New York Times (Aug 24, 2007), available at: <https://www.nytimes.com/2007/08/24/world/asia/24pakistan.html>

¹³³ See Zeeshan Haider, *Musharraf quits under impeachment threat*, Reuters (Aug 18, 2018), available at: <https://www.reuters.com/article/idINIndia-35058020080818>

¹³⁴ See Jane Perlex, *Pakistan Avoids Pitfall, but Path Ahead Unclear*, The New York Times (Mar 16, 2009), available at: <https://www.nytimes.com/2009/03/17/world/asia/17pstan.html>

factors could have triggered Kayani's intervention, but one can be sure that he would not have made this move unless he was confident that the restored Court under Chaudhry would not be a threat to the military's core interests. Kayani's bet paid off. As my analysis below confirms, the Court has consistently refused to challenge the military in any meaningful way and has, in certain cases, also proved to be a powerful proponent of the military's interests.

(i) *Military Prerogatives and Judicial Review (2005-2015): A Quantitative Study*

During times of democratization, the military's key institutional interest is retaining its independence and prime authority in policy areas which are of particular concern for it. Alfred Stepan in *Rethinking Military Politics* (his seminal work on civil-military relations in the context of Latin America), provides a useful framework for the purposes of breaking down and understanding this broad interest. He lists out a number of "military prerogatives," whereby assuming an "*an acquired right or privilege, formal or informal*" in certain areas of policy, the military can preserve its institutional authority.¹³⁵ The extent to which a civilian government can successfully challenge or contest these "military prerogatives" can determine to a significant degree the trajectory of civil-military relations in the post-authoritarian period.

¹³⁵ See Alfred Stepan, *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton, N.J.; Princeton University Press (1988), p. 93. The discussion that follows largely uses Stepan's framework as adopted by Aqil Shah in *Constraining consolidation: military politics and democracy in Pakistan (2007–2013)*, 21 *Democratization* 6 (2014), 1007-1033. Shah uses this piece to trace the path of the military's extrication from politics (formally) following Musharraf's tenure; so it is extremely relevant for the purposes of this discussion. However, I have taken the liberty to re-define and also add certain military prerogatives for the purposes of this chapter. For instance, Shah does not include the military's business interests as a core prerogative, but I have done this. While the military's business interests were not originally a core interest, they became one soon after the military and its members had realized the economic benefits relating to it. I have also clubbed certain prerogatives together (for instance, Shah treats the prerogative to appoint the army chief differently from the military's prerogative of internal autonomy), as it makes the argument easier to follow.

The military's prerogatives in Pakistan can be broadly defined as follows: (i) institutional autonomy, especially in matters of internal appointments and removals;¹³⁶ (ii) role in defining foreign and defense policy, especially as it relates to India; (iii) freedom from parliamentary and executive oversight, including budgetary allocation and control;¹³⁷ (iv) preserving the economic interests of the military and its members; (v) retaining a constitutionally sanctioned role in politics;¹³⁸ (vi) freedom from accountability (supra-legal status);¹³⁹ (vii) retaining a role in intelligence gathering and media management;¹⁴⁰ and finally (viii) defining and defending the security interests of the State.

Therefore, for the purposes of our discussion, the manner in which the Court challenged (or for that matter facilitated) these prerogatives needs to be determined. To accomplish this, I draw upon data from all of the reported opinions of the Court as well as any suo motu cases

¹³⁶ While the Prime Minister formally reserves the power to appoint the Chief of Army Staff and all other heads of the armed services, by convention (and perhaps military insistence) the pool of the candidates from which the Prime Minister makes his choice is decided by the respective armed service. Within each armed service, appointments and removals are made without any political involvement and with complete institutional autonomy.

¹³⁷ The defense budget (a one line item) is passed by the Parliament, but there is no Parliamentary oversight to check how this money is spent. Formally, the Parliamentary Committees on Defense (both in the Senate and the National Assembly) do reserve the right to hold hearings for the purpose of this accountability; however, this right is rarely exercised, and when exercised is rarely respected (senior members of the armed forces will typically never appear before the Parliament in their lifetime). See Shah, *supra* note 83, at 1020

¹³⁸ This is typically in the form of high-level policy bodies like the National Security Council, which includes members of the senior military and civilian leadership. Such bodies are in high demand, especially in times of civilian rule when the military seeks a formal seat on the policy table. Note, however, that this interest is not to be interpreted as military rule by way of martial law, which would be an "unconstitutional" role in politics.

¹³⁹ The military is averse to having its members face accountability, especially at the hands of civilian courts. Thus, for this reason perhaps no military leader has ever been successfully punished for declaring or aiding martial law. *Ibid.*, 1024-25

¹⁴⁰ The army seeks to retain control of the State's intelligence gathering apparatus, as well as the media to the extent that it seeks to build and maintain a public image that is conducive for its interests. *Ibid.*, 1021-23

which were initiated by it between the years 2005-2015. While this sample certainly does not cover every issue taken up by the Court during this period – there are more than ten thousand cases heard by the Court in any given year – it does account for the most important decisions rendered by the Court.¹⁴¹ Reported opinions can be cited as precedent and are binding on lower courts. These orders are considered as having made a substantial contribution to the development of the law; they are in this sense “important” decisions of the Court. Similarly, suo motu cases are initiated on the express directives of the Chief Justice. The issues dealt by the Court in these cases, therefore, strongly represent the policy inclinations of the Chief Justice; and in turn, the general direction of the Court (given the central role the Chief Justice plays in the Court’s administration).

The 2005-2015 period has been selected for two reasons in particular. Firstly, it coincides with the appointment (2005), removal (2007) and reinstatement (2009) of Chief Justice Chaudhry, who is generally attributed as being responsible for triggering the recent wave of judicial activism and challenge to military authority. My hypothesis is that throughout his tenure (neither before his removal nor after his subsequent reinstatement) the Court never seriously challenged military prerogatives. Secondly, this period also covers the tenure of four other Chief Justices spread across two different democratic governments (see Table 2 – Chapter I). In a sense, therefore, it allows us to test the Court’s treatment of military prerogatives across the varying policy preferences of different judges and elected governments. My hypothesis is that

¹⁴¹ Between June 2015-May 2016 alone the SCP decided over 17,000 cases. See *Supreme Court Annual Report June 2015- May 2016*, available at: http://www.supremecourt.gov.pk/web/user_files/File/SCP_Annual_Report_2015_2016.pdf

the Court treated military prerogatives with great deference consistently (by both ignoring issues which impacted them and, where adjudicated upon, deciding them in favorable terms).

Table 12 and Figure 12 provide an overview of the sample data. As should be evident, cases which impacted or could have impacted military prerogatives form a very small portion (3.94%, N=35) of the total cases in my sample (N=888). In any given year no more than six of the total sample cases for that year were connected to military prerogatives. In 2006, the year before Chaudhry was removed from office, only one case was heard which bore this connection. In 2007 – the year of his removal – six such cases were heard, but most of these cases were also decided largely in favor of military interests (as will be discussed shortly). This confirms at the very least that Chaudhry's removal had little to do with the Court challenging military prerogatives. They hardly made the Court's agenda. 2013 is the only year where military prerogatives appear to have to a somewhat substantial (>10%) presence in my sample. However, it should be noted that the total number of reported opinions and suo motu cases initiated in that year are much lower than a majority of the previous years; the number of cases connected to military prerogatives in my sample for 2013 was still a lowly six. In any event, data from this year can also be ruled out as an anomaly, with the trend returning towards the average level from the very next year (see Figure 13).

Table 12 – Breakdown of Sample

Year	Total SMCs	Total Reported Cases	Total Sample Cases	Number of cases Impacting Mil. Prerogatives	Percentage of cases impacting Mil. Prerogatives in sample
2005	17	83	100	4	4.00%
2006	16	99	115	1	0.87%
2007	26	82	108	6	5.56%
2008	2	93	95	2	2.11%
2009	26	62	88	3	3.41%
2010	26	62	88	1	1.14%
2011	20	69	89	5	5.62%
2012	22	35	57	3	5.26%
2013	15	38	53	6	11.32%
2014	8	41	49	1	2.04%
2015	12	34	46	3	6.52%
Total	190	698	888	35	3.94%

Notes:

a. Certain suo motu cases also had reported opinions. These have not been included in the count of reported opinions to avoid double-counting. In addition, certain cases had more than one reported opinion. These have also been counted as one for the same reason. However, if any such case had a judgment reported for its review/appeal decision, it was counted separately since the review case/appeal could raise new issues. Cases with reported opinions are tagged against the year in which they were reported. It should be noted that these cases could have been initiated in an earlier year and could also be heard after the date of the reported opinion. Similarly, while suo motu cases are tagged against the year in which they were initiated, these cases could be heard again in the years which follow.

b. The PLD 2012 volume has for some reason erroneously not included order dated Oct 12, 2012 passed in Const. Petition 77 of 2010, even though this order is available on the Court’s website and has been ‘approved for reporting’. I have accordingly accounted for it here.

Figure 12 – Number of cases in sample which impacted military prerogatives

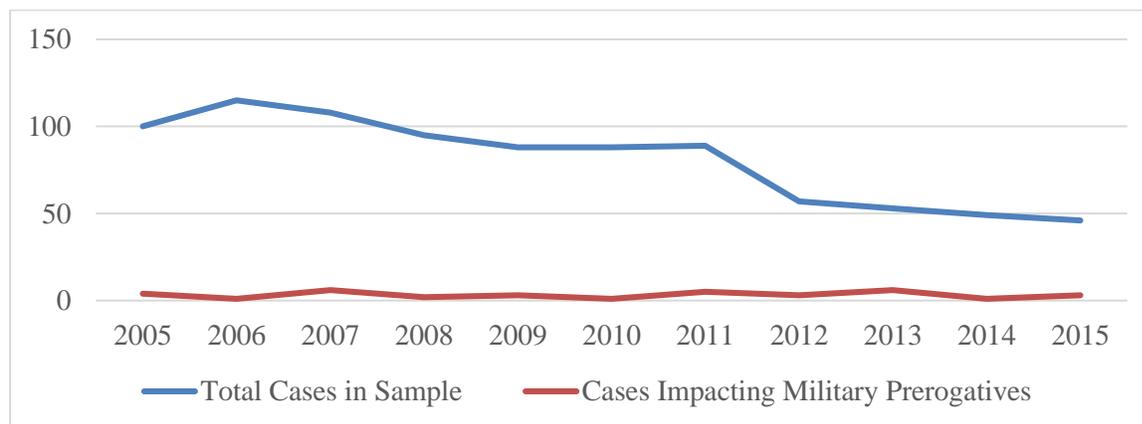
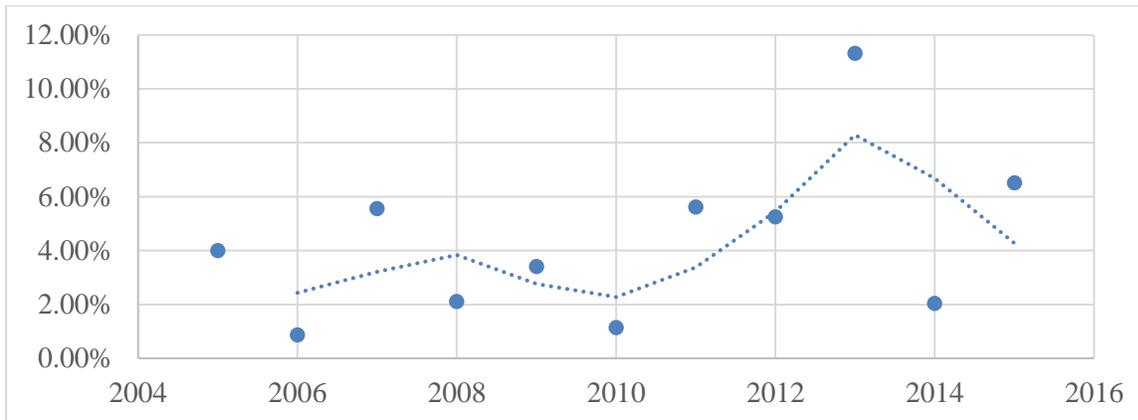


Figure 13 – Military Prerogatives: Sample Representation Trend Line (moving averages)



One may argue that in the absence of a comparative benchmark, there is no way to judge whether the number of cases concerning military prerogatives (which were heard by the Court) is low or high. A four percent overall representation on my sample may still be high considering that most petitioners/ persons are typically concerned with challenging Government action. Thus, it should not be surprising (arguably at least) that military prerogatives do not feature prominently in my sample. Additionally, it may just be that the cases concerning military prerogatives, while low in number, still mattered more for the military. A qualitative assessment of these decisions is, therefore, required to make a fair determination of the Court's strategy. I agree, and not just for this reason.

A qualitative assessment is in order also because some of these cases involve multiple issues, with a military prerogative just being an incidental matter. Furthermore, many of the cases in my sample, especially the suo motu cases, were heard over a period of time (the Court is typically interested in following up on its directions and confirming compliance). It is important, therefore, to understand how the Court approached the cases involving military prerogatives and particularly if it showed an interest in ensuring compliance of any adverse directions against the

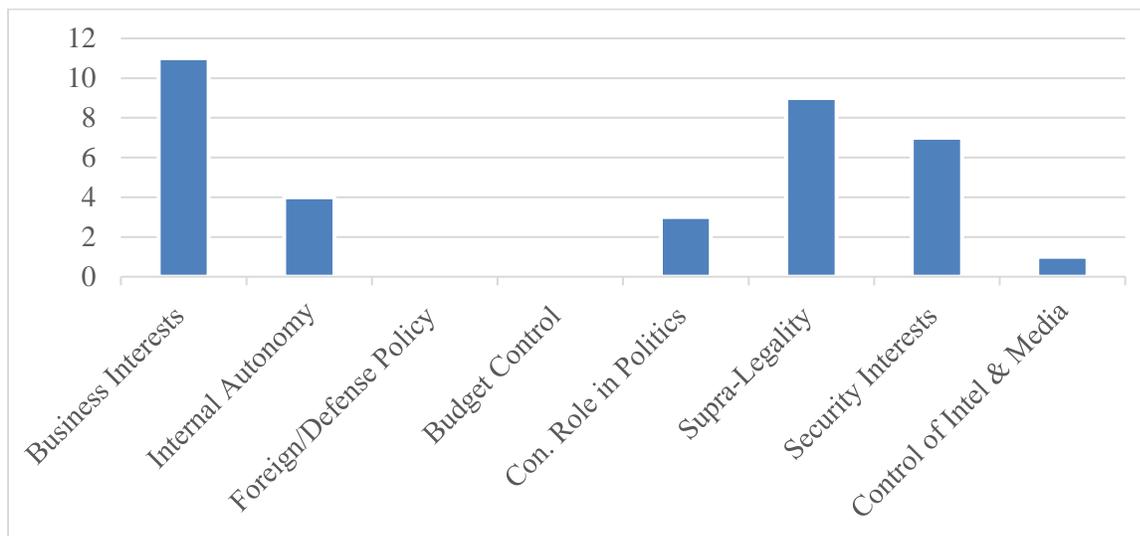
military. Indeed, for this reason, I have chosen not to broadly quantify decisions impacting military prerogatives as having been decided “for” or “against” the military; this categorization is, after all, too simplistic and does not capture the numerous nuances mentioned earlier.

What follows is an attempt to qualitatively map the various cases taken up by the Court relating to military prerogatives in my sample. Broadly, I find that the issues which really mattered to the military were decided in terms favorable for it or were not even taken up by the Court for deliberation at all. Consider, for instance, Table 13 and Figure 14 below. The Court never even touched any issues relating to the military’s defense policy, budget or foreign policy preferences; an overwhelming number of the military related cases in my sample also simply concerned the military’s business interests. Importantly, my analysis below confirms that any adverse decisions by the Court against the military were either inconsequential or not seriously followed up by the Court.

Table 13 – Year-wise Breakdown of Cases Impacting Military Prerogatives

	Bus. Interests	Internal Autonomy	Foreign /Def. Policy	Budg. Cont.	Con. Role in Pol.	Supra-legality	Secur. Interest	Control of Intel & Media	Total
2005	3	0	0	0	0	0	1	0	4
2006	0	0	0	0	0	0	1	0	1
2007	1	0	0	0	0	3	2	0	6
2008	0	1	0	0	0	1	0	0	2
2009	2	1	0	0	0	0	0	0	3
2010	1	0	0	0	0	0	0	0	1
2011	2	0	0	0	1	2	0	0	5
2012	0	1	0	0	0	0	1	1	3
2013	1	0	0	0	1	3	0	0	5
2014	0	0	0	0	0	0	2	0	2
2015	1	1	0	0	1	0	0	0	3
Total	11	4	0	0	3	9	7	1	35

Figure 14 – Breakdown of Cases Impacting Military Prerogatives



(ii) *Military Prerogatives and Judicial Review (2005-2015): A Qualitative Assessment*

(a) *Case impacting the military's security interests*

Much has been made of the missing persons' cases, so it makes sense to first examine the extent to which the Court's interference in this area proved to be a practical stickler for the military.

The issue of missing persons or state sponsored enforced disappearances is not new and according to some estimates dates back to the 1970s.¹⁴² Courts have also historically entertained these issues through their writ jurisdiction: aggrieved persons would typically file a habeas corpus petition on behalf of a missing person compelling the relevant authorities to trace the person and show cause for his or her detention (in case they were found to be detained by any

¹⁴² See *No More "Missing Persons": The Criminalization of Enforced Disappearance in South Asia*, The International Commission of Jurists (Aug 2017), p. 25, available at: <https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-Disappearance-Publications-Reports-Thematic-Reports-2017-ENG.pdf>

governmental authority).¹⁴³ The Court's jurisprudence in this area is well-developed and can even be traced to the practice of unlawful detention during colonial times.¹⁴⁴ Be that as it may, the number of missing persons and the issue as a whole gained particular currency after 2001 and the so called 'war-on-terror' which led the armed forces to spearhead several military operations within the country. When Chaudhry became Chief Justice he started taking notice of the increasing number of enforced disappearances in the country. Within a few months (in 2005), the Human Rights Commission of Pakistan submitted a petition before the Court alleging that numerous people had been abducted by intelligence agencies.¹⁴⁵ In the coming years, hundreds of other applications would be filed seeking the Court's intervention to trace "missing" persons.

