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## THE “CHAUDHRY COURT”: DECONSTRUCTING THE “JUDICIALIZATION OF POLITICS” IN PAKISTAN

Moeen H. Cheema<sup>†</sup>

*Abstract:* The Supreme Court of Pakistan underwent a remarkable transformation in its institutional role and constitutional position during the tenure of the former Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry (2005–2013). This era in Pakistan’s judicial history was also marked by great controversy as the court faced charges that it had engaged in “judicial activism,” acted politically, and violated the constitutionally mandated separation of powers between institutions of the state. This article presents an in-depth analysis of the judicial review actions of the Chaudhry Court and argues that the charge of judicial activism is theoretically unsound and analytically obfuscating. The notion of judicial activism is premised on the existence of artificial distinctions between law, politics and policy and fails to provide a framework for adequately analyzing or evaluating the kind of judicial politics Pakistan has recently experienced. The Supreme Court’s role, like that of any apex court with constitutional and administrative law jurisdiction, has always been deeply and structurally political and will continue to be so in the future. As such, this article focuses on the nature and consequences of the Chaudhry Court’s judicial politics rather than addressing the issue of whether it indulged in politics at all. It analyzes the underlying causes that enabled the court to exercise an expanded judicial function and in doing so engages with the literature on the “judicialization of politics” around the world.

### I. INTRODUCTION

The tenure of the former Chief Justice of Pakistan Iftikhar Muhammad Chaudhry<sup>1</sup> has undoubtedly been characterized by remarkable developments in the institutional role and jurisprudence of the Supreme Court of Pakistan. This recent era in Pakistan’s legal history, that of the “Chaudhry Court,”<sup>2</sup> was also marked by great controversy and vociferous debate on the place of the Supreme Court in Pakistan’s state structure and constitutional politics. By the end of Chief Justice Chaudhry’s tenure in December 2013, the Court faced a chorus of

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<sup>1</sup> Iftikhar Muhammad Chaudhry served as the Chief Justice of Pakistan from 2005 to 2013. Former President of Pakistan, General Pervez Musharraf, twice removed him as the Chief Justice in March and November 2007. He was restored as the Chief Justice in the aftermath of a populist movement for the restoration of an independent judiciary led by the country’s lawyers. Justice Chaudhry was the recipient of the prestigious Harvard Law School Medal of Freedom in 2007.

<sup>2</sup> See generally THE POLITICS & JURISPRUDENCE OF THE CHAUDHRY COURT (Moeen H. Cheema and Ijaz Shafi Gilani eds., 2014) [hereinafter POLITICS & JURISPRUDENCE].

charges that it had engaged in “judicial activism”—a term that was overwhelmingly used in a negative sense and as shorthand for allegations that the Court had acted politically, violated the constitutionally mandated separation of powers between institutions of the state, and over-reached its powers.<sup>3</sup>

This article presents a deeper analysis of the judicial review actions of the Supreme Court during Chief Justice Iftikhar Muhammad Chaudhry’s tenure, and attempts to deconstruct the charge of judicial activism that has gained such currency in public discourse in Pakistan. Rather than focusing only on high-profile constitutional and overtly political cases as most analyses of the Court’s jurisprudence do, this article also scrutinizes the Court’s administrative law jurisprudence, the judicial review of executive action, which was the cause of the real power struggle between the judiciary and the executive.<sup>4</sup> The challenges to the political executive’s control of the civil state institutions (bureaucracy, police, statutory corporations, regulatory agencies and the National Accountability Bureau) remained the site of underlying struggles that periodically spilled over or manifested in other areas of judicial action. For example, the Supreme Court’s use of *suo motu* powers to initiate judicial review actions based on media reports of maladministration or governmental corruption was at the heart of much of the controversy.

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<sup>3</sup> This critique dominated the public discourse on the Chaudhry Court, especially in Pakistan’s English-language press and international media outlets. See, e.g., Asad Jamal, *Who will hold the courts accountable*, EXPRESS TRIBUNE (Oct. 8, 2010), <http://tribune.com.pk/story/60100/who-will-hold-the-courts-accountable/>; Saroop Ijaz, *The Case for Judicial Minimalism in Pakistan*, JURIST (Oct. 11, 2010, 10:42 AM), <http://jurist.org/forum/2010/10/the-case-for-judicial-minimalism-in-pakistan.php>; Declan Walsh, *Pakistan Court Widens Role, Stirring Fears for Stability*, N.Y. TIMES (Jan. 22, 2012), <http://www.nytimes.com/2012/01/23/world/asia/pakistan-high-court-widens-role-and-stirs-fears.html?pagewanted=all>; Faisal Hussain, *Outcome of judicial activism*, DAWN (Jan. 2, 2013, 12:05 AM), <http://www.dawn.com/news/775678/outcome-of-judicial-activism>; I.A. Rehman, *Judiciary at This Point*, THE NEWS (Feb. 19, 2012), <http://jang.com.pk/thenews/feb2012-weekly/nos-19-02-2012/spr.htm#2>; Azam Khan, *Judicial activism: 20,000-plus cases still pending before top court*, EXPRESS TRIBUNE (Oct. 16, 2013), <http://tribune.com.pk/story/618834/judicial-activism-20000-plus-cases-still-pending-before-top-court/>; Maryam S. Khan, *Ambiguous Ambitions*, QANTARA (Dec. 19, 2013), <http://en.qantara.de/content/pakistans-supreme-court-ambiguous-ambitions>. The critique was widely shared by international observers such as the International Commission of Jurists, the International Crisis Group, and the Asian Human Rights Commission. See, e.g., INT’L COMMISSION OF JURISTS (ICJ), *AUTHORITY WITHOUT ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN PAKISTAN*, (Dec. 5, 2013), <http://www.refw.orld.org/pdfid/530f088d4.pdf>.

<sup>4</sup> The assertion that judicial review of executive action was the more significant or even primary site of contention between the judiciary and the executive is borne out by a study of the *suo motu* actions of the court during the former Chief Justice’s tenure. Of the *suo motu* actions initiated by the court, 38% dealt with executive inefficiency, 34% with alleged abuses of executive powers, and 11% with corruption allegations. Given that the Chief Justice had considerable discretion in the choice of subject matter in *suo motu* cases, these statistics directly reflect the priorities of the court. See Asher A. Qazi, *Suo Motu: Choosing not to Legislate*, in *POLITICS & JURISPRUDENCE*, *supra* note 2, at 281, 302.

Based on such an in-depth scrutiny of the judicial review actions of the Chaudhry Court, this article argues that the charges of judicial activism, which violates the constitutionally mandated separation of powers, are theoretically unsound and analytically obfuscating. It further argues that the very framing of the debate in terms of judicial activism is ideologically conservative as it essentially serves to mask and justify elitist forms of politics and governance.<sup>5</sup> The notion of judicial activism—premised as it is on the existence of artificial distinctions between law, politics and policy—fails to provide a framework for adequately analyzing or evaluating the kind of judicial politics Pakistan has recently experienced. The Supreme Court’s role, like that of any apex court with constitutional and administrative law jurisdiction, has always been deeply and structurally political and will continue to be so in the future.<sup>6</sup> This article thus examines the nature and consequences of the Chaudhry Court’s judicial politics rather than addressing whether it indulged in politics at all. It analyzes the underlying political causes that enabled the Court to exercise an expanded judicial function and, in doing so, engages with the literature on the “judicialization of politics” around the world.<sup>7</sup>

Part I of the article presents a brief overview of a series of events and high profile constitutional cases that politicized Pakistan’s Supreme Court during the tenure of Chief Justice Chaudhry and brought on the charges of judicial activism. Part II presents a detailed account of the judicial review of executive action by the Chaudhry Court that resulted in a protracted tussle between the elected government and the judiciary over the shape and powers of the state structure (bureaucracy, police, public corporations, and regulatory agencies). Next, Part III presents a

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<sup>5</sup> This particular critique of the rhetoric of judicial activism was made most forcefully by Upendra Baxi in an earlier era of “judicial populism” in India. See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *THIRD WORLD LEGAL STUDIES* 107 (1985). See also Jamie Cassells, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 *AM. J. COMP. L.* 495 (1989).

<sup>6</sup> As Baxi notes, the “Indian Supreme Court is a center of *political* power, even though a vulnerable one. It is a center of political power simply because it can influence the *agenda of political action*, control over which is what power politics is in reality all about.” UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 10 (1979).

<sup>7</sup> See generally, *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjorn Vallinder eds., 1995); *ON LAW, POLITICS AND JUDICIALIZATION* (Martin Shapiro & Alec Stone Sweet eds., 2002); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) [hereinafter HIRSCHL, *TOWARDS JURISTOCRACY*]; Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721 (2006) [hereinafter Hirschl, *The New Constitutionalism*]; Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *ANN. REV. POL. SCI.* 93 (2008) [hereinafter Hirschl, *The Judicialization*]; *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter *RULE BY LAW*]; *THE JUDICIALIZATION OF POLITICS IN ASIA* (Bjorn Dressel ed., 2012).

deconstruction of the charge of judicial activism and overreach, and highlights the inadequacy of a traditional paradigm of judicial role. Part IV engages with the literature on the judicialization of politics and analyzes the extent to which such theoretical framing accounts for expansion in judicial power and provides a basis for evaluation of the court's actions. A concise evaluation of the post-Chaudhry Supreme Court's role in Pakistan's politics will follow as well as a tentative conclusion on the Chaudhry Court's legacy.

## II. THE "POLITICIZATION" OF THE JUDICIARY: CONSTITUTIONAL LAW AND POLITICS OF THE CHAUDHRY COURT

Iftikhar Muhammad Chaudhry became the Chief Justice of Pakistan in the end June 2005. Given the fixity of retirement age and the "seniority principle"—Supreme Court judges retire at the age of sixty-five and at the retirement of the Chief Justice the next most senior judge as determined by date of elevation to the court must be appointed as the Chief Justice—he seemed destined to enjoy the longest tenure in Pakistan's history. While the power of a Chief Justice in forming benches, allocating cases and thus shaping a court's agenda is considerable, there was little indication at the time of his appointment as the Chief Justice of the Supreme Court that the judiciary would play a significant role in Pakistan's constitutional politics. Justice Chaudhry had been elevated to the Supreme Court in 2000 during the early days of the incumbent military regime of General Pervez Musharraf, and had served on a court that displayed little inclination towards challenging a military-led executive. He had been part of the benches that validated General Musharraf's military coup, which enabled him to amend the constitution and retain the command of the military while also being the President of the country.<sup>8</sup> Yet, in a dramatically disrupted tenure Justice Chaudhry pushed the court from the periphery of the state to the center of constitutional politics in Pakistan.<sup>9</sup>

### A. *The "Lawyers' Movement" and the Transition to Democratic Governance (2007–2009)*

In March 2007, General Musharraf, Pakistan's President and military ruler since 1999, suspended Justice Chaudhry from the office of

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<sup>8</sup> See *Shah v. Musharraf*, (2000) PLD (SC) 869; *Ahmad v. Musharraf*, (2002) SCMR 970; *Wattan Party v. Chief Executive*, (2003) PLD (SC) 74; *Pakistan Lawyers Forum v. Fed'n of Pakistan*, (2005) PLD (SC) 719.