In the context of the military's security interests, there are six cases in my sample relating to the missing persons' issue and one other case relating to the conviction of an Indian spy (which was ultimately upheld by the Court).¹⁴⁶ While the actual number of missing persons' cases is much more than this,¹⁴⁷ my sample arguably does provide a representative picture of

¹⁴³ *Ibid.*, 27

¹⁴⁴ Judgements of English courts on the matter were often relied upon, at least initially, to construe the constitutional writ jurisdiction of the superior courts of Pakistan. See, for instance, *Presiding Officer v. Sadruddin* (PLD 1967 SC 569); *Muhammad Hussain v. Sikandar* (PLD 1974 SC 139)

¹⁴⁵ See *Authority without accountability: The search for justice in Pakistan*, International Commission of Jurists (2013), available at: <https://www.icj.org/wp-content/uploads/2013/12/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-PAKISTAN-FINAL-.pdf>

¹⁴⁶ *Complaint of Saqlian Mehdi* (HRC 965/2005); *Rohaiifa v. Federation of Pakistan* (PLD 2014 SC 174); *Application by Muhabat Shah for recovery of Yaseen Shah* (PLD 2014 SC 305); *Missing persons cases* (SMC 6 of 2007); *Abduction of Imran Munir* (SMC 8 of 2007); *President Baluchistan High Court Bar Association v. Federation of Pakistan* (Const. Petition 77 OF 2010). *Manjeet Singh v. State* (PLD 2006 SC 30) concerned the conviction of an Indian spy who had been accused of espionage and terrorist activities. The Court upheld the conviction and death sentence even though the accused had retracted his confession (initially provided under questionable conditions).

¹⁴⁷ Records of the Supreme Court are not publicly available to accurately assess the number of these cases. However, in one of the Court's published orders from December, 2013, the Court itself quotes the number of missing persons' cases pending before the superior courts (including

how the Court was dealing with the missing persons' issue for two reasons. Firstly, it must be understood that even the cases in my sample often called upon the Court to investigate multiple incidents of missing persons.¹⁴⁸ As these cases were being heard, various applications relating to numerous other missing persons kept being tagged along with these cases. Secondly, as mentioned earlier, the cases in my sample are all either reported cases or suo motu cases. Both of these categories highlight the importance of these matters for the Court, so it is likely that any adverse action taken against the military or intelligence agencies would be reported here. What follows is a discussion of any adverse findings in these cases (note: not every case is discussed in the process).

The impact (and particularly adverse impact) of the missing persons' cases on the military can be considered from a number of perspectives. One of the principal points made while discussing the missing persons' cases is that the Supreme Court highlighted this issue and in a number of cases held the intelligence agencies and/or the armed forces *prima facie* responsible for the problem.¹⁴⁹ While this can be said to have irked the military, it is questionable whether this finding alone meaningfully damaged the military and particularly its reputation. For instance, in 2012, Gallup Pakistan asked a nationally representative sample of men and women from across the four provinces the following question: *in your opinion, who is most responsible*

all provincial High Courts and the Supreme Court's Human Rights Cell) as being 721. See *Application by Muhabat Shah for recover of Yaseen Shah* (PLD 2014 SC 305), at 315

¹⁴⁸ For instance, in one case which dealt with the broader law and order situation of Baluchistan, the Court periodically dealt with numerous applications concerning missing persons. In its order dated Oct 12, 2012, the Court notes that 162 such applications had been filed in this case for the recovery of missing persons. See *President Baluchistan High Court Bar Association v. Federation of Pakistan* (Const. Petition 77 OF 2010)

¹⁴⁹ See, for instance: *President Baluchistan High Court Bar Association v. Federation of Pakistan* (Const. Petition 77 OF 2010); *Application by Muhabat Shah for recover of Yaseen Shah* (PLD 2014 SC 305)

for extra-judicial abduction of missing persons? It is interesting to note that only 11% of the respondents blamed the army, whereas the overwhelming majority (69%) of respondents blamed the incumbent Government.¹⁵⁰ Be that as it may, even if we were to assume reputational damage, one can legitimately question whether it alone is enough to threaten the military's security interests. I certainly do not think that it is.

Firstly, one must appreciate the object of the missing persons' cases: typically the Court is simply interested in tracing the missing persons, not securing their release. So it is not as if the success of a missing person action would result in the release of a hardened "terrorist" who could then damage the State's security interests. The Constitution itself recognizes preventive detention as a legitimate restriction on an individual's fundamental right to liberty and Parliament can for this purpose pass a number of laws, which it has done so previously as well.¹⁵¹ The Court for its part has also remained fairly deferent in recognizing the legality of detention under these laws.

Take the example of the famous 'Adiala 11' – eleven persons who had been allegedly abducted by intelligence agencies from the Adiala jail in Rawalpindi.¹⁵² The mother of three of these detainees filed a petition before the Court for their recovery. The background of this case is particularly interesting. The petitioner's three sons were first arrested by the police and a case was registered against them before the Anti-Terrorist Court (ATC). The ATC acquitted them. They were then detained under the West Pakistan Maintenance of Public Order, 1960, for a

¹⁵⁰ Strikingly, 6% of the respondents blamed the missing persons themselves (possibly showing that the respondents either believed that these persons have voluntarily ran away or that they deserved to be 'missing' for engaging in terrorist activities). See *Majority (69%) blames present government for the plight of missing persons; 11% blame the army*, Gallup Pakistan (Oct 04, 2012), available at: <http://gallup.com.pk/majority-69-blames-present-government-for-the-plight-of-missing-persons-11-blame-the-army-gilani-pollgallup-pakistan/>

¹⁵¹ See Article 10 of the Constitution

¹⁵² See *Rohaifa v. Federation of Pakistan* (PLD 2014 SC 174)

period of 120 days. Their detention orders, however, were set aside by a High Court. At this stage, when they were ordered to be released, personnel of the intelligence agencies allegedly abducted them from the jail premises. The agencies, however, claimed that they were instead taken from the jail by men disguised as intelligence officers; these unidentified men allegedly transported the detainees to the tribal areas for terrorist activities, where they were arrested and detained by the army. The Court admitted that the relevant facts were controversial, but still went to accept the army's version, as a result of which the Court disclaimed its own jurisdiction.¹⁵³ During the hearing of the case, four of the eleven detainees also died in custody, but the Court again accepted the army's position that the relevant detainees died because of poor health rather than any torture. As for the remaining seven detainees, the Court simply passed an order that allowed their relatives and counsel to meet them without any hindrance but always "*subject to law*".¹⁵⁴

One may argue that perhaps even the act of tracing these missing persons and presenting them before the Court is onerous for intelligence agencies and the military. This is evident in part from the fact that despite repeated directives from the Court, in many of these cases the relevant authorities have resisted in producing the missing persons.¹⁵⁵ Perhaps they feared that the

¹⁵³ At the time this case was heard, the Court as such had no constitutional jurisdiction over actions taken in the tribal areas. This constitutional bar was recently lifted. See Nadir Guramani, *Senate approves bill to extend jurisdiction of Supreme Court, Peshawar High Court to Fata*, Dawn News (Apr 13, 2018), available at: <https://www.dawn.com/news/1401371>

¹⁵⁴ *Rohaifa v. Federation of Pakistan* (PLD 2014 SC 174), at 204

¹⁵⁵ For instance, by Oct 12, 2012, the Baluchistan Law & Order Case (Const. Petition 77 of 2010) had been heard almost 71 times. While the case concerned a number of issues, the issue of missing persons' and the resistance of the armed forces in producing them remained a constant object of the Court's discussion. At one stage the Court notes in clear words that: *we have repeatedly demanded from all the law enforcing agencies including [Frontier Constabulary] etc. for the production of missing persons and in this behalf categorical directions were made time and again but the orders of producing them were not carried out by simply denying that missing*

production of these persons in Court would compromise their identities and location. Perhaps they also feared prosecution in case they were found to have illegally detained someone.¹⁵⁶ Therefore, it can be argued that by pursuing the missing persons' issue the Court was threatening the security interests of the State and also discouraging personnel of the armed forces from countering terrorists, by any means necessary. The Court's actual handling of the missing persons' cases, however, belies any such impression.

Two of the cases concerning missing persons in my sample were dismissed on the first date of hearing without any substantive order or proceeding. One other case, which was pursued, demonstrates in real terms why I argue that the Court's proceedings did not in any real way impact the military or its interests. On the contrary, the Court may have actually provided the military an excuse for acquiring more power.

The case in question originated as an application filed by Mohabat Shah for the recovery of his brother, Yasin Shah, who had been missing since 2010.¹⁵⁷ In 2013, the Court took up the matter and directed the relevant authorities to trace Shah. This was as usual resisted. The military also denied having any involvement in his disappearance. It, however, was soon discovered that Shah (along with 34 other prisoners) had been handed over to the army authorities by the Superintendent of the Malakand Internment Center in 2011. This was confirmed by the Superintendent himself and was indeed one of the rare occasions that a government official directly confirmed the custody of a missing person being with the army. Additionally, given the

persons are not in their custody. Contrary to it, there is overwhelming evidence as it has been noted hereinabove, on the basis whereof prima facie involvement of FC cannot be over ruled.

¹⁵⁶ The authority of the armed forces to detain or arrest civilians was for the most part restricted to certain select areas, at least prior to 2014 when the Protection of Pakistan Act, 2014, was promulgated.

¹⁵⁷ See *Application by Muhabat Shah for recovery of Yaseen Shah* (PLD 2014 SC 305)

circumstances, it was clear that the army had no legal authority to take this action. The court ordered the production of these persons, but despite repeated directions this was not done. The army, through the Ministry of Defense, flat out rejected that it had custody of these people. After much prodding, it did, however, produce seven persons before a judge of the Court in his chambers and outside the public view; their identity was also concealed at the request of the Ministry of Defense. Shah, however, was still not produced.

Since this was a clear case of the army having illegally detained someone, the Court also opined that the persons responsible for this “*should be dealt with strictly in accordance law.*”¹⁵⁸ This was the first order of its kind, passed as late as December, 2013. There were various persons who had previously been traced as a result of the Court’s directions, but the Court had until then not really taken an interest in the circumstances leading to their disappearance or the persons responsible for the same.¹⁵⁹ This case, however, was so clear cut that even the Court was forced to order action. In pursuance of the Court’s directions, however, only one army junior commissioned officer (naeb-subedar) was identified and ordered to be prosecuted. In 2014, in compliance with the Court’s directions the police registered a case against him, but military authorities soon assumed jurisdiction over his case.¹⁶⁰ The Court could simply inquire about the authority under which the military had done this and framed certain legal questions for further

¹⁵⁸ Ibid., 322

¹⁵⁹ This was done to some extent in the *Baluchistan Law & Order* case; however, given that the Court dealt with a variety of issues in the case, including numerous applications dealing with the recovery of missing persons’, the Court was unable to focus on fixing responsibility in any particular case and instead simply directed the filing of investigation reports.

¹⁶⁰ See Nasir Iqbal, *Can civil courts try army men, SC asks govt*, Dawn.com (May 15, 2014), available at: <https://www.dawn.com/news/1106366>

consideration. From the record, it appears that no fresh directions have been issued in the case since then.

Some may argue that the *Mohabat Shah* case did negatively impact the military, even though no army official was ultimately punished. After all, the Court did declare its actions as being illegal and it also clearly noted that the army had no authority to detain people outside of certain tribal areas, suggesting further that a law should be made to control this issue.¹⁶¹ The Court's suggestion, it appears, was taken seriously. The very next year the Protection of Pakistan Act 2014, was passed, which *inter alia*, gave personnel of the armed forces the right of preventive arrest, detention and even the use of lethal force against civilians through-out Pakistan.¹⁶² Therefore, one may legitimately argue that as an offshoot of the missing persons' cases, the armed forces have actually gained greater legal authority over the management of internal security. It should also be noted that the superior courts have neither struck down the Protection of Pakistan Act, 2014, or the Action in Aid of Civil Powers Regulations, 2011 (which *inter alia* legitimizes preventive detention in the tribal areas), despite the serious constitutional objections which these laws raise.¹⁶³ The Regulations were, in particular, challenged multiple times including in the missing persons' cases discussed above, but this issue never even received a serious hearing from the Court.

¹⁶¹ See *Application by Muhabat Shah for recovery of Yaseen Shah* (PLD 2014 SC 305), at 322 (“*presently there is no law for unauthorizedly [sic] detaining undeclared internees except the Provincial Law. . .As far as the rest of the country is concerned, there must be some legislation to control such like activities and the Federation through Chief Executive must ensure that in future no enforced disappearances take place*”)

¹⁶² See Irfan Haider, *Protection of Pakistan Bill 2014 approved in NA*, Dawn.com (Jul 02, 2014), available at: <https://www.dawn.com/news/1116529>

¹⁶³ See Phelim Kline, *Pakistan's dangerous anti-terrorism law*, The Express Tribune (Jul 19, 2014), available at: <https://tribune.com.pk/story/737975/pakistans-dangerous-anti-terrorism-law/>

The Court's intervention, it appears, has also had a marginal effect on the missing persons' issue as a whole.¹⁶⁴ Enforced disappearances still continue unabated and the Court's interest in the issue has also arguably faltered over the years. In 2010, the Court itself ordered the constitution of a Committee of Inquiry for Missing Persons and started transferring missing persons' applications and cases for consideration to this Committee.¹⁶⁵ The Committee's original term was for a year, but in 2011 the Government extended its mandate and, in doing so, provided the Court a clean exit from dealing with further missing persons' cases. While the Committee has a broad mandate (which includes the pursuit of accountability), much like the Court it has restricted itself to "tracing" missing persons. The Committee has also been severely criticized for being partial towards the security agencies.¹⁶⁶ However, the Court continues to refer cases to it.¹⁶⁷ Thus, it is highly questionable that the Court's intervention in the missing persons' cases has negatively affected the security interests of the military.

¹⁶⁴ Since the constitution of the Commission of Inquiry on Enforced Disappearances by the Federal Government in 2011, the Commission has received over 5000 cases. See: <http://coioed.pk/>

¹⁶⁵ See International Commission of Jurists (2013), *supra* note 145, at 64

¹⁶⁶ The International Commission of Jurists, for instance, has noted in its report that the "*Voice for Baloch Missing Persons (VBMP)*, an organization comprised of family members of so-called missing persons from Balochistan, has criticized the Commission for protecting the security agencies allegedly responsible for carrying out the enforced disappearances and has refused to appear before the Commission." *Ibid.*, 69

¹⁶⁷ The Court recently directed the creation of a new "cell" which would deal with complaints of missing persons. However, it is not clear how this cell would operate and, more precisely, how it would be different (or better) than the Court's existing Human Rights Cell or the Commission of Inquiry in relation to the missing persons' issue. It is also interesting to note that in announcing this development, Chief Justice Nisar equally emphasized that law enforcement agencies are not always responsible for missing person. See *SC directed agencies to set up cell for missing persons*, The Pak Tribune (Jun 25, 2018), available at: <http://paktribune.com/news/SC-directed-agencies-to-set-up-cell-for-missing-persons-280874.html>

(b) *Cases impacting the military's internal autonomy*

The military jealously guards its internal autonomy; it assumes complete control over its operations, including its internal processes of appointments, removals, and promotions.¹⁶⁸ Internal autonomy also implies a sort of last say on decisions made by military tribunals in relation to any disciplinary matters. Courts in Pakistan have largely respected and even promoted the military's internal autonomy. In my case, the only decision overtly against this military prerogative was when the Court set aside certain sentences awarded by a military tribunal to civilians for conspiring with military personnel and indulging in corruption.¹⁶⁹ These sentences were, however, set aside not because the Court refused to recognize the tribunal's jurisdiction over civilians in the matter (which it did); on the contrary, the sentences were overturned on the more generic grounds of mala fides. The Court observed that the relevant civilians had been sentenced much more harshly than their co-conspirators and that this was simply unreasonable given the circumstances.¹⁷⁰

Other than the case discussed above, the author came across no example where the internal autonomy of the military was challenged. In fact, in a case involving a promotion matter of an ISI employee, the Court even rejected the petition on grounds of lack of jurisdiction.¹⁷¹ The ISI it should be noted is a civilian agency in principle, so extending its jurisdiction to this matter would not have been unprecedented given that the Court was, during this period, extensively

¹⁶⁸ See Shah, *supra* note 83, at 1019

¹⁶⁹ See *Ghulam Abbas Niazi v. Federation of Pakistan* (PLD 2009 SC 866)

¹⁷⁰ *Ibid.*, 874-878

¹⁷¹ See *Ghulam Rasool v. Government of Pakistan* (PLD 2015 SC 6)

dealing with the appointment and promotion matters of civil servants through its original jurisdiction.¹⁷² But the Court refused to even recognize these cases in its judgment.

The most fascinating case in the context of internal autonomy is, however, the *Watan Party* case, famously dubbed as the ‘Memogate case’.¹⁷³ The case stemmed from an article written by Mansoor Ijaz in the Financial Times, wherein he alleged that a “senior Pakistani diplomat” (later disclosed as Hussain Haqqani – the then Pakistani Ambassador to the U.S.) had asked him to deliver a memorandum to the then U.S. Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen.¹⁷⁴ The memorandum, Ijaz claimed, had the direct sanction of the President of Pakistan and essentially requested the United States to exercise its influence to further civilian control of the armed forces in Pakistan. In return, the United States would be provided a critical role in restructuring the Pakistani military and its defense policy. The following extract from the memo can provide some context:

*Request your direct intervention in conveying a strong, urgent and direct message to Gen Kayani that delivers Washington’s demand for him and Gen Pasha to end their brinkmanship aimed at bringing down the civilian apparatus. . . Should you be willing to do so, Washington’s political/military backing would result in a revamp of the civilian government that, while weak at the top echelon in terms of strategic direction and implementation (even though mandated by domestic political forces), in a wholesale manner replaces the national security adviser and other national security officials with trusted advisers that include ex-military and civilian leaders favorably viewed by Washington, each of whom have long and historical ties to the US military, political and intelligence communities . . .*¹⁷⁵

¹⁷² See, for instance: *Muhammad Azhar Siddiqui v. Federation of Pakistan* (PLD 2012 SC 774); *Tariq Aziz-ud-Din and others v. Federation of Pakistan* (2010 SCMR 1301)

¹⁷³ See *Watan Party and others v. Federation of Pakistan and others* (PLD 2012 SC 292)

¹⁷⁴ See Mansoor Ijaz, *Time to take on Pakistan’s jihadist spies*, The Financial Times (Oct 10, 2011), available at:

<https://www.ft.com/content/5ea9b804-f351-11e0-b11b-00144feab49a>

¹⁷⁵ See *Watan Party and others v. Federation of Pakistan and others* (PLD 2012 SC 292), at 305-306

Importantly, the memo stated that the new national security team in Pakistan would be prepared “to develop an acceptable framework of discipline for the nuclear program.”¹⁷⁶ The memo generated significant controversy in Pakistan. Hussain Haqqani tendered his resignation (without admission of guilt).¹⁷⁷ The Prime Minister of Pakistan also mandated the Parliamentary Committee on National Security to investigate the matter.¹⁷⁸

In the midst of this crisis, a petition was filed before the Court requesting that an independent Judicial Commission be formed to probe the matter. Despite calls to dismiss the petition on grounds that it raised political questions, the Court continued to hear the matter. In particular, the Court was of the opinion that since the petition raised matters concerning national security and the sovereignty of the State, it met the criteria for the Court’s original jurisdiction.¹⁷⁹ The Court proceeded to form a high-powered three member Judicial Commission to investigate the matter. This Commission found that Haqqani was indeed the author of the memo, but absolved President Zardari of any direct involvement because of lack of evidence.¹⁸⁰ Haqqani

¹⁷⁶ Ibid.