<sup>9</sup> For a discussion on the impact of judges working in extra-judicial roles, see generally Stefanus Hendrianto, *The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia*, 25 WASH INT'L L.J. 489 (2016).

Chief Justice of the Supreme Court on charges of misconduct.<sup>10</sup> The reasons for the President’s action, which subsequently caused him great political difficulties, cannot be fully explained. While one may refer to some leading cases in which the Supreme Court had nullified the actions of the government and caused it some embarrassment at a time when the military regime was gearing up to manage yet another phase of transitional elections,<sup>11</sup> it is hard to find concrete reasons for believing that the Chief Justice or the court directly threatened the Musharraf regime. One can only speculate that, as presidential and general elections vital for the continuation of the military regime were scheduled for late 2007, even such limited judicial independence was intolerable to the regime.<sup>12</sup> The dismissal of the Chief Justice unleashed a wave of protests by lawyers as well as broader political dissent that quickly spun out of control.<sup>13</sup> In the course of the so-called “Lawyers’ Movement,” the opposition political parties, especially the Pakistan Peoples Party (PPP), which participated actively in these early stages of the movement, were considerably strengthened. Nonetheless, before the Lawyers’ Movement could develop into a broader social mobilization, the Chief Justice won a case challenging his dismissal. In July 2007, an emboldened Supreme Court declared the President’s actions to be *mala fide* and restored Justice Chaudhry as the Chief Justice.<sup>14</sup>

Reinforced by the overwhelming support of the bar, its prime constituency, and emboldened by the broadening public support for its newfound stature, the superior courts began a phase of “judicial activism,” which was largely seen by the lawyers and the media as a positive development.<sup>15</sup> As the federal Parliament neared the end of its

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<sup>10</sup> See Moeen Cheema, *Justice Derailed in Pakistan: The Sacking of the CJ*, JURIST (Mar. 13, 2007, 8:01 AM ET), <http://jurist.org/forum/2007/03/justice-derailed-in-pakistan-sacking-of.php>.

<sup>11</sup> See, e.g., *Wattan Party v. Fed’n of Pakistan*, (2006) PLD (SC) 697; *Constitution Petition No. 5 of 2007*, Supreme Court of Pakistan; *Haider v. Capital Dev. Auth.*, (2006) PLD (SC) 394; *Constitution Petition No. 29 of 2007*, Supreme Court of Pakistan.

<sup>12</sup> For an analysis of the causes behind the dismissal and an explanation of judicial behavior, see Shoab A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY* 340 (Terrence C. Halliday et al. eds., 2014). Ghias argues that the court’s *suo motu* actions prior to 2007 on issues concerning urban planning and construction, deregulation of commodity pricing mechanisms, privatization of state enterprises, enforced disappearances, and illegal detentions by security agencies, as well as the constitutional questions surrounding the forthcoming presidential elections provided the impetus for dismissal of the Chief Justice. *Id.* at 346–50.

<sup>13</sup> See *Lawyers protest against Musharraf*, BBC NEWS (Mar. 12, 2007, 11:40 GMT), [http://news.bbc.co.uk/2/hi/south\\_asia/6441133.stm](http://news.bbc.co.uk/2/hi/south_asia/6441133.stm); *In Pictures: Lawyers’ Protest*, BBC NEWS, (March 12, 2007, 16:31 GMT), [http://news.bbc.co.uk/2/hi/in\\_pictures/6442747.stm](http://news.bbc.co.uk/2/hi/in_pictures/6442747.stm).

<sup>14</sup> See *Chaudhry v. President of Pakistan*, (2007) PLD (SC) 578; *Chaudhry v. President of Pakistan*, (2010) PLD (SC) 61.

<sup>15</sup> See, e.g., Imtiaz Gul, *Inhumanity of organ trade*, IMATIAZ GUL OFFICIAL WEBSITE: THE NEWS (Aug. 13, 2007), <http://www.imtiazgul.com/24.html>.



term, the Supreme Court began to focus on political procedural issues, the resolution of which would free up political space and allow the possibility of greater democratization. In several cases the Court pushed for equal electioneering opportunities for opposition political parties that would undermine the military regime's attempts at managing yet another façade of democratic transition. Prior to the general elections scheduled for the end of 2007, General Musharraf intended to ensure a successful result in a presidential election that would guarantee him another five-year term in office. Success would be ensured if he continued to occupy the office of the Chief of Army Staff (CoAS), the real source of power. Rumors of a political deal being brokered by the American and British governments between the military regime and Benazir Bhutto's PPP were rife. Pursuant to this deal, General Musharraf would be guaranteed a secure term as Presidency even if his supporters lost in the general elections and even if he subsequently gave up the office of the military chief.

Such speculations gained credence when, on the eve of presidential elections in October 2007, General Musharraf passed the National Reconciliation Ordinance (NRO) granting immunity from long-standing corruption charges to a number of PPP leaders. In a controversial election the next day, General Musharraf secured more than half of the votes cast by the electoral college. Members of federal and provincial legislatures belonging to the PPP noticeably abstained, thereby facilitating his re-election. Within a week of the promulgation of the NRO, the Supreme Court admitted a petition challenging its constitutionality and took an unprecedented step by granting an interim injunction against the operation of the ordinance.<sup>16</sup> Earlier, General Musharraf's re-election as President had also been challenged before the resurgent Supreme Court.<sup>17</sup> The Court allowed the election to proceed subject to the condition that the election results could not be formally announced until its final decision. The most important legal question before the Court was whether a serving chief of the army may validly contest the election for the presidency. Fearing an adverse verdict, General Musharraf imposed a state of emergency on November 3, 2007.<sup>18</sup>

This was in reality martial law. The military regime suspended the constitution and issued a Provisional Constitutional Order (PCO) that

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<sup>16</sup> See *Hassan v. Fed'n of Pakistan*, (2008) PLD (SC) 80.

<sup>17</sup> See Moeen Cheema, *Supreme Challenge: Pakistan's Presidential Election Goes to Court*, JURIST, (Oct. 18, 2007, 8:01AM), <http://www.jurist.org/forum/2007/10/supreme-challenge-pakistans.php>.

<sup>18</sup> See Moeen Cheema, *Martial Law by Another Name in Pakistan*, JURIST, (Nov. 3, 2007, 8:01AM), <http://jurist.org/forum/2007/11/martial-law-by-another-name-in-pakistan.php>.

purported to grant itself the authority to rule, legislate, and even make constitutional amendments.<sup>19</sup> This state of emergency was designed primarily to undermine the independence of the judiciary, and judges of the superior courts were asked to take a fresh oath of office under the PCO.<sup>20</sup> A majority of the Supreme Court and High Court judges either refused to take such an oath or were not invited to do so.<sup>21</sup> New judges were appointed in their places and Justice Chaudhry was thus dismissed for the second time in a year. The protests by lawyers and civil society activists were brutally suppressed.<sup>22</sup> The military regime was intent on maintaining control by suppressing the protest movement. It needed the space to implement its immediate plans of achieving legal cover for its actions from an acquiescent judiciary as well as to offer sufficient political incentives to wean political parties from participation in the protest movement. The reconstituted Supreme Court rejected the constitutional challenges to General Musharraf's re-election and validated the imposition of emergency.<sup>23</sup>

General Musharraf announced plans to hold elections in early 2008 and, feeling somewhat confident about the prospect of another term in the presidency, reluctantly relinquished the command of the armed forces. Prior to ending the emergency, President Musharraf exercised his self-granted powers by amending the constitution to provide constitutional cover to actions undertaken during the emergency period, including the removal of superior court judges.<sup>24</sup> The assassination of Benazir Bhutto in December 2007, however, plunged the nation into confusion and utter grief and cast a long shadow over the prospects of a transition to greater democracy. General elections were belatedly held in February 2008 after Asif Ali Zardari, who had taken over the chairmanship of the PPP and the Pakistan Muslim League (PML(N)) leadership, agreed with the military regime on an electoral plan. Both these parties emerged as the biggest winners although no single party commanded an outright majority.<sup>25</sup> The

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<sup>19</sup> Provisional Constitution Order, 2007 (President's Order No. 1 of 2007).

<sup>20</sup> Oath of Office (Judges) Order, 2007, (Nov. 3, 2007).

<sup>21</sup> See Moeen Cheema, *Pakistan: Mock Trials, Kangaroo Courts and Court Jesters*, JURIST, (Nov. 9, 2007, 8:01 AM), <http://jurist.org/forum/2007/11/pakistan-mock-trials-kangaroo-courts.php>. In total 61 judges of the superior courts were thus deposed: 13 out of 18 (17 permanent and one ad-hoc) Supreme Court judges, including the Chief Justice; 18 out of 31 Lahore High Court judges; 24 out of 28 Sindh High Court judges, including the Chief Justice; and 6 out of 13 Peshawar High Court judges, including the Chief Justice.

<sup>22</sup> See Moeen Cheema, *Musharraf's Real "War on Terror" in Pakistan*, JURIST, (Nov. 6, 2007, 8:01AM), <http://jurist.org/forum/2007/11/musharraf-real-war-on-terror-in.php>.

<sup>23</sup> See *Ahmed v. Chief Election Comm'r, Islamabad*, (2008) PLD (SC) 13; *Khan v. Musharraf*, (2008) PLD (SC) 178.

<sup>24</sup> Constitution (Amendment) Order, 2007 (President's Order No. 5 of 2007).

<sup>25</sup> *Party Position in National Assembly: Result of Elections 2008*, GEO TV, <http://www.geo.tv/election2008/images/data/NAPosition.pdf> (last visited Apr. 16, 2016).



parties, historically archrivals, unveiled an accord to form a coalition government and to restore the deposed judges, who were immediately released from house arrest. Optimism about the restoration of judges began to fade, however, as disagreement over the procedure for the restoration emerged between the coalition partners.<sup>26</sup>

PML(N) members resigned from the coalition government citing the refusal of the PPP to honour its commitments regarding the restoration of the judges. After protracted talks, the parties reached another agreement in early August pursuant to which President Musharraf would be impeached by parliament and the judges restored soon thereafter. As the threat of impeachment crystallized, Musharraf resigned as President and the PPP immediately announced Asif Zardari as its candidate for the vacant presidency. In September 2008, Asif Zardari won the election to become the President of Pakistan, an office that gave him immunity from prosecution for corruption charges. In the aftermath of President Zardari's election the Lawyers' Movement appeared to have lost all steam. A number of deposed Supreme Court and High Court judges took oaths of office, thereby breaking ranks with the Chief Justice and the Lawyers' Movement.<sup>27</sup> Prominent government representatives made frequent statements on national media implying that the person of Justice Chaudhry had been politicized during the movement and he was no longer fit to act in a judicial capacity.