¹⁷⁷ See Josh Rogin, *Haqqani resigns as Pakistan’s ambassador to Washington over “memogate”*, Foreign Policy (Nov 22, 2011), available at: <http://foreignpolicy.com/2011/11/22/haqqani-resigns-as-pakistans-ambassador-to-washington-over-memogate/>

¹⁷⁸ See Munizae Jahangir, *Parliamentary Committee on National Security to investigate the scandal: PM*, Express Tribune (Nov 28, 2011), available at: <https://tribune.com.pk/story/298746/parliamentary-committee-on-national-security-to-investigate-the-scandal-pm/>

¹⁷⁹ Chief Justice Chaudhry was specifically of the opinion that, “*the action of originating/drafting Memo in relation to the affairs of Pakistan, as has been mentioned therein, is tantamount to compromising security and sovereignty of Pakistan and if such effort had succeeded, Americans would have been allowed to control our security, the independent character of the government of the country would be totally lost.*”

¹⁸⁰ The Commission did, however, note “*that it was also its considered view that Haqqani led Mansoor Ijaz into believing the memo had the authority of President Zardari.*” See Azam Khan, *‘Boss’ Zardari had no involvement in Memogate: Commission report*, Express Tribune (Jun 16, 2012), available at: <https://tribune.com.pk/story/394746/boss-zardari-had-no-involvement-in-memogate-commission-report/>

was forced to flee the country and is currently living in the US in self-exile. The Court recently also pressed the Federal Investigation Agency to approach Interpol for issuing a ‘red warrant’ for his extradition.¹⁸¹

Some may argue that the contents of the memo (even if it taken at face value) were not as egregious as they were portrayed to be. After all, the civilian leadership was merely seeking the assistance of a powerful ally, so that it could exercise control over its own military. Yet, given Pakistan’s history, it is not surprising that the military would have taken issue with this move. What was particularly fascinating, however, was the manner in which the Court jumped to guard the military’s interests. A nine-member larger bench was constituted to hear this petition, which indicated the importance of this matter for the Court. In what was an unprecedented move, the Court also heard directly from the Chief of Army Staff and the Director General of the ISI.¹⁸² In many ways, the Memogate case was a powerful signal for the military: it could rely upon and be heard directly by a Court that will take an interest in protecting its autonomy, which contrasts sharply with the treatment awarded by the Court to civilian institutions. For instance, the Court has repeatedly sought to oversee and manage Government agencies, including their internal

¹⁸¹ See *SC issues arrest warrants for ex-ambassador Hussain Haqqani*, Dunya News (Feb 15, 2018), available at: <https://dunyanews.tv/en/Pakistan/427861-SC-issues-arrest-warrants-ex-ambassador-Hussain-Haqqani>

¹⁸² This caused particular uproar for the Government, given that the military formally comes under the control of the Ministry of Defense and cannot provide statements in Court directly without the Government’s approval. The action taken by the Chief of Army Staff even pressed the Prime Minister to publicly state that the military was operating as “state within a state.” The military responded with an ominous but sufficient warning by noting that the PM’s statement, “*has very serious ramifications with potentially grievous consequences for the country.*” See Karen Bruilliard, *Army Government Rift Deepens in Pakistan*, The Washington Post (Jan 12, 2012), available at: https://www.washingtonpost.com/world/asia_pacific/army-government-duel-escalates-in-pakistan/2012/01/11/gIQAerfrqP_story.html?utm_term=.53d49c4f6a35

processes and appointment mechanisms for senior functionaries.¹⁸³ Similarly, as will be discussed later (in Section III below), the Court has not accorded the Parliament any deference in relation to its internal processes for disqualifying Parliamentarians; indeed, the Court has itself assumed primacy in these matters.

(c) *Cases impacting the military's constitutional role in politics*

The Pakistani Court has acknowledged and accepted that the military's constitutional role may travel well beyond merely defending the country against external aggression.¹⁸⁴ So the Court, for instance, has never questioned the inclusion of members of the military force on the country's National Security Council – the country's top policy body for security related issues. Nor has the Court moved to remove the practice of directly recruiting members of the military in the bureaucracy, even though this practice is patently unfair to all the civilians who have to go through an extremely rigorous selection process.¹⁸⁵ But perhaps the greatest recognition of the

¹⁸³ In 2015, for instance, the Supreme Court took the NAB to task over its internal mechanisms for appointing officers as well as managing finances (See SMC 10 of 2015). On a broader level, the Court had earlier changed the appointment mechanism for senior functionaries in most statutory organizations, by ordering that such appointments be made through a specified Commission (See Constitution Petition 30 of 2013). See Chapter II of this dissertation for more details in this reference.

¹⁸⁴ The traditional “function” of the armed forces, pursuant to Article 245 (1) of the Constitution is to “*defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.*”

¹⁸⁵ For recruitment purposes, civilian applicants have to first pass an exceedingly difficult exam which is notorious for its low passage rates. In 2016, for instance, about 12,000 people appeared for the entrance exam for the CSS; only 379 (or 0.003%) of those who appeared qualified for the next round of interviews. See *368 candidates pass CSS exam, 238 qualify for service*, The Express Tribune (Apr 27, 2016), available at: <https://tribune.com.pk/story/1092948/238-candidates-qualify-css-exam/>

military's constitutional role by the Court is its decision in the *District Bar Association* case, which related to the constitution of military courts.¹⁸⁶

In response to a series of terrorist attacks, in 2014 the Pakistani Parliament passed the 21st Constitutional Amendment, which *inter alia* provided the military the authority to constitute military tribunals for the purposes of trying civilians accused of terrorism.¹⁸⁷ This move, which has been described as a “soft coup”,¹⁸⁸ was roundly criticized by the legal community, among others. Bar Associations across the country passed resolutions against it and also challenged the Amendment before the Supreme Court.¹⁸⁹ The challenge was grounded on the basic structure doctrine, a legal principle which essentially implies that the Parliament's power to amend the Constitution is not unfettered i.e. the Parliament cannot change the basic structure or certain ‘salient features’ of the Constitution.¹⁹⁰ At the time, the Pakistani Supreme Court had never struck down a constitutional amendment, but it had previously confirmed the existence of a basic structure/unamendable salient features in the Pakistani Constitution.¹⁹¹ It had even demonstrated its willingness to strike down the 18th Constitutional Amendment on the basis that it sought to

¹⁸⁶ See *District Bar Association v. Federation of Pakistan* (PLD 2015 SC 401)

¹⁸⁷ See *Parliament passes 21st Constitutional Amendment, Army Act Amendment*, Dawn.com (Jan 06, 2015), available at: <https://www.dawn.com/news/1155271>

¹⁸⁸ See Farooq Yousuf, *Pakistan's 21st amendment: national consensus or soft coup?*, Open Democracy (Jan 06, 2015), available at: <https://www.opendemocracy.net/open-security/farooq-yousaf/pakistan%E2%80%99s-21st-amendment-national-consensus-or-soft-coup>

¹⁸⁹ See Sarfraz Ali, *Lawyers observe black day across country against military courts, 21st Amendment*, Daily Pakistan (Jan 29, 2015), available at: <https://en.dailypakistan.com.pk/headline/lawyers-observe-black-day-across-country-against-military-courts-21st-amendment/>

¹⁹⁰ See Aqa Raza, *The Doctrine of 'Basic Structure' of the Indian Constitution: A Critique*, available at SSRN (2015): <https://ssrn.com/abstract=2661127> or <http://dx.doi.org/10.2139/ssrn.2661127> (Raza provides a useful overview of the development of this doctrine in India. Decisions from the Indian Supreme Court are frequently cited and relied upon by Pakistani courts in the context of the basic structure doctrine.)

¹⁹¹ See *Syed Zafar Ali Shah v General Pervez Musharraf* (PLD 2000 SC 869)

threaten the independence of the judiciary – an unamendable “salient feature” of the Constitution.¹⁹² The 18th Amendment, it should be noted, merely sought to change the judicial appointment process in a manner which provided some say to legislators.¹⁹³ Yet, it still caused great alarm for the judiciary and the Court essentially coerced the Parliament to amend the 18th Amendment in a manner which satisfied it (or risk it being struck down).¹⁹⁴

Given this history, there was serious cause to believe that the Court would strike down the 21st Constitutional Amendment. After all, the Amendment sought to place judicial power in the hands of the military. It should also be noted that whenever Parliament had sought to create specialized tribunals or courts, the Court had always moved to guard its judicial power by requiring judges of these Courts to be appointed by the judiciary and also by retaining a right to review judgments of these courts.¹⁹⁵ While these decisions were rendered in relation to statutory courts and tribunals, considering the scope of the basic structure doctrine, there was no reason to believe that the Court would not extend these principles to the 21st Amendment. Yet to the surprise (and disappointment) of many the Court upheld the 21st Amendment. The Court merely reserved a marginal right to review judgments of military courts on very limited grounds and this

¹⁹² See *Nadeem Ahmed, Advocate v. Federation of Pakistan* (Const. Petitions No. 11-15, 18-22, 24, 31, 35, 36, 37 & 39-44 of 2010) (The Court held that “*Judicial independence is one of the core values of our Constitution because it is inextricably linked with the enforcement of fundamental rights [Article 184 (3) and Article 199 of the Constitution] and the rule of law.*”)

¹⁹³ See *supra* note 11 and accompanying text

¹⁹⁴ See *supra* note 14 and accompanying text

¹⁹⁵ See *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445), *Chenab Cement Products v. Banking Tribunal* (PLD 1996 Lahore 672), and *Imran v. Presiding Officer, Punjab Special Court* (PLD 1996 Lahore 542). These cases dealt with the appointment mechanism for judges, specifically in the context of special courts, such as those constituted for trying persons accused of terrorist activities. The Court was of the opinion that since the Constitution required the separation of the judiciary from the executive, the terms and conditions of the judges of these courts, including their appointment mechanism, should be structured in a way which fosters the independence of the judiciary.

right too has also (till the writing of this dissertation) never been meaningfully exercised.¹⁹⁶ The military courts' judgment is a powerful reminder that the Court would never really move to displace the military's formal role in constitutional politics, even if this role encroaches its own authority.

The Court has also moved to practically augment the military's formal role in managing the internal security of the country. In *Imran Khan, etc. v. Election Commission of Pakistan*,¹⁹⁷ the Court recognized both the operational efficiency and the so called 'neutrality' of the armed forces. Imran Khan had petitioned the Court to direct the Election Commission of Pakistan (ECP) to conduct voter verification in Karachi. The Court directed the ECP to comply with this request and prepare fresh electoral roles. However, the Court, recognizing both the security situation in Pakistan and the politicization of the police force, directed that this exercise should be conducted with the "help and assistance of [the] Pakistan army."¹⁹⁸

In an earlier suo motu case,¹⁹⁹ also in the context of the security situation in Karachi, the Court appears to have gone further and provided a permanent role to the military in controlling the law and order situation of the city. In its judgment, the Court noted the negligence of the Government in addressing the crisis in Karachi,²⁰⁰ especially in so far as the Government failed to provide the Pakistan Rangers (a parliamentary force commanded by military officers)

¹⁹⁶ Since the announcement of this verdict the Court has never overturned a sentence awarded by a military court. In 2016, the Court dismissed the appeal of sixteen petitioners who had been sentenced to death by military courts. See *Said Zaman Khan v Federation of Pakistan* (2017 SCMR 1249)

¹⁹⁷ PLD 2013 SC 120

¹⁹⁸ *Ibid.*, 140

¹⁹⁹ SMC 16 of 2011 (PLD 2011 SC 997)

²⁰⁰ The Court noted that the lawlessness and violence in the city was not just a product of ethnic strife, but had political roots and that major political parties had actually provided moral and financial support to various militant groups.

appropriate powers in time to contain the situation.²⁰¹ The order noted in clear terms that the Rangers was critical to maintaining the peace in the city and that the situation would get worse if it powers were withdrawn.²⁰² The Court also directed that a Committee be constituted to supervise law enforcement agencies and to ensure that they act indiscriminately against the perpetrators, without regard to any political affiliation. This Committee was to be headed by the Chief Justice of the Province and would include the heads of all security agencies, including the Director General of Rangers.²⁰³

Therefore, in a sense, not only was the military provided a permanent role in managing the law and order situation of the city, it was also provided validation for assuming greater powers in this reference. In the years to come, the Pakistan Rangers was given these powers, which it used partially to specifically target certain political parties.²⁰⁴ By including the DG Rangers in the high powered Committee, the Court also recognized the military's voice on the internal security policy table. Among other things, this case was a clear demonstration that the Court could both uphold and advance the military's security objectives in a formal 'constitutional' way.

(d) Cases impacting the military's business interests

An overwhelming number (N=11 or 31.42%) of cases which impacted military prerogatives, concerned the military's business interests. At first glance, it does appear that the Court was purposely making in-roads, at least in so far as the military's economic prerogatives

²⁰¹ Ibid. 1117, 1130

²⁰² Ibid.

²⁰³ Ibid. 1134

²⁰⁴ See *Rangers take MQM leaders into custody, seal party headquarters Nine Zero*, Dawn.com (Aug 22, 2016), available at: <https://www.dawn.com/news/1279250>

are concerned. However, a qualitative analysis of these cases tells us a story that is less alarming from the military's point of view. What follows is a discussion of those cases in particular which appear to have been decided against the military's interests.

Three cases which were overtly decided against a military corporation or authority related to the sale/allotment of land.²⁰⁵ The military operates various housing schemes for the benefit of its members who can in turn sell the property so allotted to civilians, among others.²⁰⁶ As in any property transaction, disputed terms, change of circumstances and lack of title, can, among other things, lead to the deal being set aside. This is what largely happened in these cases: the Court simply refused to recognize the military corporation's/authority's position with respect to a particular deal. No broad precedent as such was established nor did the plots in question appear to be of high value.²⁰⁷ For all intents and purposes, these matters appeared to be routine and can, at best, be described as being low priority for the military.

Three other cases also dealt with the allotment of land, but this time with the military affiliated entity as a buyer or occupant of this land – the value of the properties involved in these cases was also significantly higher than the cases dealt with earlier.²⁰⁸ For the purposes of the

²⁰⁵ See: *Defense Officers Housing Authority v. Muhammad Bashir* (PLD 2005 SC 359); *Pakistan Defense Officers Housing Authority, Karachi v. Shahim Khan and 5 others* (PLD 2005 SC 792); *Province of Punjab v. Border Area Committee* (PLD 2011 SC 550)

²⁰⁶ For an overview of the various housing schemes operated by the military or under its patronage see: Siddiq, *supra* note 40, at 193-198

²⁰⁷ No case involved the allotment of more than two plots. To put this into proper context, any one Phase of the Defence Housing Authority – the military's premier land development scheme – contains thousands of plots. In Lahore, alone, there are currently twelve Phases of DHA development. See <https://dhalahore.org/download-dha-maps/>

²⁰⁸ See *Complaint regarding establishment of Makro-Habib Store on playground* (SMC 10 of 2009); *Suo Motu action regarding illegal selling out of the Auqaf properties by the Chairman Evacuee Trust Property Board* (PLD 2014 SC 100); *Destruction of forest and illegal acquisition of land by DHA and Bahria town* (SMC 3 of 2009)

development activities undertaken by the Defense Housing Authority (DHA) and other commercial ventures of the military, land needs to be acquired. This process of land acquisition is, however, tainted with a number of issues. The military has historically used its influence to get favorable treatment and terms in so far as the allotment of publicly owned land to its corporate arm is concerned.²⁰⁹ The military has on occasion also exercised its muscle for purposes of occupying land.²¹⁰ The usage of these tactics is common even amongst the private sector. But given the scale of the military's operations and its influence, the employment of these tactics is all the more prevalent in organizations like the DHA. The Court was not shy of highlighting this and set aside a number of high value land acquisition deals, which presumably would have caused considerable loss to the DHA.²¹¹ In doing so, again, the Court was not venturing into new territory. The decisions rested on firm precedent, rules and regulations, which dealt with the disposal of public property.²¹² The Court, therefore, appeared to be dealing with military businesses in a manner no different than regular businesses. Having said this, it is also important to highlight that the Court was exercising a degree of restraint in dealing with these cases, which was perhaps only reserved for military corporations and personnel.

In attacking these transactions, the Court, it appears, was largely critical of the public entity which was making the sale to the military business, rather than the military business itself.

²⁰⁹ See Siddiqi, *supra* note 40, at 170-172, 185, 204

²¹⁰ *Ibid.*, 198-199

²¹¹ For instance, in one of the cases dealt by the Supreme Court it was noted that the Army Welfare Trust (AWF) leased prime property in Karachi from the Federal Government at an annual rent of Rs. 6020. It later leased this property to a private corporation for approximately Rs.17.5 million as annual rent. The AWT pocketed the difference, while the Federal Government (and the public exchequer as a result) continued to receive the low rent. See *Complaint regarding establishment of Makro-Habib Store on playground* (Suo Motu Case No.10 of 2009)

²¹² See, for instance: *Pervaiz Oliver v. St. Gabriel School* (PLD 1999 SC 26); *Iqbal Haider v. Capital Development Authority* (PLD 2006 SC 394).

For instance, in a case involving the illegal sale of property owned by the Evacuee Trust Property Board (ETPB) of Pakistan to the DHA, the Court noted lack of transparency and mala fides in the manner the ETPB handled the transaction.²¹³ It accordingly set aside the deal and also ordered the initiation of criminal proceedings against the relevant offenders; however, in doing so, it specifically mentioned the name of then Chairman of the ETPB, Asif Hashmi.²¹⁴ No official from the DHA – the senior leadership of which are all retired army officials – was identified in this manner, even though it was the DHA which was going to benefit directly from this illegal arrangement. Similarly, in another case, involving the encroachment and illegal acquisition of forest land, the Court expressly found fault with the manner in which other private entities had occupied the land, but has so far not made a ruling against the DHA even though it is arguably similarly placed as the other encroachers.²¹⁵

In addition, there was a clear hesitance on part of the Court in pursuing implementation of any adverse decisions against military businesses. It should be noted that in most of the cases discussed the military affiliated entity has not returned possession of the land once its sale was set aside by the Court.²¹⁶ The Court for its part has also not done much to ensure implementation. The only exception to this was a 2013 suo motu case concerning the sale of DHA land to the Employees Old Age Benefit Institution.²¹⁷ The DHA, it appears, was not just buying public land at discounted prices, it was also selling it back to publicly owned corporations at inflated prices.

²¹³ See *Suo Motu Action Regarding Illegal Selling Out of The Auqaf Properties by the Chairman Evacuee Trust Property Board* (PLD 2014 SC 100), at 122

²¹⁴ *Ibid.*, 131

²¹⁵ See Order dated May 04, 2018, in SMC 3 of 2009

²¹⁶ See Anjum Altaf, *Another Plea to the Chief Justice*, Dawn.com (Apr 10, 2018), available at: <https://www.dawn.com/news/1400712>; Abdul Rasheed Azad, *PAC informed: DHA Lahore occupies 300 kanals of ETPB land*, Business Recorder (Nov 22, 2017), available at: <https://fp.brecorder.com/2017/11/20171122237140/>

²¹⁷ See *Multi-billion Scam in the EOBI* (Cont. Petition No. 35 OF 2013)

In this particular case, the Court set aside this deal and ordered the DHA Islamabad/Rawalpindi to return the money it had received from the EOBI for the sale. When the DHA refused, the Court ordered that its accounts be frozen to the tune of 22 billion rupees (the sale price).²¹⁸ Certainly this was a welcome and somewhat drastic measure, but here again it is important to highlight that none of the contempt petitions filed against the DHA in this case have so far been decided by the Court.