However, the lawyers announced plans to organize a "Long March" on the capital in March 2009 with the support of opposition political parties. As thousands marched towards Islamabad demanding the reinstatement of Justice Chaudhry, the PPP government buckled under the threat of a violent confrontation with the protesters and the pressure of the military command.<sup>28</sup> Contrary to the fears of an immediate backlash against the elected government that had resisted the Chief Justice and the other judges' reinstatement, the Court initially proceeded cautiously and began the task of dismantling the legal consequences of the emergency. The Supreme Court declared the imposition of emergency by General Musharraf to be unconstitutional.<sup>29</sup> The Court then held that, since the office of the Chief Justice had never legally fallen vacant, the purported appointment of Justice Dogar as Chief

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<sup>26</sup> See generally, RAJSHREE JETLY, THE UNRAVELLING OF COALITION POLITICS IN PAKISTAN: INSTITUTE OF SOUTH ASIAN STUDIES (ISAS) BRIEF NO. 66 (2008).

<sup>27</sup> See Moeen Cheema, *The End of the Lawyers' Movement in Pakistan?*, JURIST (Sept. 16, 2008, 8:01AM), <http://jurist.org/forum/2008/09/end-of-lawyers-movement-in-pakistan.php>.

<sup>28</sup> See *Pakistan Media Reaction: March 17, 2009*, WIKILEAKS.ORG, [https://wikileaks.org/plusd/cables/09ISLAMABAD564\\_a.html](https://wikileaks.org/plusd/cables/09ISLAMABAD564_a.html).

<sup>29</sup> Sindh High Court Bar Assoc. v. Fed'n of Pakistan, (2009) PLD (SC) 879.

Justice was *void*. The Court then began the process of removing judges appointed in the aftermath of the emergency on the basis that the constitutional requirement of consultation with the Chief Justice had not been satisfied. As Justice Dogar was never the lawful Chief Justice, all appointments to judicial office made in consultation with him were, therefore, also nullified.<sup>30</sup>

The Supreme Court did not, however, automatically invalidate all of the actions taken pursuant to the emergency. In a show of respect for the democratic process unfolding in the aftermath of the emergency, the Court accepted the validity of the February 2008 elections, the formation of federal and provincial governments thereafter, and the election of President Zardari. While the Court stripped General Musharraf’s emergency ordinances of permanency, it did not immediately declare them to be null and void. It was only in November 2009, when the Court declared the NRO to be unconstitutional and *void ab initio*, that an overt confrontation between the judiciary and the executive materialized.<sup>31</sup> The decision resurrected all criminal cases covered by the ordinance including those against prominent politicians belonging to the PPP government and senior bureaucrats, some of whom occupied key posts in the federal and provincial governments. Most notably, the list of NRO beneficiaries included Pakistan’s incumbent President, who stood accused of serious corruption and money-laundering charges in Pakistan, Switzerland, Spain, and the United Kingdom.

*B. Tensions between the Political Executive and the Chaudhry Court (2009–2013)*

While the Court had a strong constitutional basis for striking down the ordinance, one aspect of the judgment ensured that political volatility between the elected executive and the judiciary would continue. This related to the withdrawal of corruption and money-laundering charges against the President in Switzerland (the so-called “Swiss case”). This case had been initiated through a mutual legal assistance request by the Government of Pakistan in 1998. As investigations in the case were

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<sup>30</sup> See *Bhinder v. Fed’n of Pakistan*, (2010) PLD (SC) 483. The Court was particularly severe on those judges who had held office prior to the emergency and had taken oath under the PCO. Contempt of court notices were issued to these judges compelling their resignations. See *Abdul Hameed Dogar v. Federation Of Pakistan*, (2010) SCMR 312; *Dogar v. Fed’n of Pakistan*, (2011) PLD (SC) 315; Criminal Original Petitions No. 93 to 98, 100 & 104 of 2009 and 2, 3 & 4 of 2011; (2011) PLD (SC) 197; *Khan v. Registrar, Supreme Court Of Pakistan*, (2010) PLD (SC) 806.

<sup>31</sup> See *Hassan v. Fed’n of Pakistan*, (2010) PLD (SC) 1. See also Moeen Cheema, *Back to the Future: The Pakistan Supreme Court’s NRO Judgment*, JURIST (Jan. 14, 2010, 8:01 AM), <http://www.jurist.org/forum/2010/01/back-to-future-pakistan-supreme-court-s.php>.

nearing a conclusion in April 2008, the Attorney General of Pakistan withdrew the declaration of the Government of Pakistan's interest as a civil party in the case, citing the NRO as justification for the withdrawal. The Supreme Court of Pakistan took exception to the manner in which the Swiss case had been closed. In its order, the Court declared that all actions taken pursuant to the NRO were illegal and directed the government to take immediate steps to reverse the benefits of the NRO, including the withdrawal of its interest in the Swiss case. This would have effectively required the federal government to play a role in re-initiating money-laundering charges against the President in a foreign jurisdiction. Quite expectedly, the government resisted.

In the government's defense, at least in regards to the order affecting the Swiss case, there was room to argue that it violated the immunity of the President from criminal prosecution under Article 248 of the Constitution.<sup>32</sup> Furthermore, the President was likely to be covered by international law of sovereign immunity in the proceedings before Swiss courts. However, the President never formally claimed immunity before the Court. The government also dragged its feet in implementing other aspects of the judgment, including the dismissal of all NRO beneficiaries from important positions in the bureaucracy as it was directed to do by the Court.<sup>33</sup> This resulted in a protracted battle with the Supreme Court, characterized by contempt and insubordination in the government's dilatory tactics. As the Court's order to void the NRO remained largely unimplemented, the Court built up pressure through enforcement proceedings.<sup>34</sup> In addition to resisting the enforcement of Court directives, it appeared that the government's strategy was to politicize the actions of the superior courts and to create an impression of victimization at the hands of the judiciary and, indirectly, the military establishment. Leading government party figures began making comments to the effect that, from the government's perspective, the court was displaying vindictiveness and political bias.

While hearings on the review and enforcement petitions in the NRO case dragged on, another important constitutional case brought the Parliament and the judiciary into direct confrontation. In April 2010, the Parliament passed the 18th Amendment to the Constitution with

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<sup>32</sup> PAKISTAN CONST. art. 248(2).

<sup>33</sup> See Faisal Shakeel, *President, PM threatened: apex court brandishes 'disqualification' sword*, EXPRESS TRIBUNE (Jan. 10, 2012), <http://tribune.com.pk/story/319251/supreme-court-reserves-judgement-in-nro-implementation-case/>; *Text of SC order in NRO case*, DAWN (Jan. 10, 2012), <http://www.dawn.com/news/687167/text-of-sc-order-in-nro-case>.

<sup>34</sup> *Id.*

widespread support from across the political divides.<sup>35</sup> The most significant aspect of the constitutional amendment was the undoing of the constitutional changes of the Musharraf era, which transferred key powers to the presidency. The 18th Amendment tilted the balance of powers back toward the Parliament and the elected executive, at least in regards to constitutional form.<sup>36</sup> The 18th Amendment also introduced significant reforms to the electoral process.<sup>37</sup> Additionally, there was a serious attempt to redress the historical imbalance between federal and provincial powers by abolishing the “Concurrent List.” The list specified legislative powers common to both federal and provincial legislatures, and had effectively granted ascendancy to the federation over a vast array of subjects.<sup>38</sup> The amendment also added fundamental rights to information and compulsory education and bolstered the bill of rights with the addition of rights to “fair trial” and “due process” that may have a far-reaching impact on the rights jurisprudence of Pakistan's courts.<sup>39</sup>

The 18th Amendment was seen by many as a watershed for democratic politics in Pakistan and raised the prestige of the country's political parties. While there was much to commend about the amendment, it also attracted immediate controversy. Petitions were filed before the Supreme Court to challenge one particular aspect of the amendment: the revamped process of judicial appointment.<sup>40</sup> As opposed to the earlier process of judicial appointment based upon the binding recommendations of the respective chief justices of superior courts, the Amendment entrusted judicial appointments to a newly created judicial

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<sup>35</sup> PAKISTAN CONST., *amended by* Constitution (Eighteenth Amendment) Act, 2010.

<sup>36</sup> See PAKISTAN CONST. arts. 75, 90, 101, 232, & 243 *amended by* Constitution (Eighteenth Amendment) Act, 2010, §§ 26, 28, 33 86, & 90. The President's power to delay assent to bills of Parliament was also constrained. Most notably, the President's powers to dismiss the government and dissolve parliament was confined. See PAKISTAN CONST. art. 58(2)(b), *amended by* Constitution (Eighteenth Amendment) Act, 2010, § 17. Furthermore, the President was bound to act “on and in accordance” with the advice of the Prime Minister and the Cabinet. See PAKISTAN CONST. art. 48, *amended by* Constitution (Eighteenth Amendment) Act, 2010, § 15.

<sup>37</sup> See PAKISTAN CONST. art. 213 & 224, *amended by* Constitution (Eighteenth Amendment) Act, 2010, §§ 77 & 83. While the 18th Amendment undid most of the constitutional changes brought about by General Musharraf, it retained several positive aspects of the military regime's initiatives. See PAKISTAN CONST. art. 51, 59, & 106, *amended by* Constitution (Eighteenth Amendment) Act, 2010, §§ 16, 18, & 36.

<sup>38</sup> See PAKISTAN CONST. art. 142, *amended by* Constitution (Eighteenth Amendment) Act, 2010, § 49. Only the areas of criminal law, criminal procedure, and evidence were left as common domain. Other long standing provincial concerns, such as federal control over natural resources and decision-making on the construction of mega-hydroelectric projects, were also addressed. See PAKISTAN CONST. art. 157 & 161, *amended by* Constitution (Eighteenth Amendment) Act, 2010, §§ 58 & 60.

<sup>39</sup> See PAKISTAN CONST. art. 19(A), 25(A), & 10(A), *inserted by* Constitution (Eighteenth Amendment) Act, 2010, §§ 7, 9, & 5.

<sup>40</sup> See PAKISTAN CONST. art. 175(A), *amended by* Constitution (Eighteenth Amendment) Act, 2010, § 67.

commission and a parliamentary committee.<sup>41</sup> This change in the appointment procedure so soon after the superior judiciary had won its hard-earned independence aroused suspicion that the real aim of this amendment was the subjugation of the judiciary, rather than meaningful reform of the appointment process. Arguments were raised that the amendment violated the “basic structure” of the constitution by undermining the independence of the judiciary and the separation of powers. This raised concerns that the Supreme Court might consider invalidating a constitutional amendment relying upon precedents established earlier by the Indian Supreme Court.

In October 2010, the Supreme Court issued an interim order and, adopting a “dialogic approach,” referred certain matters back to the Parliament for consideration. The court noted several aspects of the amendment that, in its opinion, might undermine the independence of the judiciary, including: the role of the Chief Justice had been considerably reduced; representatives of the executive had been given an equal role in the Judicial Commission; and a Parliamentary Committee had been granted virtual veto powers in judicial appointments.<sup>42</sup> The Supreme Court recommended several changes to the judicial appointment process in its interim order, most of which were adopted by the Parliament through the 19th Amendment.<sup>43</sup> However, the Supreme Court’s recommendation that the Judicial Commission be granted the final say in judicial appointments was disregarded.<sup>44</sup> In February 2011, the issue of judicial appointments arose once again when a bench suspended the decision of the Parliamentary Committee rejecting nominations of four candidates for appointment to the provincial High Court by the Judicial Commission. The court reasserted the judiciary’s control over the subject of judicial appointment by holding the decision of the Parliamentary Committee and its reasons to be reviewable. This effectively reverted the