Importantly, even if every decision noted above is ultimately implemented, it would hardly dismantle the vast business empire that the military has created. According to Siddiqa's conservative estimate in 2007, the total value of the urban land property owned by the military in four cities is close to five hundred billion rupees (approximately eight billion dollars in 2007 US dollar terms).²¹⁹ This does not include rural land owned by the military nor does it include the vast tracts of land owned by entities like the DHA, which are expanding aggressively. For instance, the Creek City 4000 unit housing scheme by DHA in Karachi is alone expected to be worth four hundred billion rupees. The military's commercial interests also go well beyond land. For example, military linked foundations are estimated to have investments in over 718 companies, cumulatively amounting to approximately ten percent of all private sector assets.²²⁰ With the rare exception of one case (discussed below), the Court never really adjudicated upon

²¹⁸ The Court, however, did permit reasonable requests by the DHA to withdraw money from this account from time to time. See *EOBI scam: DHA allowed to disburse salaries from accounts*, Express Tribune (Aug 02, 2013), available at:

<https://tribune.com.pk/story/585455/eobi-scam-dha-allowed-to-disburse-salaries-from-accounts/>

²¹⁹ See Siddiqa, *supra* note 40, at pp. 189, 198, 236

²²⁰ *Ibid.*

the broader legality of the military's expansive business empire or the systemic and somewhat discriminatory statutory concessions military businesses receive.²²¹

In 2015, while hearing a matter which dealt with another questionable land deal entered into by the DHA, the Court finally questioned the constitutionality of the broad discretionary powers provided to the DHA under the relevant statute.²²² The Court also ordered that the accounts of DHA should be audited by the Auditor General of Pakistan, like any public institution which had been established by the Federal Government. Both of these observations were quite troubling for the DHA. But like always, implementation and follow-up has been an issue, especially after the retirement of Justice Jawwad S. Khawaja who was the Chief Justice at the time and also the presiding judge of the bench which gave the relevant directions.²²³ For instance, the Auditor General has been unable to conduct a public audit of the DHA's accounts, despite the Court's express orders.²²⁴ For its part, the Court has also chosen not to issue contempt notices to the DHA.²²⁵ It could, thus, just be the case that the wider (and only) judicial quest against the expansive powers and concessions granted to military businesses was simply a reflection of the ideological proclivities of one judge.²²⁶ As an institution, however, the Supreme

²²¹ In fact in one of the cases in my sample, the Court actually interpreted the relevant tax concession in a manner which was consistent with the position taken by the military owned corporation and against the Collector of Customs. Based on the cause of action in this case alone, a tax demand of almost 179 million rupees was rejected by the Court. See *Collector of Customs, Karachi v. Fauji Fertilizer Co. Ltd.* (PLD 2005 SC 577)

²²² See Order dated Sep. 01, 2015 in *Regarding unsatisfactory investigation in a case FIR No.544/15 under section 420/468 471 PPC at PS Defence-A, Lahore* (SMC 12 of 2015)

²²³ Justice Jawwad S. Khawaja retired on Sep 09, 2015.

²²⁴ See Wasim Iqbal, *22 state entities claiming audit immunity*, Business Recorder (Jan 07, 2017), available at: <http://fp.brecorder.com/2017/01/20170107120860/>

²²⁵ My review of the Court's records suggests that since the dismissal of DHA's review petition on 04.04.2016, the case has not been heard or fixed for hearing.

²²⁶ In my sample, Justice Khawaja featured prominently on any bench that ruled against military prerogatives. For instance, he was responsible for initially pushing Musharraf's treason case. He

Court, at best, simply adjudicated upon the disputes of military businesses, like any other business entity.

(e) *Supra-legality*

Given the historic position and authority of the military, it has been difficult to hold it accountable. The military itself assumes, given its sense of identity and heightened patriotism, that it can do no wrong; after all, it is the nation's "savior" and will vociferously contest any attempt to challenge this image. In this light, Figure 14 above does provide a somewhat optimistic view of the Court's ability to pursue the military's accountability. However, as is often the case, first impressions can be misleading. While the Chaudhry Court certainly did attempt (in its later years) to draw some important lines for the military, it skirted difficult issues by never really punishing any military official.

Per my sample, between the years 2005-2012 there was no real attempt at making the military accountable. While in 2007, the Court did initiate two suo motu cases which implicated military personnel and specifically its leadership, these matters were not decided until much later and were also decided somewhat in favor of the military as an institution.²²⁷ In 2011, the Court

was also among the dissenting judges who refused to validate the 21st Constitutional Amendment that provided for the creation for military courts.

²²⁷ SMC 9 of 2007 raised the issue of the hundreds of people who been killed extra-judicially in a military operation in Islamabad in 2007. The Court ordered the formation of a Judicial Commission which was tasked with investigating the causes of the operation, the proportionality of the military's force and accountability for those responsible for any illegality. The Commission, which released its report in 2013, largely absolved the military of any blame and held Musharraf primarily responsible for the operation, recommending in turn that a murder case should be registered against him. The Court on receipt of the report principally dealt with issues relating to the compensation of victims and the restoration of the site at which the operation was carried out, rather than the registration of any specific cases. SMC 25 of 2007 concerned the assassination of Benazir Bhutto. Musharraf personally was considered as one of the people who was responsible for her death. In addition, higher ups in the police, military and intelligence

initiated another suo motu action on the widely reported and televised extra-judicial killing of a civilian by a low-ranking soldier of the Pakistan Rangers.²²⁸ The Court ordered that action be taken against the accused swiftly. Shortly thereafter the relevant Rangers' patrol team was sentenced by civilian courts.²²⁹ This was a rare moment of accountability and perhaps even the first time that a military official was sentenced by a civilian court for an action taken on-duty. However, it is important to note that the relevant Rangers' personnel were not officers, let alone high-ranking members of the military. In addition, at the time of the suo motu action, the Court was heavily coordinating with the Pakistan Rangers in relation to the law and order situation in Karachi (discussed earlier). Therefore, this case could also be considered an extension of that coordination, to the extent that both the Court and the Rangers were interested in maintaining the legitimacy of that operation, which acts like these threatened.²³⁰

The real breakthrough, if it can be termed as such, was made in 2012 when the Court decided a petition that was filed by Asghar Khan, a former Commander-in-Chief of the

agencies, allegedly conspired to cover up his involvement by destroying critical evidence and hampering the investigation. The case was only heard once by the Court and dismissed almost ten years later without any substantive reason.

²²⁸ See *Brutal killing of a young man by Rangers in Karachi* (SMC 10 of 2011)

²²⁹ See Zeeshan Mujahid, *Sarfaraz Shah murder case: In swift trial, Rangers man is sentenced to death*, The Express Tribune (Aug 12, 2011), available at: <https://tribune.com.pk/story/229867/court-to-present-verdict-in-sarfaraz-shah-murder-case-today/>

²³⁰ The Rangers it should be noted were given a number of extra-powers as a result of the Court's intervention in the *Karachi Law & Order* case (SMC 16 of 2011). The Court's intervention and the legitimacy of the Rangers' powers rested on the premise that it would use the same to target militants and gangs, not innocent civilians. For this reason, perhaps, the Rangers did not even contest the civilian court's jurisdiction to try the relevant personnel. The Court similarly also continued to show interest in the Rangers' operation and this is evident in part from the fact that in 2013 it again took notice of another extra-judicial killing by the Rangers. The incident was also ordered to be investigated by the Court. See Constitution Petition 37 of 2013

Pakistan Air Force.²³¹ Khan alleged in his application to the Chief Justice that the former Chief of Army Staff, Mirza Aslam Beg, and Director General ISI, Asad Durrani, had in connivance with the President of Pakistan, attempted to influence the outcome of the 1990 elections by providing funds to select political parties and politicians. While the application was filed in 1996, its hearings were disrupted by the military coup in 1999. In 2012 the case started being fixed for hearing regularly again and by the end of the year it was finally decided. The Court *inter alia* found that Khan's allegations were well-founded and ordered the Federal Government to "*take necessary steps under the Constitution and Law*" against the former Chief of Army Staff, among others.²³² These proceedings, however, have not been instituted; nor has the Court really insisted or followed-up on the same.²³³ It should also be noted that the Court was quite careful not to alienate the military as an institution in its order. At several points in his opinion, Justice Chaudhry emphasized that this was a matter concerning unlawful acts by individuals and should not be read as an indictment of the military as an institution.²³⁴ By some measure, the military

²³¹ See *Air Marshal (Retd.) M. Asghar Khan v. General (Retd.) Mirza Aslam Baig* (PLD 2013 SC 1)

²³² *Ibid.*, 119

²³³ Only recently, after a gap of almost six years from the date of the judgement, has the Court inquired from the Federal Investigative Agency (FIA) what became of the investigation against Beg and Durrani. The FIA reported that the enquiry had still not been finalized. In all fairness, the Court for its part also virtually sat on the Beg's review petition for six years, giving the FIA an excuse to not pursue the matter seriously. See Hasnaat Malik, *Asghar Khan case: FIA to call in Beg, Durrani to finalise inquiry*, The Express Tribune (May 08, 2018), available at: <https://tribune.com.pk/story/1705047/1-asghar-khan-case-sc-gives-govt-week-decide-actions-beg-durrani/>

²³⁴ For instance: "*It may be observed that any violation of the oath of office or any other illegal act committed by a State functionary is a personal act for which the individual concerned would be liable in accordance with law, and the institution to which such individual may belong would not be involved in it in any way.*" At another point, he directly commends the services of the military by stating that "*the Armed Forces have always sacrificed their lives for the country to defend any external or internal aggression for which it being an institution is deeply respected by the nation.*" It should also be noted that this case was initiated on Air Marshal (Retd.) Asghar Khan's application. Khan was deeply revered by the armed forces; in fact, he also openly

was not even the purported target of the Court's order.²³⁵ Still, one must admit that a precedent was set and the road partly paved towards holding high-ranking (retired) military officials accountable.

In 2013, another petition against a senior (also retired) army official was heard by the Court.²³⁶ The Supreme Court was petitioned to direct the Federal Government to institute treason proceedings against General Musharraf for suspending the Constitution and unconstitutionally removing judges of the superior courts on November 03rd, 2007. In response to this petition, the Federal Government submitted a statement before the Court that it would investigate Musharraf for this crime. In view of this statement, the Court dismissed the petition noting that the Government should proceed in accordance with its undertaking “*without unnecessary delay*”.²³⁷ Later, at the request of the Government, the Chief Justice also nominated some of the senior most judges in the country to preside over a special court, which would hear the treason case against Musharraf.²³⁸ As an upshot of these proceedings, for the first time in the history of Pakistan, a former military dictator was indicted for committing high treason – a charge which

admitted before the Court that the reason for filing his application was that the actions of the former Chief of Army Staff and the DG ISI brought disrepute to the armed forces and that they should be punished for that.

²³⁵ One of the primary beneficiaries of the funds doled out by the ISI and the army was Nawaz Sharif, then Chairperson of the PML (N) – the party in opposition. Therefore, the judgement appeased the PPP and its supporters at a time when the Court was perceived as being biased against the PPP. At the same time, the Court used this judgment to once again subtly target President Zardari. The judgement notes that the office of President cannot be used for political purposes. President Zardari at the time was co-chairperson of the PPP and was using his office to *inter alia* target the Court. Zardari was called upon to make some important adjustments to the manner he used his office after the judgment was pronounced. See Mubashir Zaidi, *Presidency to shun political activity, at least officially*, Dawn News (Oct 31, 2012), available at: <https://www.dawn.com/news/760335>

²³⁶ See *Moulvi Iqbal Haider v. Federation of Pakistan* (2013 SCMR 1683)

²³⁷ *Ibid.*

²³⁸ This was done in accordance with the provisions of the Criminal Law Amendment (Special Court) Act, 1976.

could lead to the death penalty, if convicted.²³⁹ This naturally caused great anxiety for the military and especially its leadership, many of whom served under Musharraf. Yet, while the Musharraf treason trial is quite unprecedented and important in its own right, it cannot be said to have broken the historic deference which the judiciary has shown when it comes to holding military personnel accountable; in many ways, on closer examination, it is a clear demonstration of this deference.

Firstly, Musharraf's actions had been declared as being unconstitutional and consequently treasonous as far back as 2009, when Chaudhry was restored to office and a larger bench of the Court tested the validity of Musharraf's declaration of emergency.²⁴⁰ The Court could, if it was seeking accountability, have directed the Federal Government to institute treason proceedings there and then, but it exercised restraint for a number of years.²⁴¹ The Court particularly never went after the senior leadership of the army which supported (either directly or indirectly) his unconstitutional actions,²⁴² even though it had ample opportunity to do so.²⁴³ This

²³⁹ See *Musharraf indicted for treason; pleads not guilty to all charges*, Dawn.com (Mar 14, 2014), available at: <https://www.dawn.com/news/1096826>

²⁴⁰ Consider, for instance, the following extract from *Sindh High Court Bar Association case*: “*the holding in abeyance of the Constitution and/or making amendments therein by any authority not mentioned in the Constitution otherwise than in accordance with the procedure prescribed in the Constitution itself, is tantamount to mutilating and/or subverting the Constitution ... It should be noted that Articles 6 and 237 were framed in the backdrop of the successive abrogation of the Constitutions and imposition of martial laws in the country from time to time by the General commanding the Army at his will and whim.*”

²⁴¹ Even Moulvi Iqbal Haider's petition, which ultimately led to the initiation of treason proceedings against Musharraf, remained pending for about two and half years but no order was passed in it. It was only on Musharraf's return to Pakistan in 2013 that the petition was heard for the first time.

²⁴² Pursuant to Article 6 of the Constitution, any person aiding, abetting or collaborating with any person who “*abrogates or subverts or suspends or holds in abeyance*” the Constitution shall also be guilty of high treason.

²⁴³ For instance, in one case (Civil Review Petition Nos. 328 & 329 of 2013), the Court itself recounts that in 2009 a petition was filed which sought the initiation of treason proceedings against about 627 respondents including the President, Generals, Corps Commanders, and the

willful neglect on part of the Court was brought to the fore multiple times, especially by those people who were in fact being hounded by the Court for supporting Musharraf. For instance, soon after the restoration of Chaudhry, the Court charged several judges (who had supported Musharraf) with contempt of court.²⁴⁴ Many of these judges expressly objected that they were being discriminated against through the pursuit of selective accountability i.e. senior army officials, including the relevant Corps Commanders, were also liable for disobeying the Court's orders on November 03, 2007; but the Court was not moved by this.²⁴⁵ Musharraf himself (during his trial for treason and several appeals before various courts) wanted the Government to extend the scope of the treason investigation to include numerous other people who had supported him, including the relevant Service Chiefs, Corps Commanders and all senior members of the armed forces. But the Court dismissed his plea.²⁴⁶ It was far safer to go after a retired General, than a serving one; Musharraf knew this, and so did the Court.

Secondly, and this follows from the previous point, Musharraf's trial should not be construed as an attack against the military – rather it was simply an indictment of one person who was the cause of great hardship for Justice Chaudhry and Nawaz Sharif personally. By

Chief of Air Force, among others, all who had assisted Musharraf. However, this petition was not entertained by the office of Supreme Court.

²⁴⁴ See *Criminal Original Petitions No. 97 & 98 of 2011* (PLD 2011 SC 195/ PLD 2011 SC 680). The Court had essentially charged various judges of the superior courts with contempt of court for disobeying an order passed by a seven member bench of the Court on November 03, 2007. This order essentially restrained all senior functionaries of the State including the President, Prime Minister, Chief of Army Staff, etc. from taking any action against the independence of the judiciary. Judges of the superior courts were similarly restrained from taking any oath under the PCO or endorsing any unconstitutional step.

²⁴⁵ See Qaiser Zulfiqar, *Nine PCO judges will be prosecuted*, The Express Tribune (Feb 03, 2011), available at: <https://tribune.com.pk/story/112946/sc-decides-to-proceed-against-pco-judges/>

²⁴⁶ See Hasnaat Malik, *Top court rules only Musharraf to be tried for treason*, The Express Tribune (Feb 27, 2016), available at: <https://tribune.com.pk/story/1055347/proclamation-of-emergency-top-court-rules-only-musharraf-to-be-tried-for-treason/>

2013, Sharif was the Prime Minister, so it can be argued that the Court led by Chaudhry chose to go after Musharraf with the full assurance that the Federal Government would support it – and it did.²⁴⁷ In fact, and to be clear, the Court never even directed the Federal Government to initiate his trial; the Government voluntarily chose to do this and based on this undertaking the Court dismissed the petition. His trial can, therefore, be construed as the result of strategic cooperation between two state institutions that were adversely affected by Musharraf’s actions. In many ways, it is a form of vengeance against an individual, more than anything else.²⁴⁸ However, admittedly many in the military would still consider his trial as an institutional attack, which brings me to my last point i.e. Musharraf has still not been convicted for committing treason.