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<sup>41</sup> A new article 175(A)(2) on the “Appointment of Judges to the Supreme Court, High Courts and the Federal Shariat Court” provided for the composition of the judicial commission as follows: “For appointment of Judges of the Supreme Court, the Commission shall consist of—(i) Chief Justice of Pakistan; (ii) Members: four most senior Judges of the Supreme Court; (iii) Member: a former Chief Justice or a former Judge of the Supreme Court of Pakistan to be nominated by the Chief Justice of Pakistan, in consultation with the two member Judges, for a period of two years; (iv) Member: Federal Minister for Law and Justice; (v) Member: Attorney-General for Pakistan; and (vi) Member: a Senior Advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a term of two years.”

<sup>42</sup> Ahmad v. Fed’n of Pakistan, (2010) PLD (SC) 1165.

<sup>43</sup> In particular, judicial representation on the Commission was increased from two to four, the Parliamentary Committee was required to give reasons in case of a rejection of the Judicial Commission’s nomination, and the Committee’s hearings were mandated to be held in camera. See PAKISTAN CONST. *amended by* Constitution (Nineteenth Amendment) Act, 2010, § 4.

<sup>44</sup> See PAKISTAN CONST. art. 175(A)(12), *amended by* Constitution (Nineteenth Amendment) Act, 2010, § 4(e)(ii).

process of judicial appointments to that adopted by the court through the so-called “Judges’ case” in the 1990s, albeit with a much broader consultation requirement.<sup>45</sup>

By 2012 the relations between the judiciary and the elected institutions reached a tense but stable equilibrium. However, as the sitting Parliament entered the fifth and final year of its term, the NRO saga took yet another turn. The Supreme Court, which had earlier compelled the removal of the chairman of the National Accountability Bureau (NAB), the country's corruption watchdog, for his failure to assist the court in the NRO case and had also invalidated the appointment of the Prosecutor General, now voided the purported appointment of the incumbent Chairman of the NAB on account of the government's failure to hold a meaningful consultation with the leader of the opposition as required by law.<sup>46</sup> The possibility that it might be compelled to appoint a neutral person to the post of Chairman NAB, an office responsible for the investigation and prosecution of corruption offenses, brought the government face to face with a battle for its political survival. On the other hand, frustrated with its inability to compel the government to abide by its orders, not only in the NRO case but also a host of other cases, the Supreme Court charged the Prime Minister with contempt of court.

In April 2012, a seven-member bench of the Supreme Court convicted the Prime Minister for contempt of court and imposed a nominal sentence.<sup>47</sup> The Prime Minister’s legal team decided not to file an appeal against the conviction. The Speaker of the National Assembly disposed of a reference calling for the disqualification of the Prime Minister without furnishing any reasons. A three member bench headed by the Chief Justice admitted for hearing a petition challenging the Speaker’s decision. The bench held that Article 63(1)(g) applied in this instance and was self-executing. Article 63(1)(g) provides for the

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<sup>45</sup> In *Al-Jehad Trust v. Fed’n of Pakistan*, (1996) PLD (SC) 324, known as the “Judges’ case,” the Supreme Court examined a range of issues related to judicial appointments. The key question was whether the president had unfettered discretion in appointing judges to the superior courts under Articles 177 and 193 of the Constitution. The relevant constitutional provisions required the president to make appointments to the Supreme Court “after consultation with” the Chief Justice of Pakistan (CJP), and appointments to the High Courts “after consultation with” the CJP and the Chief Justice (CJ) of the concerned High Court. Relying upon the principle of judicial independence in Islam and Indian precedents, the Supreme Court held that the president could not reject a chief justice’s nomination without giving cogent objective reasons, nor appoint someone whose nomination had been rejected by the CJP or the CJ of the High Court. This effectively gave the chief justices the final say in judicial appointments.

<sup>46</sup> See *Bank of Punjab v. Haris Steel Ind. Ltd.*, (2010) PLC (SC) 1109; *Orakzai v. Pakistan*, (2011) PLD (SC) 365.

<sup>47</sup> See *Criminal Original Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010*, (2012) PLD (SC) 553.



disqualification of a member of Parliament if “he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to . . . the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary.”<sup>48</sup> The Court thus disqualified and unseated an elected Prime Minister for failure to obey its directions in the NRO case, specifically in regard to the instruction to write a letter to Swiss authorities.<sup>49</sup> The PPP’s replacement in the office of the Prime Minister found himself in a similar situation facing contempt proceedings before the Supreme Court.<sup>50</sup> The tension was finally diffused when the successor Prime Minister wrote a letter to Swiss prosecutors in accordance with the instructions of the Court. The ease with which the controversy was ultimately resolved reflected badly on both the elected institutions and the Court.

As Pakistan moved toward another general election and neared the completion of an elected government’s tenure for the first time since the 1970s, the Supreme Court appeared to be playing a significant role in undermining the electoral prospects of the incumbent government.<sup>51</sup> However, the protracted tussle with the executive had begun to take its toll on the court’s credibility and public perception as well. A few decisions in 2012 courted extensive controversy in addition to the Prime Minister’s contempt saga.<sup>52</sup> The Justice Chaudhry’s personal reputation came under intense public scrutiny when the Chief Justice’s son was accused of financial impropriety and receiving funds from a property developer to allegedly influence the Chief Justice position in certain cases.<sup>53</sup> While the developer in question subsequently admitted before the court that this attempt to curry favour with the Chief Justice had been futile, Justice Chaudhry’s actions in initiating a *suo motu* case to

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<sup>48</sup> See PAKISTAN CONST. art. 63.