For all the hue and cry surrounding Musharraf’s trial, the fact remains that even after five years, his trial has not been concluded.²⁴⁹ In fact, and perhaps under direct pressure from the military, it was the Court which paved the way for his exit from the country. In 2013, while initially dealing with the case, the Court had ordered that his name be placed on the country’s exit control list, effectively ensuring that he would stand trial.²⁵⁰ On March 16th 2016, the Court backtracked on this order, which it surprisingly noted as having ceased to be in force since July,

²⁴⁷ *Moulvi Iqbal Haider v. Federation of Pakistan* (2013 SCMR 1683)

²⁴⁸ Musharraf also raised the issue of Chaudhry’s bias against him in a review petition he filed against the *Sindh High Court Bar Association* decision, which initially declared his November 3rd actions as being unconstitutional and possibly treasonous. The Court, however, dismissed this charge. See *General Parvez Musharraf v. Nadeem Ahmed Advocate* (Civil Review Petitions No. 328 & 329 of 2013 in Const. Petitions No. 8 & 9 of 2009)

²⁴⁹ See Hasnaat Malik, *Musharraf treason case: Special court to resume hearing on March 8*, The Express Tribune (Feb 26, 2018), available at: <https://tribune.com.pk/story/1645211/1-musharraf-treason-case-special-court-resume-hearing-march-8/>

²⁵⁰ See *Moulvi Iqbal Haider v. Federation of Pakistan* (2013 SCMR 1683)

2013.²⁵¹ Two days after this order, Musharraf left the country and there hasn't been much progress in his treason case since then.²⁵²

Therefore, despite several opportunities to pursue military accountability, the Court's record over the past decade in this area can best be summed as follows: one conviction against a soldier of a para-military force who was filmed while killing an unarmed civilian. It should also be emphasized that accountability, as a theme, runs across nearly all of the military prerogatives discussed in this chapter; and, as any reader would appreciate, it has been largely absent. For instance, the missing persons' cases also raised the issue of accountability for illegal detention, but as I noted earlier no one was punished. In relation to the missing persons' issue it is also interesting to note that despite repeated disobedience neither any official from the intelligence agencies nor the military was ever indicted for contempt of court. In fact, in one of the cases considered above, the Court even dismissed a contempt application on the grounds that it rarely, if ever, punishes anyone for contempt;²⁵³ strikingly, this order was passed less than a year after the Court punished an incumbent Prime Minister for disobeying the Court's directives.²⁵⁴

²⁵¹ See *Federation of Pakistan v. General Parvez Musharraf* (Civil Appeal No.870/2014)

²⁵² Recently, the Court even considered allowing Musharraf to contest the 2018 elections (despite the pending treason trial). See *Pakistan SC Allows Musharraf to Contest July 25 Elections*, The Hindu (Jun 07, 2018), available at: <https://www.thehindu.com/news/international/pakistan-sc-allows-musharraf-to-contest-july-25-general-elections/article24104977.ece>; Malik Asad, *High treason case reaches dead end*, Dawn News (Jul 20, 2016), available at: <https://www.dawn.com/news/1271938>

²⁵³ See *Rohaiifa v. Federation of Pakistan* (PLD 2014 SC 174), at 205

²⁵⁴ See *PM Convicted of Contempt of Court*, Dawn News (Apr 26 2012), available at: <https://www.dawn.com/news/713548>

(f) *Cases impacting the military's control of the media and intelligence*

The military in Pakistan maintains a tight grip on the public narrative by directly (and indirectly) influencing the media and controlling the intelligence agencies. While from a constitutional standpoint the fundamental right to freedom of speech is “*subject to any reasonable restrictions imposed by law in the interest of . . . the integrity, security or defence of Pakistan or any part thereof,*”²⁵⁵ the military is not dependent upon the Constitution to curtail any criticism against it. Instead, intelligence agencies simply intimidate and coerce journalists to advance the narrative supported by the military.²⁵⁶ Pakistan is for this reason, among others, considered to be one of the most dangerous countries for journalists.²⁵⁷ Owners of media corporations are also disinclined to promote stories that are adverse to the military's interests. The military has a tight grip over cable operators and can effectively shut down a channel, if it so wishes.²⁵⁸

The Court has generally not done much to change or address the military's tight grip over the media or its intelligence agencies. While certain cases did raise the issue of protection of

²⁵⁵ See Article 19 of the Constitution

²⁵⁶ See *Pakistan's military, ISI waging quiet war against journalists, activists, says expert*, Business Standard (Mar 29, 2018), available at: http://www.business-standard.com/article/news-ani/pakistan-s-military-isi-waging-quiet-war-against-journalists-activists-says-expert-118032900114_1.html; Nosheen Abbas and Michael Safi, *Pakistani journalist who criticised military tells of attempted abduction*, The Guardian (Jan 10, 2018), <https://www.theguardian.com/world/2018/jan/10/pakistani-journalist-taha-siddiqui-military-attempted-abduction>;

²⁵⁷ See *Pakistan rated among most dangerous countries for journalists*, Dawn.com (Nov 03, 2017), available at: <https://www.dawn.com/news/1368018>

²⁵⁸ For instance, this is alleged to have happened recently when the country's largest TV network – Geo News – was shut down for being critical of the army. See *Geo goes dark: Media and the military in Pakistan*, Al-Jazeera (Apr 14, 2018), available at: <https://www.aljazeera.com/programmes/listeningpost/2018/04/geo-dark-media-military-pakistan-180413213149760.html>

journalists, they were often in the context of police brutality – the armed forces were generally not indicted in any way.²⁵⁹ This has been the case even where the involvement of intelligence agencies is *prima facie* evident. For instance, in 2011, journalist Saleem Shahzad was found murdered in mysterious circumstances.²⁶⁰ The general impression was that Shahzad had been targeted by the intelligence agencies, as he had published various stories that connected the military to terror outfits.²⁶¹ Shahzad himself had identified the danger to his life and had previously disclosed that he was receiving death threats from the ISI.²⁶² The Government constituted a Judicial Commission to investigate his death; however, the Commission largely absolved the army and intelligence agencies from having any direct connection to his murder.²⁶³ This was so even though the Commission was convinced that “*the agencies, including ISI, have been using coercive and intimidating tactics in dealing with those journalists who antagonise the*

²⁵⁹ In 2007, for instance, the Supreme Court twice took suo motu notice of violence against journalists, but both of these cases implicated the police and not the army. See *Brutal torture on lawyers in the vicinity of Lahore High Court, Lahore and brutality of police against journalists* (SMC 1-Q, 2 and 3 of 2007); *Application by the Press Association Supreme Court against intimidation of journalists* (SMC 5 of 2007). Recently, the Court again took notice of certain journalists being manhandled by the police and ordered that a judicial inquiry should be conducted. See Hasnaat Malik, *SC orders judicial inquiry after journalists manhandled by Islamabad police*, The Express Tribune (May 04, 2018), available at: <https://tribune.com.pk/story/1702166/1-sc-orders-judicial-inquiry-journalists-manhandled-islamabad-police/>

²⁶⁰ See Declan Walsh, *Missing Pakistan journalist Saleem Shahzad found dead near Islamabad*, The Guardian (May 31, 2011), available at: <https://www.theguardian.com/world/2011/may/31/missing-pakistan-journalist-found-dead>

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ The Commission did, however, submit some broad findings regarding the role of intelligence agencies; it also specifically suggested the creation of a legislative framework that would provide some oversight for agency operations and a mechanism to resolve complaints against them. These recommendations were non-binding in nature. See Salman Siddiqi, *Saleem Shahzad murder: Commission report points out everything, but the murderers*, The Express Tribune (Jan 13, 2012), available at: <https://tribune.com.pk/story/320957/saleem-shahzad-commission-report-released/>

agency's interest.”²⁶⁴ A few years later, journalist and renowned news anchor, Hamid Mir, was shot several times. Again, the general perception, at least among journalists, was that Mir had been targeted by the ISI. Mir himself held the ISI responsible for the attack.²⁶⁵ The Government again constituted a Judicial Commission to investigate the allegations; and the Commission again absolved the ISI and the military. This time, however, the Commission went further than before and sought to warn journalists (who by and large had blamed the ISI for the attack)²⁶⁶ to refrain from tarnishing the military. The following extract from the Commission's report is particularly indicative of its mindset:

*...we cannot lose sight of an important aspect of the matter, viz., the interaction of the media persons with the agencies in the course of their professional duties. In the process, there are concerns raised on behalf of the agencies vis-à-vis reporting on sensitive issues of national security. Such concerns have their genesis in various Articles of the Constitution, including Article 5 (loyalty to State and obedience to Constitution and law) and Proviso to Article 10(7) ibid. It is noteworthy that the safeguard as to arrest and detention enshrined in the latter provision does not apply to a person who is employed by, or works for, or acts on instructions received from, the enemy or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a Federal law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity. Similarly, the right to freedom of speech is also subject to reasonable restrictions imposed, inter alia, in the interest of integrity, security and defence of Pakistan or any part thereof, friendly relations with foreign States and public order.*²⁶⁷

The Commission, thus, appeared to echo the national security concerns of the military and perhaps also served to provide a crude reminder that there were circumstances under which

²⁶⁴ See *Commission didn't exonerate ISI of murder allegations*, The News (Apr 24, 2014), available at: <https://www.thenews.com.pk/archive/print/637482-commission-didn%E2%80%99t-exonerate-isi-of-murder-allegations>

²⁶⁵ See *Hamid Mir blames 'ISI within ISI' for attack*, Dawn.com (Apr 27, 2014), available at: <https://www.dawn.com/news/1102478>

²⁶⁶ Nearly every journalist and media person who appeared before the Commission blamed the ISI and the military for the attack on Mir.

²⁶⁷ See *Report of the Commission of Inquiry to Inquire into the Incident of Firing at Mr. Hamid Mir Anchor Person Geo News TV Channel*, pp. 39-40, available at: <http://mediamatterspakistan.org/wp-content/uploads/2016/04/HMCR.pdf>

anyone, including journalists, may justifiably go “missing”. It is also noteworthy that as an upshot of the Hamid Mir assassination attempt and the media’s general indictment of the ISI, Geo News was shut down by the Public Electronic and Media Regulatory Authority (PEMRA) for a period of fifteen days along with being fined.²⁶⁸ The message was loud and clear: if you go after the ISI, it will not only hunt you down, but also drive you out of business.

The only case in my sample relating to, albeit indirectly, the military’s media management prerogatives also captures this somewhat favorable trend for the military interests.²⁶⁹ The Government (much like the military) attempts to control the public narrative by influencing journalists and media corporations. This is done primarily by bribing journalists and enticing media corporations with a considerable revenue stream through Government sponsored advertisements. In 2012, this issue of bribing journalists was highlighted when a prominent TV anchor, Hamid Mir, filed a petition requesting the Court to *inter alia* investigate the issue by forming a Judicial Commission.²⁷⁰ The Court agreed and formed a Commission with a very broad mandate including, among others things, identifying corruption in the media, studying the

²⁶⁸ See *PEMRA suspends Geo TV’s licence for 15 days, imposes Rs10 million fine*, The Express Tribune (Jun 6, 2014), available at: <https://tribune.com.pk/story/718288/pemra-suspends-geo-tvs-licence-for-15-days-imposes-rs10-million-fine/>

²⁶⁹ The Saleem Shahzad and Hamid Mir Judicial Commissions provided reports which were favorable for the military, but these were not included in my sample since the reports of these Commissions were not directed pursuant to an order of the Court; rather these Commissions were formed by the Government.

²⁷⁰ Mir’s own name had come up in a document (circulated on social media) alleging that he along with several other journalists had received payments from Malik Riaz, a prominent businessman, who at the time had launched a media campaign against the Supreme Court, and especially Justice Chaudhry. See Iftikhar A. Khan, *Journalists, anchors with alleged Bahria Town link: Petition filed in SC to seek probe*, Dawn News (Jul 19, 2012), available at: <https://www.dawn.com/news/735702>

usage of government advertisements, creating a code of conduct for the media, and examining the need of having a Ministry of Information.²⁷¹

As an offshoot of Mir's petition and the report of the Commission, it emerged that a number of Government departments/ministries had secret funds which were not audited officially and were, among other things, used for the purposes of bribing journalists.²⁷² The Court was flabbergasted and ordered that all such secret funds be dismantled. The Court also ordered the promulgation of a suitable Code of Conduct for the media and the appointment of permanent Chairman for the PEMRA. In a manner, therefore, the Court made a number of moves to curtail the Government's influence over the media. The Government also appeared to have largely complied with the Court's orders: a Chairman for PEMRA was appointed, the Code of Conduct was promulgated and all secret funds were abolished, except two.²⁷³

Secret funds of the intelligence agencies still remain.²⁷⁴ And it appears that the Court has not objected to this, even though its order was arguably broad enough to cover them. The Court in the *Hamid Mir* case also fell short of making any reference to the intelligence agencies or the military in relation to the role they have come to play in controlling the media, and especially in persecuting journalists. The Court could have also legitimately questioned why the military has

²⁷¹ See *Hamid Mir v. Federation of Pakistan* (Const. Petition 105 of 2012)

²⁷² Ibid.

²⁷³ See *Journalist Absar Alam appointed as PEMRA chairman*, The Express Tribune (Oct 22, 2015), available at: <https://tribune.com.pk/story/977619/journalist-absar-alam-appointed-as-pemra-chairman/> (Absar Alam who was appointed as the Chairman PEMRA was arguably also close to the judiciary, since he was one of the members of the Judicial Commission constituted by the Court); Hassan Belal Zaidi, *Only ISI and IB still have 'secret funds', Dar tells NA*, Dawn News (Jun 19, 2016), available at: <https://www.dawn.com/news/1265830>; *Govt unveils PEMRA's fresh code of conduct*, The Express Tribune (Aug 21, 2015), available at: <https://tribune.com.pk/story/942083/govt-unveils-pemras-fresh-code-of-conduct/>

²⁷⁴ See Hassan Belal Zaidi, Ibid.

an official public relations wing (the ISPR) which directly invests in state propaganda and provides statements on behalf of the army.²⁷⁵ But it appears to have sidestepped all of this and instead focused on the Government alone. While the Court's object in the *Hamir Mir* decision is certainly laudable in some respects, by just focusing on the Government it can be said have furthered the civil-military imbalance (especially in so far as control over the media is concerned).

III. THE STRATEGY OF JUDICIAL DEFERENCE AND THE MILITARY

Given the discussion above, it should be clear that the Court was holding back punches in dealing with the military. Despite clear opportunities, the Court chose to exercise restraint and award deep deference for military prerogatives, even where this interred its ability to do complete justice. The Court, for instance, ignored express pleas to hold military personnel accountable in the same manner that it was hounding judges who had assisted Musharraf on November 03, 2007. To be sure, the Court did not even require an appeal to act. The Court's extremely wide *suo motu* jurisdiction provided it the latitude to practically examine any issue affecting the State. It also exercised this jurisdiction quite aggressively since Chaudhry's tenure. Between the years 2005-2015, the Court took up 190 *suo motu* cases concerning all manners of

²⁷⁵ The ISPR heavily expanded its operations during Musharraf's regime to counter the growing number of independent media outlets in the country. See Shah *supra* note 45, at 44. The ISPR plays a central role in controlling public opinion and has also partnered with the private sector to produce a number of movies which positively portray the military. See Sher Khan, *With ISPR support, debut film-maker hopes to revive national pride*, The Express Tribune (Oct 27, 2013), available at:

<https://tribune.com.pk/story/623233/with-ispr-support-debut-film-maker-hopes-to-revive-national-pride/>

social policy including law & order,²⁷⁶ environmental pollution,²⁷⁷ rights of civil servants,²⁷⁸ prison reform,²⁷⁹ and price controls,²⁸⁰ among other issues. However, only 16 or approximately 8.42% of the 190 *suo motu* cases²⁸¹ admitted during this period were directly related to military prerogatives. And, as discussed earlier, many of these cases were either decided in terms favorable for the military or the Court simply showed no enthusiasm in implementing an adverse verdict. In fact, one *suo motu* case was taken up on the express request of a military owned corporation that accused a governmental agency of favoritism and corruption in awarding a public contract.²⁸² The matter was heard and the Government agreed to re-bid the contract.

One may rightly question why the Court was not enthusiastic about dealing with more issues concerning the military. Why, for instance, did the Court not inquire about the vast tracts of land awarded to senior members of the armed forces or the jobs they secure in military corporations upon retirement? These issues were after all the subject of the Court's *suo motu* jurisdiction when it came to civilian establishment.²⁸³ Similarly, why was there no concern about

²⁷⁶ See, for instance: SMC 16 of 2011 (PLD 2011 SC 997) (dealing with the law & order situation in Karachi)

²⁷⁷ See, for instance: SMC 13 of 2005 (dealing with the risk of environmental damage as a result of a new housing scheme)

²⁷⁸ See, for instance: *Anita Turab* case (PLD 2013 SC 195) (dealing with the rights and obligations of civil servants, especially in relation to following illegal orders from the Government)

²⁷⁹ See, for instance: SMC 1 of 2006 (the Court took notice of the poor conditions of female prisons and the failure of Federal and Provincial Governments to comply with laws and rules governing prisons)

²⁸⁰ See, for instance: SMC 10 of 2007 (dealing with the increase in price of daily commodities and the failure of the government to implement price controls)

²⁸¹ This figure does not include any cases registered as human rights cases, which are also an extension of the Court's *suo motu* jurisdiction, but differ to the extent that they require an applicant.

²⁸² See *Suo Moto Action Regarding Huge Loss to Public Exchequer by Ignoring the Lowest Bid of Fauji Foundation* (SMC 5 of 2010)

²⁸³ See Order dated November 11, 2013 in *Corruption in Hajj Arrangements* (Suo motu Case No. 24 of 2010) [the Court practically banned the re-employment of retired civil servants

defense expenditure or even its public audit? It's not as if the Court has otherwise showed restraint in checking the appropriateness of public spending.²⁸⁴ The Court has previously also ordered the Auditor General, among others, to conduct institution specific audits and present reports about malpractices to the Court.²⁸⁵ Deference for the military's interests was, therefore, not grounded in precedent or lack of jurisdiction. Why then would the Court willingly pull punches when it came to the military's interests, but proverbially take the gloves off when it came to the civilian leadership?

This question becomes all the more important given the historic relationship between the judiciary and the military; the former having been ravaged by the latter on numerous occasions. The declaration of the state of emergency by Musharraf on November 03, 2007, was another such instance: numerous judges of the superior courts were personally humiliated and removed from office on that date. For the first time in the nation's history, however, all of these judges were restored to office by March, 2009.²⁸⁶ The public rallied behind them and a civilian

through this order – this practice allowed politicians to, among other things, reward loyal (and perhaps also efficient) civil servants]

²⁸⁴ The Court has passed orders concerning the Government's expenditure on low-income housing, VIP security, development projects, education and health care, among other issues. See *SC seeks report on budgetary allocations for katchi abadis*, The News (Sep 08, 2015), available at: <https://www.thenews.com.pk/print/14508-sc-seeks-report-on-budgetary-allocations-for-katchi-abadis>; *Will shut down Orange Line train if health, education not prioritised: CJP Nisar*, The Express Tribune (Jan 06, 2018), available at <https://tribune.com.pk/story/1602284/1-will-shut-orange-line-train-health-education-not-prioritised-cjp-nisar/>; *Rs1.38b spent on VIP security annually: CJP*, The Nation (Apr 23, 2018), available at: <https://nation.com.pk/23-Apr-2018/rs1-38b-spent-on-vip-security-annually-cjp>

²⁸⁵ See *Hamid Mir v. Federation of Pakistan* (Const. P 105 of 2012) (Court ordered the audit of 19 publicly owned and/or statutory corporations). More recently, the Court also ordered the audit of the Pakistan Railways to determine the cause for its consistent losses. See *Wajih Ahmed Sheikh, SC orders private firm to audit railways within six weeks*, Dawn News (Apr 29, 2018), available at: <https://www.dawn.com/news/1404537>

²⁸⁶ See Nick Schifrin, *Pakistani Chief Justice Iftikhar Chaudhry Reinstated*, ABC News (March 16, 2009), available at: <http://abcnews.go.com/International/story?id=7094949>

government was also in place. Theoretically, at least, the Chaudhry Court could have used this position to reign in the armed forces; or, at the very least, not hamper the elected government's efforts in asserting civilian control over the military (as it did in the Memogate case discussed earlier). But it choose not to do so. The Court instead focused on targeting the Government on grounds of corruption, inefficiency and abuse of power.²⁸⁷ This prioritization of the military's interests over the Government was, as discussed above, also observed during the tenure of other Chief Justices who served during between the years 2005-2015. It is arguably even more prevalent today.

It appears, thus, that there is a form of institutional commitment by the Court to honor military prerogatives. And as I argue below, this institutional commitment can be best understood as a judicial strategy directed at maintaining and expanding power in the Pakistani political context. Four structural features have led to the development of this strategy: (i) the popularity of the armed forces and the relative unpopularity of the elected government; (ii) the potential to make wide-ranging decisions of policy by attacking the Government, as opposed to the military; (iii) the institutional make-up of the military and the judiciary, which facilitates cooperation and mutual respect; and (iv) the relative ability of the Court to contain the threat of retaliation from the Government versus the military. What follows is a discussion of each of these features.

(i) *The Military's High Legitimacy*

The judiciary values its legitimacy for a number of reasons. Legitimate courts are more effective in defending themselves against institutional attacks as well as in securing compliance

²⁸⁷ See Qazi, *supra* note 29, at 302

of their decisions.²⁸⁸ In addition, since judges personally care about their reputation, they are, as a result, concerned about the legitimacy of the court as well as the decisions rendered by them personally.²⁸⁹ Judges, therefore, will typically endeavor not to give decisions which are out of sync with the public mood or which lack specific support of the populace.²⁹⁰

It is no secret that the civilian government and bureaucracy in Pakistan is by large considered to be corrupt and ineffective by an overwhelming majority of the public.²⁹¹ Similarly, it is generally accepted that the military is the most trusted and respected public institution in Pakistan.²⁹² The public's positive perception of the military has also remained consistently high

²⁸⁸ See, generally, Tom S. Clark, *The Limits of Judicial Independence*, New York, NY: Cambridge University Press (2011) (arguing in part that court curbing attacks by Congress are driven by public discontent with the judiciary); James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*. 25 *Law & Society Review* 3 (1991), pp. 631-636 (finding in part that the Court's diffuse support can contribute to the public's acceptance of unpopular decisions)

²⁸⁹ See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation*, Chicago and London: The University of Chicago Press (2015)

²⁹⁰ See Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus & Giroux 2009) (Friedman makes a forceful case for establishing how public opinion both empowers and constrains the U.S. Supreme Court); Anke Grosskopf and Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*. *Political Research Quarterly* 51 (1998), pp. 633-654 (arguing how disagreements with specific decisions can lower the public's trust and confidence in the Court)

²⁹¹ For instance, the law enforcing arm of the Government – the Police – has been consistently rated as the most corrupt authority in numerous surveys. A public opinion survey by Gallup Pakistan in 2013 found that 88% of the population viewed police officials as being involved in corruption related practices – the highest figure for any public organization. The figure declined to 82% in 2016, nevertheless 4 in 5 Pakistanis still believe that police officers are corrupt. See, *2013-2016: Majority urban Pakistanis view police as the most corrupt authority*, Gallup Pakistan (Aug 23, 2017) available at:

<http://gallup.com.pk/2013-2016-majority-urban-pakistanis-view-police-as-the-most-corrupt-authority-judges-and-magistrates-are-perceived-to-be-the-least-corrupt-world-justice-project-and-gallup-pakistan/>

²⁹² See Irfan Haider, *Army the most trustworthy institution in Pakistan, survey reveals*, Dawn News (Oct 20, 2015), available at: <https://www.dawn.com/news/1214367>; See also: *Public trust in performance of Army has risen since 2008, except for a slight decline in 2011*, Gallup Pakistan

despite some recent incidents which would call into question its competency. In 2011, for instance, following the Bin Laden raid in Pakistan,²⁹³ Gallup noted the following (somewhat surprising) results from a public survey:

*One in three Pakistanis say they approve of the local leaders in the city or area where they live, and one in five say they approve of Pakistan's leadership at a national level. This is especially striking in comparison with the high confidence rating enjoyed by the military (based on the most recent Gallup flash poll, still close to 80%), despite the skepticism some Pakistanis have expressed about the military's not knowing in advance about the bin Laden raid.*²⁹⁴

For the Court, therefore, going after the military can come at a fairly high cost from a public opinion perspective. This is especially so given that the military, as noted earlier, is not only popular but also has a powerful hold on the media, which can be used to damage the Court as well as individual judges.²⁹⁵ On the other hand, targeting the civilian government, especially in relation to issues concerning governance, corruption and inefficiency, appears to be a safe

(Dec 24, 2014), available at: <http://gallup.com.pk/public-trust-in-performance-of-army-has-risen-since-2008-except-for-a-slight-decline-in-2011/>

²⁹³ The US raid on Osama Bin Laden's residence in Abbottabad, Pakistan, raised a number of issues regarding the Pakistani military's operational ability. Firstly, the inability of the military to identify Bin Laden's presence either demonstrated poor intelligence or complicity, both of which were highly problematic. Secondly, the military's response to the US raid was entirely unsatisfactory and raised concerns regarding its ability to defend against a surprise attack. See Jane Perlez, *Pakistani Army, Shaken by Raid, Faces New Scrutiny*, The New York Times (May 04, 2011), available at: <https://www.nytimes.com/2011/05/05/world/asia/05pakistan.html>; Asad Hashim, *Military failures revealed by Bin Laden raid*, Al-Jazeera (Jul 10, 2013), available at: <https://www.aljazeera.com/indepth/features/2013/07/201371013940370892.html>

²⁹⁴ See *Pakistan's troubled State*, Gallup.com. available at:

<http://news.gallup.com/poll/157055/pakistan-troubled-state.aspx>

²⁹⁵ That the military is capable of pressurizing individual judges is clear from an incident in 2014. In one day, defamatory banners targeting Justice Jawwad S. Khawaja proposed up all over the capital city of Islamabad. It later emerged that the ISI was connected with the campaign against him, presumably because the military was not satisfied with the way he was handling certain cases. See *Deflecting criticism: No one can disgrace me, says Justice Khawaja*, The Express Tribune (May 24, 2014), available at: <https://tribune.com.pk/story/712382/deflecting-criticism-no-one-can-disgrace-me-says-justice-khawaja/>; Nasir Iqbal, *Man behind defamatory banners had links with ISI, court told*, Dawn News (Mar 20, 2015), available at: <https://www.dawn.com/news/1170764>

choice.²⁹⁶ In many ways, the Court was also expected to do this following the restoration of judges in 2009. From the various speeches delivered by leaders of Lawyer's Movement, including many public speeches by Chaudhry himself, it was clear that the restored judiciary would be called upon to do more than just be a legitimizing force for incumbent executive policies;²⁹⁷ not delivering on this pledge to restore the "rule of law" could in turn have even damaged the Court's, and especially Chaudhry's, reputation.²⁹⁸

Therefore, going after the Government, instead of the military, was clearly in the interests of maintaining and building the Court's legitimacy, as well as the reputation of individual judges.

(ii) *The Institutional Ethos of the Judiciary and the Military*

The institutional design of the judiciary and the military provides a strong foundation for a relationship of mutual respect and cooperation.²⁹⁹ Both institutions are somewhat meritocratic with entry standards, qualifications for positions and established paths of promotion.³⁰⁰ The judiciary like the military is also a "technical" profession which requires dedicated training and

²⁹⁶ These issues also affect the public on a day-to-day basis, so they also are more likely to welcome judicial activism in these areas as compared to say defense policy.

²⁹⁷ See *The Pakistani Lawyers' Movement and the Popular Currency For Power*, 123 Harv. L. Rev. 1705 (2010), pp 1715-1725

²⁹⁸ See Carlotta Gall, *Reinstatement of Pakistan's Chief Justice Ends a Crisis, but It Might Lead to Another*, The New York Times (Mar 17, 2009), available at: <https://www.nytimes.com/2009/03/17/world/asia/17judge.html>

(*"Muneer A. Malik, one of the Supreme Court lawyers who ran the campaign for Mr. Chaudhry's reinstatement, said the chief justice was now under enormous pressure to deliver an independent judiciary after so many in the judicial profession had risked so much in the struggle for his reinstatement."*)

²⁹⁹ See Hootan Shambayati, *Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian Politics) in Rule by Law: The Politics of Courts in Authoritarian Regimes*, Tom Ginsburg et al. (Eds.), Cambridge: Cambridge University Press (2008), pp. 285-286

³⁰⁰ *Ibid.*

localized knowledge.³⁰¹ As a result of this configuration, both institutions share their contempt for politicians who are typically not trained specialists and are generally perceived to be incompetent and corrupt, especially in Pakistan.

In addition, the military and the judiciary in Pakistan are hierarchical institutions that provide for centralized authority.³⁰² This in turn allows their behavior to be predictable for other actors who can rely on it for the purposes of following a cooperation strategy.³⁰³ The common law judiciary of Pakistan, for instance, deeply embodies the concept of binding precedent and the primacy of the Supreme Court in all matters of law and policy.³⁰⁴ Importantly, while all judges carry an equal vote, the Chief Justice of Pakistan (much like the Chief of Army Staff in relation to the military) commands a special place in the judicial hierarchy. The Chief Justice can assign cases to specified judges, control the cause list of the Supreme Court, and initiate suo motu actions, among other things.³⁰⁵ Therefore, the Chief of Army Staff has but to consider the

³⁰¹ Ibid.

³⁰² One can argue that executive authority is also hierarchal; however, Pakistan follows a parliamentary system of governance where the Federal Cabinet controls (in theory at least) the framing of policy. The size of the Cabinet as well as the identity of Cabinet Ministers could vary from time to time. At one point, the Cabinet had almost 61 Members in it. See Karen Brulliard, *Pakistan faulted on cabinet's size*, The Washington Post (Oct 17, 2010), available at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/16/AR2010101603211.html>. Furthermore, the presence of an independent bureaucracy and provincial authority also makes the centralization of executive power difficult in Pakistan.

³⁰³ See Scott Glover and Peter Dickson, *The role of predictability in cooperative and competitive joint action*, 43 *Journal of Experimental Psychology: Human Perception and Performance* 4 (2017), pp. 644-650

³⁰⁴ See Article 189 of the Constitution

³⁰⁵ See Maryam Khan, *The Politics of Public Interest Litigation in Pakistan in the 1990s*, 3 *Social Science and Policy Bulletin* 2 (2011), pp.6

preferences of the Chief Justice to predict the “mood” of the judiciary and implement a strategy of cooperation or competition, as the case may be, on an institutional level.³⁰⁶

Given what has been noted above, it should come as no surprise that the military and the judiciary have cooperated in the past to curtail the authority of civilian governments. Chief Justice Munir, for instance, was highly in favor of a strong executive led by the military as compared to the politicians.³⁰⁷ Many would argue that he went out of his way to legitimize the first martial law of Pakistan. He had earlier also legitimized the dissolution of the country’s first Constituent Assembly, in relation to which he reportedly said: “[*the Assembly*] lived in a fool’s paradise if it was ever seized with the notion that it was the sovereign body in the State.”³⁰⁸ Since Munir’s validation of martial law, the Supreme Court has time and again legitimized military intervention. And while there were some judges who did contest the martial regime, they were always outnumbered by those who supported it.³⁰⁹

During times of civilian rule, especially during the 90s, the Court continued to express its disdain for the civilian leadership. On several occasions, noting the corruption and ineptitude of the elected government, the Court legitimized the dissolution of the National Assembly by the

³⁰⁶ These preferences can be assessed from the various judgements authored by the Chief Justice prior to his or her appointment as Chief Justice. It should be noted as per Article 175A (3) of the Constitution, “*the President shall appoint the most senior Judge of the Supreme Court as the Chief Justice of Pakistan.*” Though, this provision was added to the Constitution in 2010, the Supreme Court has long recognized that the most senior judge shall be appointed as Chief Justice. See *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 Supreme Court 324). Therefore, by the time a Supreme Court justice is appointed as the Chief Justice there is sufficient material on the record to judge his or her preferences, as well as the preferences of judges who are in next in line for becoming the Chief Justice.

³⁰⁷ See Azeem, *supra* note 65, at 57-60

³⁰⁸ See Newberg, *supra* note 70, at 48

³⁰⁹ See *The PCO and its victim judges*, Dawn News (Jan 07, 2008), available at: <https://www.dawn.com/news/841674/pco-and-its-victim-judges>

President.³¹⁰ While validating Musharraf’s martial law in 1999, the Court in particular noted the importance of this Presidential power of dissolution and how its absence had removed a ‘safety valve’ in the system.³¹¹ There was, it appears, a constant need to watch, ward off and flush the civilian leadership, if need be.

The judiciary’s historic distrust and lack of respect for civilian governments appears to have survived the Musharraf regime. Recently, the Chief Justice of Pakistan, Mian Saqib Nisar, vocally expressed this sentiment by publicly stating that the Court was compelled to intervene in matters concerning the executive because of the “*poor state of affairs.*”³¹² Such comments are not rare and have been often reported in the media.³¹³ In many ways, the Court appears to be utilizing the same rhetoric employed by dictators to justify their unconstitutional intervention in politics.

³¹⁰ See generally Siddique, *supra* note 72

³¹¹ Consider the following extract from paragraph 249 of the judgement: *After careful analysis of the above material, we are of the view that it is never safe to confer unfettered powers on a person who is holding the reins of the affairs of the country as is embedded in the saying, ‘power corrupts and absolute power corrupts absolutely’.*, Accordingly, while upholding the judgment in *Mehmood Achakzai’s case (supra)* we would like to observe that probably the situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Article 58(2)(b). See *Zafar Ali Shah v. General Pervez Musharraf* (PLD 2000 SC 869)

³¹² See *Judiciary ‘compelled’ to interfere in executive affairs, says CJP*, The Nation (Apr 01, 2018), available at: <https://nation.com.pk/01-Apr-2018/judiciary-compelled-to-interfere-in-executive-affairs-says-cjp>;

³¹³ See, for instance: *‘I’ve seen no improvement’: CJP takes KP chief minister to task over water woes, state of hospitals*, Dawn.com (Apr 19, 2018), available at: <https://www.dawn.com/news/1402551>.

(iii) *Executive Policy: a wider and more attractive palette*

Judges are motivated by, among other things, bringing the law closer to their policy preferences.³¹⁴ And if this is indeed the case, as many scholars do suggest,³¹⁵ then judges should by and large seek to increase the number of issues which they can legitimately rule on. If, however, given the choice between choosing to rule on military prerogatives or government policy in general,³¹⁶ it should be clear that judges would generally choose to exercise jurisdiction more aggressively over the latter rather the former.

The executive is formally entrusted with the management of a variety of policy issues such as the economy, environmental regulation, education, medical care, income redistribution and law enforcement, among others. These policy areas not only outnumber military prerogatives (in turn allowing for more space for judicial activism), but also carry wider constituencies in the public. Bar associations, opposition parties, students, environmental activists, and so forth, are likely to be more concerned about and affected by (on a day-to-day basis at least) executive policy rather than military prerogatives.³¹⁷ It would, thus, make sense to rule on issues which

³¹⁴ See, generally, Lee Epstein and Jack Knight, *The Choices Justices Make*, Washington, D.C.: CQ Press (1998)

³¹⁵ For instance, various studies which consider the behavior of U.S. Supreme Court justices find that these judges aim to bring the law closer to their ideological preferences. See Jeffery A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, *Am. Pol. Sci. Rev.* 557 (1989), pp. 560-561. Other studies similarly find that U.S Supreme Court judges will vote according to their preferences, even if this is contrary to a controlling precedent. See Jeffery A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model*, New York: Cambridge University Press (1993), pp. 179-207.

³¹⁶ As I argue later in Section III (iv), any attempt to target both the military and the government is likely to invite severe pushback for the Court, which would be completely defenseless against any attack.

³¹⁷ Arguably, political parties and especially the elected government is also a constituency in any action against military prerogatives i.e. they may support the Court in this initiative. However, various political parties still draw their strength in part from the powerful military establishment.

allow the judiciary to develop alliances with groups which can defend it, rather than making a powerful enemy.³¹⁸

It also needs to be emphasized that the judiciary in Pakistan has not ousted jurisdiction when it comes to military prerogatives; it has simply chosen not to exercise it or it has exercised it in a manner which largely accords deference to military interests. For instance, in 2014, the Supreme Court in allowing the establishment of military courts, also reserved for itself the jurisdiction to review judgments of any such court.³¹⁹ While the Court has certainly chosen to not set aside any judgment of a military court, it should not be immediately assumed that this deference is driven out of fear; perhaps it is simply the product of ideological agreement. Judges may just be more trusting of the military's competence in determining defense policy and security related issues (in part because of the institutional ethos of the two institutions, as explored earlier). This can also explain why perhaps the Court was more willing to rule against the military's business interests. Judges, given their training, may generally feel more comfortable ruling on contracts issues and company rights – issues they deal with on a daily basis – rather than, for instance, the country's foreign policy on India. On the other hand, the executive's poor record of service delivery and general reputation of corruption provides the Court both the space to expand and sufficient reason to dismiss the Government's judgment on policy issues.³²⁰

In addition, given the high public opinion ratings of the military, it would perhaps not even make sense for opposition parties to support a move against the military.

³¹⁸ These “judicial support networks” can be critical for the expansion of judicial power, especially in an authoritarian context. See Moustafa and Ginsburg, *supra* note 128, at 13

³¹⁹ See *District Bar Association v. Federation of Pakistan* (PLD 2015 SC 401)

³²⁰ Robinson who has extensively studied the rise of the Supreme Court of India largely attributes its increasing authority to a fractured government and poor service delivery. India it should be noted is also quite similar to Pakistan in terms of both cultural and constitutional

In brief, tinkering with the policy palette of the executive is not only ideologically more attractive for judges (compared at least to military prerogatives), it also far richer in terms of the issues they can influence as well as the alliances they can build through it.

(iv) *Controlling Retaliation*

Judges as strategic actors account for retaliation against their decisions.³²¹ If a decision may cost a judge his or her job, or will, for that matter, invite legislative changes that broadly impact judicial independence, he or she will certainly weigh these consequences before making the ruling.³²² In a typical constitutional democracy, judges in estimating retaliation will usually just account for the preferences of the executive and the legislature (and public opinion by extension); after all, in a well-functioning constitutional democracy most court curbing actions can only be taken by these institutions. The military has no direct control over the legislature or the executive, as a result of which it cannot remove judges or take any of the usual court curbing measures.³²³ The military can declare martial law, but this action (while disastrous for the judiciary) is also an option of last resort.³²⁴ The dim likelihood of a martial attack compared with

history. See Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash. Uni. Global Studies Law Rev. 1 (2009)

³²¹ See generally: Epstein and Knight, *supra* note 314

³²² See, Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 American Journal of Political Science 4 (2009), pp. 971–989

³²³ For instance, in the U.S. some of the typical court curbing measures which the executive/legislature can take include: “(1) [U]sing the Senate’s confirmation power to select certain types of judges; (2) enacting constitutional amendments to reverse decisions or change Court structure or procedure; (3) impeachment; (4) withdrawing Court jurisdiction over certain subjects; (5) altering the selection and removal process; (6) requiring extraordinary majorities for declarations of unconstitutionality; (7) allowing appeal from the Supreme Court to a more “representative” tribunal; (8) removing the power of judicial review; (9) slashing the budget; (10) altering the size of the Court.” See Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992), at 377

³²⁴ See Section I (iii) above for a discussion on why martial law would be a low probability event.

the strong likelihood of the Government slicing judicial independence, bit by bit, makes one wonder why it ever would be prudent for the Pakistani Supreme Court to rule against the Government and not the military. However, the Court's strategic calculus becomes clear when one considers that Pakistan is unlike most constitutional democracies; particularly, the ability of the elected government to meaningfully retaliate against the judiciary in Pakistan is fairly limited. As I have noted before:

“The power of judicial appointments . . . is largely vested in the judiciary. A Supreme Court justice holds office until the age of sixty-five, unless he sooner resigns or is removed from office in accordance with a prescribed procedure, which too is controlled by the judiciary. The court is responsible for appointing its own staff and determining their conditions of service. The court may also frame any rules of procedure for its practice. The court even exercises a great degree of financial independence – it can re-appropriate funds from one budgetary head to another without executive interference.”³²⁵

While, the elected government can certainly pass a constitutional amendment which, for instance, changes the removal mechanism for judges, mandates earlier retirement, curbs jurisdiction, or reduces judicial privileges, the Court has established precedent which allows it to even question the legality of a constitutional amendment. The ‘basic structure doctrine’ in Pakistan particularly allows the judiciary to strike down any constitutional amendment, if it *inter alia* infringes upon the “independence of the judiciary.”³²⁶ Thus, for this reason the Parliament was partly unsuccessful in changing the appointment process of judges through the 18th Constitutional Amendment; it was compelled by the Court to make crucial amendments to the proposed judicial appointment mechanism or risk the entire structure being stuck down.³²⁷

³²⁵ See Qazi, *supra* note 29, at 297-298

³²⁶ See *District Bar Association v. Federation of Pakistan* (PLD 2015 SC 401)

³²⁷ See Ijaz, *supra* note 14, at 88-89

That the Court is successful in having the Parliament bend the knee before it is, as argued earlier, partly a function of the civil-military imbalance. An attempt by the Government to directly disobey the Court on a matter relating to its independence is likely to trigger a constitutional crisis which may in turn provide space for military intervention (perhaps even at the Court's invitation).³²⁸ The military for its part would be motivated to protect the Court's independence since it is directly interested in maintaining a political neutral judiciary that can challenge the Government.³²⁹ Thus, so long as the military is not itself threatened by the Court, it is likely to come to its aid.

For the Court then the calculus is quite clear: influence Government policy aggressively, develop relevant constituencies, and thrash the executive, but exercise restraint when it comes to the military. After all, even if one assumes the judiciary's interest in genuinely questioning military prerogatives, what about the risk of doing so? The military can possibly cooperate with the judiciary to ward off an attack from Parliament, but can legislators protect the Court in case of an attack from the military? Realistically they can hardly protect themselves, let alone the Court.

Importantly, even if the military does not exercise the 'nuclear' coup option, its withdrawal of support from the Court could leave it open to attack from the Government. The civilian government, it should be noted, has a long history of undermining judicial independence. It should, for instance, be remembered that it was the civilian government led by President Zardari which for long resisted the restoration of Justice Chaudhry. In a sense, in making this

³²⁸ The Court, as mentioned earlier, has frequently quoted Article 190 of the Constitution as a reminder to the executive that it can directly call the army to its aid, if required.

³²⁹ See Shambayati, *supra* note 299, at 287

move Zardari drew first blood against the Chaudhry Court. His Government subsequently also enacted the 18th Amendment to change the appointment mechanism for judges. There is, thus, no guarantee that even if the Court does not seriously challenge the Government (which is hard to conjure, given the very nature of judicial review),³³⁰ it would not try to politically influence the Court. This risk is particularly salient since, unlike the military coup option, the cost for the Government for undermining judicial independence is not high.³³¹ For the Court, therefore, the option of least resistance with the maximum payoffs is allying with the military against the civilian government, not the other way around.

One may well argue that even if the civilian government cannot undermine judicial independence directly by way of a constitutional amendment, it can do so indirectly by attacking the Court's legitimacy through public rallies, media appearances and, importantly, disobedience. The military would arguably also be less equipped to ward off these attacks. This is certainly true, but the Pakistani Supreme Court has not required direct military support to counter or at least contain these risks to its legitimacy.

For starters, the fundamental right of speech is itself limited in a manner that it does not protect comments, which infringe or negatively impact the legitimacy of the judiciary.³³² The Court has also readily used its contempt powers and has indicted politicians as well as journalists

³³⁰ See Robert H. Bork, *Judicial review and democracy*, 24 *Society* 5 (1986), pp 5-6

³³¹ Even constitutional amendments can be passed with relative ease in Pakistan: they don't require approval from Provincial legislatures and all members of Parliament are mandated to vote on a constitutional amendment in accordance with the position prescribed by the head of their party. See Articles 63A and 239 of the Constitution.

³³² See Article 19 of the Constitution, which reads in relevant part as follows, “*every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law. . . in relation to contempt of court*”

for contempt of court.³³³ The latter have for the most part exercised a degree of self-restraint; media houses, after all, have benefited greatly from an alliance with the Court and the Court has also nurtured this relationship by treating them as a direct constituency.³³⁴ The Court has since 2012 also played an active role in supervising the operations of PEMRA – the regulatory authority for electronic media in Pakistan.³³⁵ PEMRA, therefore, is inclined to take a particular interest in monitoring the media for purposes of safeguarding the Court’s interests. Where it fails, the Court is known to not only take stern action against PEMRA, but also pass gag orders which could, for instance, ban coverage of entire speeches as well as particular people who have previously taken a hardline stance against the judiciary.³³⁶

In relation to the threat of disobedience by the Government, it must first be appreciated that this would be an issue that is not germane to an elected government. The military too would likely disobey adverse directions and here perhaps the Court’s capacity to punish military officials for contempt of court may be further limited. Indeed, the Court has historically never

³³³ See Hasnaat Malik, *Supreme Court issues contempt of court notices to Mubashir Lucman, ARY CEO*, The Express Tribune (Sep 09, 2014), available at: <https://tribune.com.pk/story/760036/supreme-court-issues-contempt-notices-to-mubashir-lucman-ary-ceo/>; Haseeb Bhatti, *SC indicts Tallal Chaudhary for contempt of court over anti-judiciary speeches*, Dawn News (Mar 15, 2018), available at: <https://www.dawn.com/news/1395411>

³³⁴ The Court would protect the media from Government encroachment and would even reward particular news coverage by taking suo motu actions on their basis. See, generally: Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, 35 *Law & Social Inquiry* 985 (2010)

³³⁵ See *Hamid Mir v. Federation of Pakistan* (Const. P 105 of 2012). During the proceedings of this case, the Court directed the framing of a new code of conduct (which *inter alia* preserved the judiciary’s interest in ensuring fair and non-contemptuous coverage about it), as well as the appointment of a permanent Chairman to lead the authority.

³³⁶ Recently, for instance, the Lahore High Court directed PEMRA to enforce its Code of Conduct and ensure that the anti-judiciary speeches made by the former Prime Minister, Nawaz Sharif, among others, should not be aired. See Rana Yasif, *Anti-judiciary speeches: Nawaz, daughter taken off air*, The Express Tribune (Apr 16, 2018), available at: <https://tribune.com.pk/story/1686760/1-lhc-slams-pemra-dismissing-anti-judiciary-petition/>

punished any army official for contempt of court (despite recorded disobedience),³³⁷ but has still been able to sentence an incumbent Prime Minister, among others, for contempt. Moreover, the threat to the Court's legitimacy from the Government's disobedience may itself be limited when compared to the military's disobedience. Since the Government is unpopular and broadly resented (unlike the military), disobedience of judicial orders (especially in matters that highlight the Government's corruption or ineptitude) may just be perceived as an extension of the Government's inefficiency; if anything, the public may come to appreciate the Court's resolve at solving the governance crisis.³³⁸

Importantly, the Court can contain the risk of retaliation from any civilian government by directly affecting its composition. The Court has developed a line of precedents which allow it to broadly enforce the Constitutional criteria for disqualifying Members of the Parliament.³³⁹ It has previously also used this authority to disqualify and de-seat an incumbent Prime Minister for contempt of court.³⁴⁰ It threatened another with the same consequence till compliance with the Court's directions was achieved.³⁴¹ Recently, as mentioned in the introduction, the Court also

³³⁷ See, for instance: *Rohaifa v. Federation of Pakistan* (PLD 2014 SC 174), at 205

³³⁸ This argument is dealt in greater detail in Chapter I of this dissertation.

³³⁹ See, for instance: *Iftikhar Ahmed Khan Bar v. Chief Election Commissioner* (PLD 2010 SC 817) (finding that a candidate who makes false declarations in his nomination papers is liable to be disqualified from Parliament); *Ishaq Khan Khakwani v. Mian Muhammad Nawaz Sharif* (PLD 2015 SC 275) (finding in part that the disqualification of Members of Parliament is not a political question)

³⁴⁰ The Court did this in spite of the ruling of the Speaker of the National Assembly who refused to forward Prime Minister Gilani's disqualification case to the Election Commission of Pakistan. It should be noted that prior to the Court's ruling on this matter, the Speaker's nod on a question of disqualification was considered to be a requirement under Article 63 of the Constitution. The Court essentially took the Speaker's discretionary powers away in so far as this issue is concerned. See Raja Asghar, *A judicial blow to parliament*, Dawn News (June 12, 2012), available at: <https://www.dawn.com/news/727883>

³⁴¹ See Declan Walsh and Salman Masood, *New Pakistani Premier Faces Contempt Notice on Corruption Inquiry*, The New York Times (Aug 08, 2012), available at:

removed Prime Minister Sharif from office over a controversial misdeclaration on his nomination form. The Court held that given his false declaration, it could no longer find him to be “truthful or honest”, which is a requirement for becoming a Member of Parliament.³⁴² As many have noted, the extremely wide language of the Court’s opinion implies that almost any legislator can fall under the Court’s hammer and be permanently disqualified from running for public office.³⁴³ Side by side, the Court has entertained a number of cases which allow it to consistently provide new standards and rules that govern elections and which in turn can also influence the outcome of any election.³⁴⁴ It is also worth noting that judges in Pakistan have as of

<http://www.nytimes.com/2012/08/09/world/asia/raja-pervez-ashraf-faces-contempt-charges-in-pakistan.html>

³⁴² Articles 62 and 63 of the Constitution prescribe the various qualifications and disqualifications for becoming a Member of Parliament. It is interesting to note that these Articles were previously amended by both General Zia and Musharraf to introduce various broad qualification requirements (such as the candidate must be “sagacious, righteous and non-profligate”) for the purposes of controlling the political process. Prior to 2012, the Court had, however, restricted the effects of these changes; it had largely read the relevant Constitutional provisions “*narrowly to ensure that the fundamental right to contest an election is not infringed without just cause.*” See Saad Rasool, *Distilling Eligibility and Virtue: Articles 62 and 63 of the Pakistani Constitution*, 1 Lums Law Journal 1 (2013), pp. 42-43

³⁴³ See, for instance: Babar Sattar, *Reign of discretion: Part – I*, The News (Dec 30, 2017), available at: <https://www.thenews.com.pk/print/262182-reign-of-discretion-part-i>; Babar Sattar, *Reign of discretion: Part – II*, The News (Jan 06, 2018), available at: <https://www.thenews.com.pk/print/264914-reign-of-discretion-part-ii>

³⁴⁴ See *Workers Party Pakistan v. Federation of Pakistan* (PLD 2012 SC 681) (the Court directed the Election Commission of Pakistan to *inter alia* monitor campaign and election expenses, prepare electoral rolls through credible and independent agencies, and review the appropriateness of the ‘First Past the Post’ system); *Nasir Iqbal v. Federation of Pakistan* (PLD 2014 SC 72) (the Court essentially directed the Election Commission of Pakistan to make arrangements so that overseas Pakistanis can also vote in the elections). Recently the Court ordered all electoral nominees to submit an affidavit to the Court which included details regarding their educational background, criminal record and assets, among other things. This was done despite an express attempt by the Parliament to exclude the declaration of these details on any nomination form. See *Submission of affidavit mandatory along with electoral nomination papers: SC*, Geo News (Jun 06, 2018), available at: <https://www.geo.tv/latest/198185-submission-of-affidavit-mandatory-along-with-electoral-nomination-papers-sc>

late been tasked to conduct and monitor elections.³⁴⁵ Furthermore, only former and/or serving superior court judges can serve as ‘Commissioners’ of the Election Commission of Pakistan, which is the primary body that deals with the conduct of elections, its schedule, delimitation of constituencies and complaints arising from elections.³⁴⁶ In a manner, thus, judges have come to acquire an almost overarching role in determining both the entry and exit of politicians, which in turn provides them important leverage against the elected government; leverage which is also critically absent when it comes to the military.³⁴⁷

Given what has been noted above, it should not be surprising to find that the Court has strategically chosen to align itself with the military. Going after the elected government instead of the military makes sense because it is less risky (both from a public opinion and retaliation perspective) and more rewarding (considering the policy options as well as the potential to develop various supportive constituencies). In addition, given the institutional similarities (and perhaps mutual respect) between the judiciary and the military, the judiciary may actually be disinclined to take any action which runs counter to the military’s core prerogatives.

Having said this, it certainly does not mean that the Court will always cooperate with, or defer, to the military. Indeed, the presence of certain adverse decisions against military prerogatives in my sample indicates that there may be exceptions to the general rule; but these exceptions too can be understood within the framework of the Court’s institutional strategy

³⁴⁵ See Iftikhar A. Khan, *ECP decides to appoint judicial officers as ROs for elections*, Dawn News (Mar 31, 2018), available at: <https://www.dawn.com/news/1398646>

³⁴⁶ See Articles 213, 218 and 219 of the Constitution (it is a constitutional requirement for every Member of the Election Commission to have previously been at least a judge of a High Court in Pakistan)

³⁴⁷ The military functions as an autonomous organization with historically no judicial control over its internal appointments and removals.

described above. For instance, while the public highly supports the military, it may still favor certain actions against it. A majority of Pakistanis do believe that Musharraf should be tried for treason and this may have given the Court the confidence to pursue this case initially.³⁴⁸ Nonetheless, the Court backed off when the Chief of Army Staff reportedly made it clear that the military as an institution would not stand for Musharraf's trial.³⁴⁹ Similarly, individual judges, especially when nearing retirement, may be more concerned about their personal policy preferences and reputation with specific audiences, rather than the legitimacy and institutional stability of the Court. This is what I believe triggered some of the Court's harsher opinions against the military in 2013.³⁵⁰ Chaudhry was nearing retirement and also eyeing a career in politics, so perhaps he was more motivated than before to pursue cases of interest against the military and redouble his perception as a "fearless" judge.³⁵¹ On an institutional level, however, the Court remained committed to honoring military prerogatives, as is evident from the immediate fall in the number of cases concerning military prerogatives following 2013 (see Figure 13). Lastly, judges may, at times, simply estimate (perhaps even wrongly) issues as being low-priority or non-threatening for the military.³⁵² Thus, the Court's decision in the *Asghar Khan*

³⁴⁸ See *Majority Pakistanis (86%) believe individuals privy to and in favor of declaring emergency in the country in 2007 should be tried for treason along with Musharraf*, Gallup Pakistan (Jan 21, 2014), available at: <http://gallup.com.pk/majority-pakistanis-86-believe-individuals-privy-to-and-in-favor-of-declaring-emergency-in-the-country-in-2007-should-be-tried-for-treason-along-with-musharraf-gilani-pollgallup-pakistan/>

³⁴⁹ See *Raheel Sharif Helped Me and Pressurized Nawaz Sharif*, *Dunya News* (Dec 19, 2016), available at: <https://www.youtube.com/watch?v=UMp7Wxjm3jw>

³⁵⁰ Musharraf's treason trial, it should be noted, was also initiated during this period. The Court's most indicting verdict in the missing persons' cases was also pronounced a couple of weeks before Chaudhry's retirement.

³⁵¹ There is certainly some evidence for this view. For instance, following his retirement and the two-year political activity ban envisaged in the Constitution, Chaudhry launched a new political party in Pakistan – the Pakistan Justice Democratic Party.

³⁵² This estimation may in part be informed by prior precedent. If the Court has previously ruled against the military on a particular issue and has not received pushback, it may continue to

case may have been partially influenced by the fact that both Aslam Beg and Asad Durrani, against whom proceedings were ordered, retired from active service in the early 1990s. Their relationship with the then prevalent military leadership was limited at best. The Court, therefore, may have felt comfortable ruling against these individuals without importantly indicting the military as an institution.³⁵³ However, as soon as the military made its position clear on the issue,³⁵⁴ the Court backed off – the case was not fixed for another six years and proceedings have still not been initiated against both Durrani and Beg.³⁵⁵

CONCLUSION – THE NEW EQUILIBRIUM: A NETWORK OF UNELECTED INSTITUTIONS

The discussion above attempted to answer three basic questions regarding the Court’s observed behavior over the past decade or so. Firstly, how did the Court become so powerful? In other words, why did the elected government repeatedly fail in containing the Court? For this purpose, Section I examined the history of the civil-military imbalance in Pakistan. I argued that the presence of the military as a powerful independent institution has weakened the Government’s ability to handle (and especially create) any constitutional crisis, especially one that involves the Court which appears to exercise the authority to directly call the army for its defense.

entertain these issues, perhaps even more confidently. Yasser Kureshi who is currently studying the judiciary’s treatment of military prerogatives between the years 1974-2008, for instance, reports that over the years the judiciary became increasingly more likely to rule against the military’s economic and policy prerogatives, as compared to its security interests. This may in part be the product of supportive precedent. It should also be noted that the military’s tolerance level for judicial decisions against it may increase as the judiciary becomes more popular (and powerful as a result).

³⁵³ See *supra* note 234 and accompanying text

³⁵⁴ See Baqir Sajjad Syed, *Kayani hits back — apparent reaction to bashing of generals*, Dawn News (Nov 06, 2012), available at: <https://www.dawn.com/news/761898>

³⁵⁵ See *supra* note 233

Section II examined why the army would come to the Court's aid, especially given that the Chaudhry Court's activism and the subsequent Lawyers' Movement practically pushed General Musharraf out of power? To answer this, I built upon the distinction between the military dictator and the military as an institution and particularly how the two could have varying interests. An examination of all of the Court's suo motu cases (N=190) and reported judgments (N=698) between the years 2005-2015 made it clear that the Court never seriously challenged the military's core interests as institution. Only 35 cases in the sample bore any connection to the military's interests. The Court never even touched any issues relating to the military's defense policy, budget or foreign policy preferences; any adverse decisions by the Court against the military were also either inconsequential or not seriously followed up by the Court. Importantly, the Court may have propelled the military's interests both directly (e.g. the Memogate case where the Court guarded the military's internal autonomy) as well as indirectly (by challenging and undermining the Government). The military, thus, had an important incentive to maintain a politically neutral judiciary that could keep the Government in check and also weaken its resolve to exercise control over the military.

Lastly, I attempted to explain why the Court willingly allied with the military instead of the civilian government. In particular, I highlighted four structural features (some of which are perhaps unique to the Pakistani political context) which facilitated the development of this judicial strategy. The Government, I argued, was a better target for the Court given that: (i) its public approval ratings were much lower than the military's; (ii) the Court and the military shared a number of institutional characteristics which made cooperation between them easier; (iii) influencing executive policy was more attractive both from an options perspective as well as

the opportunities it provided for the development of supportive constituencies; and (iv) with the military's aid, the Court could effectively contain any threat of retaliation from the Government.

Readers may find that this discussion still fails to address an important issue or gap in the Court's strategy: namely that by allying with the military against the Government and particularly by undermining the latter, have the Court's actions not made a military takeover more imminent? And if this is indeed the case, then has the Court not signed its own death warrant?

Neils Bohr, Nobel laureate and physicist, is famously attributed as saying "*prediction is very difficult, especially if it's about the future.*" I agree. Though I will attempt to make one in the following paragraphs and, in doing so, I hope to explain the new equilibrium in Pakistani politics.

It is admittedly the case that a narrative of an ineffective and corrupt civilian government has historically been used to justify martial law. Wide sections of the public have indeed welcomed martial law for this reason. To the extent, therefore, that the Court further highlighted the Government's corruption and abuse of power, it does appear to have strengthened the military's rationale for intervention. Be that as it may, it must be emphasized that the military's decision to impose martial law is not solely dependent on the Government's public perception; nor, for that matter, do poor approval ratings of the Government immediately imply that the public would welcome a coup (like before). Indeed, data from various public opinions polls conducted over the past few years suggests that martial law is not a popular option anymore.³⁵⁶

³⁵⁶ In 2013, Gallup Pakistan asked a nationally representative sample of men and women from across the country: *Some people think that Muslim countries should have a monarchy, others favor a democratic system and yet others support army rule. What type of system do you prefer?*

May be the Lawyers' Movement had a profound impact on the public's sense of constitutionalism and resolve against the military rule; or the Court's pursuit of accountability provided the public less cause to believe that military intervention is the only answer to their problems. Either way, it does appear that unlike before the military may face stiff public resistance if it decides to take over. More so, it is not just a hostile public that the military may have to reckon with. For a coup to be successful, the support of other key players (in the local as well as the international community) is required;³⁵⁷ this support, however, currently appears to be fairly absent in the Pakistani political context.

Major political parties have managed to keep a united front against direct military intervention and have by and large supported the democratic transition.³⁵⁸ The international appetite for working with Pakistani military dictators also seems to have faded in recent years.

In response, 17% said monarchical rule, 73% said a democratic system and 9% said army rule. 1% did not give a response. More recently, respondents were asked to specifically opine on the suitability of various governance systems including direct democracy, representative democracy, rule by army, rule by experts and rule by a strong leader. The largest number of respondents opined that the two democracy related options were a "good" way for governing the country. Whereas, military rule was the least popular option, with the majority of respondents saying that it was a "bad" way for governing the country. See *An overwhelming majority of Pakistanis (73%) say there should be democratic rule in Muslim countries; 17% prefer a monarchical system*, Gallup Pakistan (Aug 22, 2013), available at: <http://gallup.com.pk/an-overwhelming-majority-of-pakistanis-73-say-there-should-be-democratic-rule-in-muslim-countries-17-prefer-a-monarchical-system-gilani-pollgallup-pakistan/>; *More than two third Pakistanis (68%) opine that direct democracy is a good way of governing the country, followed by 62% who support representative democracy, 45% say rule by a strong leader and 43% support rule by experts. 2 in 5 Pakistanis (41%) consider military rule as a good way to govern the country*, Gallup Pakistan (Mar 02, 2018), available at: <http://gallup.com.pk/more-than-two-third-pakistanis-68-opine-that-direct-democracy-is-a-good-way-of-governing-the-country-followed-by-62-who-support-representative-democracy-45-say-rule-by-a-strong-leader-and-43-suppo/>

³⁵⁷ See Clayton Thyne et al., *Even Generals Need Friends: How Domestic and International Reactions to Coups Influence Regime Survival*, *The Journal of Conflict Resolution* (2017), pp. 1-27

³⁵⁸ Shah, *supra* note 45, at 37-38

The U.S., which also happens to be a major international donor and ally of Pakistan, particularly appears to be less willing than before to support a military government. For instance, one of the key conditions of the Kerry-Lugar bill was that the military does not “*materially and substantially [subvert] the political or judicial processes of Pakistan.*”³⁵⁹ Critically, the military will likely lack support of the judiciary in case of a direct military take-over.

It is important to note that each martial law received the sanction of the judiciary. This legitimization is important from the military’s perspective, which likes to function under a veneer of legality even as it flouts all legal norms.³⁶⁰ Chaudhry’s resistance, unlawful removal and the subsequent restoration of judges has, however, implanted powerful norms and rules in the legal community, which are likely to make the legitimization of a hostile military intervention very difficult in the future. There are a number of precedents which the Chaudhry Court has established in this reference starting from the Court’s order in November, 2007, restraining Musharraf and others from taking any unconstitutional steps, particularly against the judiciary.³⁶¹ This was indeed the very first time that the judiciary had passed an order of this nature and though this order did not restrain Musharraf, a majority of superior court judges still agreed to abide by it. The Chaudhry Court upon restoration also refused to validate Musharraf’s

³⁵⁹ See Fair, *supra* note 98, at 572-573

³⁶⁰ Thus, the military has, at times, gotten rid of dissident judges, but has never done away with the judiciary entirely. Courts, after all, can be quite useful for authoritarian regimes. See Moustafa and Ginsburg, *supra* note 128, 4-14

³⁶¹ One can argue that Musharraf did this anyway, but consider the consequences. A clear majority of judges refused to back his actions and even the judges who did support him, did so on very restricted terms. Unlike before, the Dogar Court maintained the right to judicially review any act of the Chief of Army Staff, or President, notwithstanding any ouster of jurisdiction. The Court could also re-examine, at any stage, the Proclamation of Emergency. See *Tika Muhammad Iqbal Khan v. General Pervez Musharraf* (PLD 2008 SC 6). Musharraf’s second coup in this sense was on a tight judicial leash to begin with. In any case, Musharraf’s actions triggered popular resentment against him and also against the military. The deposed judges were restored and a humiliated Musharraf had to resign under the threat of impeachment.

unconstitutional actions; importantly, it went after the judges who supported him by taking an oath under his Provincial Constitutional Order (PCO).³⁶² These ‘PCO judges’ as they often referred to (and typically as an insult in the legal community) were charged with contempt of court and many were also unceremoniously removed from office.³⁶³ The Supreme Court also amended its Code of Conduct to expressly preclude any judge from condoning a military takeover.³⁶⁴ In times of political crises when the likelihood of martial law is high, the Court has also issued public statements vocally projecting that it will not sanctify any such step.³⁶⁵ It should be noted that Musharraf too was indicted for high treason. And though he has not been punished so far, it was an important first for Pakistan. The Court has, therefore, set high fences around it to ward against any military coup. For the purposes of attaining judicial legitimacy (at least), the military’s direct intervention on the political scene (if any) will likely need to be short, objective-based, and, importantly, at the Court’s invitation.

Lastly, the military as an institution (keeping individual ambitions aside) would require strong reasons to initiate a coup, especially considering the obstacles described above. Presently, at least, there isn’t sufficient cause to take this drastic step. The military’s core prerogatives are well respected by the Government and the judiciary. Through the Court, it can also influence any

³⁶² See *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879)

³⁶³ See *SC rejects appeal of PCO judges*, Pak Tribune (May 19, 2011), available at: <http://paktribune.com/news/SC-rejects-appeal-of-PCO-judges-239476.html>

³⁶⁴ The following Article XI was added to the Code of Conduct for Judges of the Supreme Court and The High Courts: *No Judge of the superior judiciary shall render support in any manner whatsoever, including taking or administering oath in violation of the oath, of office prescribed in the Third Schedule to the Constitution, to any authority that acquires power otherwise than through the modes envisaged by the Constitution of Pakistan.*

³⁶⁵ For instance, recently Chief Justice Nisar is reported to have said: “*There is no room for martial law in the Constitution. If I have strength, I will suspend it even if I am alone. And if I can’t do it, then I will go home, but will never endorse it.*” See Amir Wasim, *No more validation of martial laws, reiterates CJP*, Dawn News (Apr 06, 2018), available at: <https://www.dawn.com/news/1399894>

State policy of interest, as well as the composition of the incumbent Government.³⁶⁶ Why would it then need to intervene directly and assume greater responsibility for the State, especially given that it already has its hands full with various internal security issues? As Christine Fair put it in 2011: *a coup seems unlikely in the near future. Kayani and his generals have no interest in taking political ownership of the various compound crises besetting Pakistan.*³⁶⁷ Her prediction seems to have held true. For the first time in the country's history an elected government completed its term in 2013. Another one is nearing the completion of its term in 2018. There is, thus, cause to believe that a new political equilibrium has been established in Pakistan, and so as long as the relevant actors respect it, the military will not lead a coup.

What is this new equilibrium? Three features in particular define it. First, strong, independent and widely legitimate unelected institutions (such as the judiciary and the military) that jealously guard their internal autonomy.³⁶⁸ Second, unelected institutions directly and openly informing State policy in areas which interest them. Third, unelected institutions cooperating with each other to constrain an elected Government that is functional on paper (with regular

³⁶⁶ See *supra* note 339 and accompanying text

³⁶⁷ See Fair, *supra* note 98, at 15

³⁶⁸ There is cause to think that the network of unelected institutions is expanding and includes institutions other than the judiciary and the military. Recently, for instance, Prime Minister Abbasi, whose party seems to be under attack from both the judiciary and the military, gave the impression that the upcoming elections would not be held fairly since they would be influenced by “aliens” (a veiled reference to the armed forces and the judiciary). The Election Commission of Pakistan quickly shot back by noting that it was “*completely ready to hold the 2018 General Elections and is entirely independent when it comes to its legal and constitutional responsibilities.*” Similarly, the Chairman of the National Accountability Bureau appears to be openly challenging the ruling party and is quick to rebuff any political criticism. See *NAB chief rebukes Punjab CM over criticism of corruption watchdog*, The Express Tribune (May 02, 2018), available at: <https://tribune.com.pk/story/1700763/1-nab-chief-rebukes-punjab-cm-criticism-corruption-watchdog/>; *ECP dismisses PM's remarks saying 'aliens' to hold upcoming elections*, Geo News (May 04, 2018), available at: <https://www.geo.tv/latest/194008-ecp-dismisses-remarks-saying-aliens-will-hold-upcoming-elections?5aec277d9e54a>

elections and nominal law-making powers), yet fundamentally powerless to act against this coalition.

Perhaps the clearest evidence of this equilibrium (and also its stability) has come to the fore recently in the case which led to Nawaz Sharif's disqualification, and particularly its aftermath. Some opposition parties filed a petition before the Court requesting it to investigate Sharif for certain corruption and money laundering charges which had emerged from the Panama Leaks.³⁶⁹ The Court heard the matter and formed a Joint Investigation Team (JIT) to investigate the charges. The JIT, which included members of the ISI and the Military Intelligence, found evidence of impropriety on the basis of which the Court later disqualified Sharif.³⁷⁰ The Court also ordered the National Accountability Bureau (NAB) to formally investigate the matter and tasked one of its judges to supervise the NAB's proceedings in this reference.³⁷¹ The cases against Sharif are expected to be decided shortly.

All of this was achieved without a military takeover and while Sharif's party, which he still heads, controlled the Government.³⁷² The Court, which has remained largely unscathed from

³⁶⁹ See *SC set to hear Panama Papers petitions on Oct 20*, The Express Tribune (Oct 15, 2016), available at: <https://tribune.com.pk/story/1199178/legal-battle-looms-sc-set-hear-panama-papers-petitions-20th/>

³⁷⁰ See *A timeline of the Panamagate JIT's 60-day investigation*, Dawn News (July 10, 2017), available at: <https://www.dawn.com/news/1344426>

³⁷¹ See Haseeb Bhatti, *Panamagate case: Justice Ijazul Ahsan to oversee proceedings by NAB*, Dawn News (Aug 02, 2017), available at: <https://www.dawn.com/news/1349165>

³⁷² Various commentators note that the plot to remove Sharif from power was hatched in part by the military itself which started exerting pressure on the Government through the PTI and other political parties early on (since 2014). It is argued that the military was not comfortable with Sharif's leadership for a variety of reasons including his policy on India and decision to investigate Musharraf for treason. See *Hashmi says Imran conspired with 'disgruntled elements in the army' during 2014 sit-in*, Dawn.com (Jan 01, 2017), available at: <https://www.dawn.com/news/1305784>; G. Parthasarathy, *Why Pakistan Army wanted Nawaz Sharif out and here's what may happen*, The Economic Times (Jul 31, 2017), available at:

this episode, continues to influence executive policy in matters which appeal to it. Arguably, in so far as influencing Government policy is concerned, the Court led by the present Chief Justice, Saqib Nisar, has gone further than any of his predecessors, including Chaudhry. In the first few months of 2018, Nisar is attributed as having initiated 34 suo motu cases.³⁷³ He also frequently makes media appearances and regularly visits government facilities, including hospitals, for surprise inspections. When questions were raised regarding the power under which was making these inspections, he abruptly remarked that the “*Constitution gave him the right to do so*” (without of course citing any specific Article from the Constitution or prior judicial precedent).³⁷⁴ That all of this has been made possible with the army’s support (and perhaps blessing) is now an open secret, leading some to describe the current state of affairs as a “judicial coup” or “judicial martial law.”³⁷⁵

The current political dynamic in Pakistan is in some respects certainly unique, but in others no so much. Unelected institutions – particularly the judiciary and the military – have been known to work together for the purposes of constraining the elected government.

Shambayati, for instance, provides evidence of such networks in the case of both Iran and

economictimes.indiatimes.com/articleshow/59837753.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

³⁷³ See Rehman, *supra* note 6

³⁷⁴ See *Constitution gives me right to visit hospitals, says CJP*, Geo News (Jan 11, 2018), available at: <https://www.geo.tv/latest/176347-constitution-gives-me-right-to-visit-hospitals-says-cjp>

³⁷⁵ See, for instance: Rezaul H. Laskar, *Judicial coup in Pakistan: Letter of the law, not its spirit, is at work*, Hindustan times (Aug 03, 2017), available at: <https://www.hindustantimes.com/analysis/letter-of-the-law-not-its-spirit-seems-pakistan-judiciary-s-concern/story-elQNVZMeY1SLqBAFeuGJEN.html>; *This is nothing short of judicial martial law, says Nawaz Sharif*, Samaa News (Apr 23, 2018), available at: <https://www.samaa.tv/pakistan/2018/04/this-is-nothing-short-of-judicial-martial-law-says-nawaz-sharif/>

Turkey.³⁷⁶ In both these cases, however, what's interesting is that that the constitutional design was specifically manipulated in a manner whereby the judiciary could be influenced and used for the purposes of controlling the elected government.³⁷⁷ The Pakistani story is in this sense unique. The military fearing Musharraf's departure did not institutionalize judicial review or bring about widespread changes in the Constitution which would protect its interests. In fact, any changes brought about by Musharraf in 2007 were neither validated by the Parliament or the Court. The story of the Pakistani Court's expansion, therefore, cannot be explained by simply referring to the interests of "departing hegemony" or political parties who empower courts as a means of "political insurance."³⁷⁸ Rather this is a story of a court acting strategically to create space for itself by (among other things) making itself relevant for powerful unelected institutions (like the military). Whether we will see this happening in other contexts is, in my view, conditional upon five political and institutional factors.

³⁷⁶ See Shambayati, *supra* note 299

³⁷⁷ In Turkey, following the declaration of each martial law, the military stepped in and manipulated constitutional design to limit the powers of the Parliament and shift control over important issues to the domain of unelected institutions, like the judiciary. The 1982 Constitution specifically also limited the role of Parliament in deciding the membership of these institutions and in some cases provided this power expressly to the military.

In Iran's case, the post-revolution Constitution of 1979, specifically placed certain checks on elected institutions through a network of unelected institutions like the Council of Guardians, which had the power to review the constitutionality of legislative acts. The Constitution also structured these unelected institutions in a way that they could be controlled by the Supreme Leader (the highest religious political authority in Iran, whose role would be equivalent to that of military in Turkey) directly. *Ibid.*, 290-302

³⁷⁸ See, generally: Ran Hirchl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, MA: Harvard University Press (2004) (the 'hegemonic preservation thesis' as posited by Hirchl explains the rise of judicial review as a consequence of departing hegemony seeking to preserve their status); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, New York: Cambridge University Press (2003) (Ginsburg argues in part that judicial review is adopted as a form a "political insurance" which can mitigate the risk of electoral loss)

The first, and perhaps most important condition, is that of a politically insulated judiciary. An independent process for the appointment and removal of judges is required, which allows them to pursue policy positions independent of executive preferences. While this was not always the case in Pakistan, the development of such a process (spearheaded in part by the Court itself),³⁷⁹ laid the foundation of an internally cohesive judiciary that could clearly distinguish itself from the political elite. Secondly, judicial intervention should be a popular and legitimate choice, which in turn requires the presence of a relatively unpopular and ineffective government. In Pakistan's case, following the Lawyers' Movement consistent intervention on the political scene was indeed expected from the judiciary and it became a reliable source for the Court's legitimacy. Thirdly, judges would require the support of other institutional actors. The presence of powerful unelected institutions that seek to guard their institutional autonomy (especially under changing political circumstances), facilities such support. In Pakistan, the military establishment (which was under the threat of losing its influence) could be counted upon to support the judiciary against an institutional attack. Fourthly, the judiciary should be able to define its agenda and exercise wide powers of judicial review. The *suo motu* jurisdiction in Pakistan was critical from the perspective of tackling any State policy of interest, as well as entertaining issues which could serve the interests of judicial allies. Lastly, the judiciary itself requires sound leadership which can facilitate the development and implementation of a coherent strategy. The administrative powers afforded to the Chief Justice of Pakistan allowed one person

³⁷⁹ The Constitution formally provided the President the authority to appoint judges of the Supreme Court. This authority was to be exercised in "*consultation*" with the Chief Justice of the Supreme Court. However, the President effectively had the last say. This changed in the 1990s. In *Al-Jehad Trust v. Federation of Pakistan* (P L D 1996 Supreme Court 324), the Supreme Court interpreted the relevant constitutional provision in a manner to essentially hold that the advice of the Chief Justice was binding on the President, unless very strong reasons were given by the President (which could also be challenged and overturned in Court).

to define to a great degree the policy direction of the Court. In addition, Chief Justice Chaudhry himself was responsible for uniting the Pakistani judiciary and giving it the drive necessary for its independence.

The Pakistani judicial-military network is still evolving and its effects (especially in relation to the socio-economic objectives that the Court set for itself) remain to be seen. While it is certainly true that even in the short-term this alliance has undermined democracy and particularly the democratically elected leadership, it is perhaps equally true that its presence may have averted an all-out military coup. Time, however, will be the judge of this.