<sup>49</sup> See *Siddique v. Fed’n of Pakistan*, (2012) PLD (SC) 660. The author served as the Judges’ Associate to the Supreme Court bench that decided the so-called Prime Minister’s disqualification case.

<sup>50</sup> See Criminal Original Petition No. 74 of 2012, In *Suo Motu Case No. 04 of 2010*, (2012) PLD (SC) 1086.

<sup>51</sup> Other cases which caused simmering tensions between the judiciary and the executive included cases concerning the disqualification of members of parliament for submitting fake academic degrees in the 2008 elections and for possessing dual citizenship. See *Muhammad Rizwan Gill v. Nadia Aziz*, (2010) PLD (SC) 828; *Mian Najeeb-ud-Din Owaisi and another v. Amir Yar Waran and others*, (2013) PLD (SC) 482; *Syed Mehmood Akhtar Naqvi v. Federation of Pakistan*, (2012) PLD (SC) 1089.

<sup>52</sup> See, e.g., *Watan Party and others v. Federation of Pakistan*, (2012) PLD (SC) 292. This so-called “Memo case” arose out of an alleged secret memorandum to U.S. government by Mr. Hussain Haqqani, Ambassador of Pakistan to the United States, urging certain actions against Pakistani military. The manner in which the Inter-Services Intelligence chief submitted an incriminating affidavit against the ambassador leading to his removal created suspicions of collusion between the military and the Court against the government.

<sup>53</sup> See *Suo Motu Case No.5 of 2012*, (2012) PLD (SC) 664. Similar allegations had formed the basis of General Musharraf’s misconduct charges against the Chief Justice in 2007.

scrutinize the allegations and insisting on heading the bench cast a shadow over his impartiality and integrity.<sup>54</sup> Four years after the successful Lawyers’ Movement, fundamental divisions appeared to have split the lawyers’ communities virtually down the middle, mostly along party-political and rural-urban lines. While many of the district and peri-urban bar associations continued to support the judiciary’s robust anti-government stance, the more prominent High Court and Supreme Court bar associations became increasingly critical of the exercise of judicial power and accused the court of having over-stepped its constitutional bounds. With the holding of elections in May 2013, a peaceful transfer of power to the PML(N) at the federal level and a number of political parties in the provinces, and the retirement of the Chief Justice in December 2013, Pakistan approached a period of relative calm at least as regards the relations between the judiciary and the elected executive.<sup>55</sup>

Despite the repeated claims that the Court had undermined an elected government, bolstered the military’s covert role in politics, and threatened Pakistan’s delicate democratic transition through its judicial activism, it could be argued that the emergence of a powerful judiciary had in fact strengthened democratic politics in Pakistan.<sup>56</sup> In addition to invalidating the imposition of the emergency state by General Musharraf, the Supreme Court also made symbolic pronouncements declaring military intervention in politics illegal.<sup>57</sup> The Court also made tentative advances in holding the executive’s claimed prerogatives in the domains of national security and foreign policymaking, which arguably are exercised more by the military and its intelligence agencies than the elected government, to be justiciable.<sup>58</sup> In that context the limited ground that the Supreme Court covered in checking the practice of enforced abduction and extra-legal detention by the intelligence agencies was not insignificant.<sup>59</sup> The Court also made some progress in scrutinizing

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<sup>54</sup> See *id.*

<sup>55</sup> See Moeen Cheema, *Pakistan elections and the challenges facing the new government*, AL JAZEERA (May 13, 2013), <http://www.aljazeera.com/indepth/opinion/2013/05/201351355212336147.html>.

<sup>56</sup> See Sultan Babar Mirza, *The Chaudhry Doctrine: A ‘Small-c Constitutional’ Perspective*, in *POLITICS & JURISPRUDENCE*, *supra* note 2, at 33.

<sup>57</sup> See, e.g., *Khan v Beg*, (2013) PLD (SC) 1.

<sup>58</sup> It can be argued that even the highly controversial Memo case, which was seen by many as an attempt to destabilize the Presidency and the elected government, had the positive dimension of establishing a precedent for holding both the civil and military establishments’ national security actions justiciable. Notably, the serving Director-General of Inter-Services Intelligence voluntarily submitted a brief before the court in that case. See Moeen Cheema, *Pakistan’s clash of institutional authority*, EAST ASIA FORUM (Jan. 22, 2012), <http://www.eastasiaforum.org/2012/01/22/pakistan-s-clash-of-institutional-authority/>.

<sup>59</sup> See *Cases Related to Missing Persons*, SUPREME COURT OF PAKISTAN, [http://www.supremecourt.gov.pk/HR\\_Cases/1st%20final/1st.htm](http://www.supremecourt.gov.pk/HR_Cases/1st%20final/1st.htm).

questionable financial transactions of corporate bodies affiliated with the military.<sup>60</sup> Most significantly, through the extensive exercise of judicial review of executive action, as discussed in the following section, the Court took up and highlighted matters of maladministration and corruption. The Court's critics fretted that this kind of judicial activism strengthened the military *vis a vis* a civilian government—after all narratives of bad governance and corruption have historically provided the military with the strongest arguments for intervening in or overthrowing elected governments. However, it could be argued on the contrary that the Court's actions in fact deprived the military of its strongest justification for overtly intervening in politics.

### III. THE “JUDICIALIZATION” OF GOVERNANCE: JUDICIAL REVIEW OF EXECUTIVE ACTION BY THE CHAUDHRY COURT

While the high profile constitutional controversies helped create a perception (and reality) of confrontation between the superior judiciary and the elected executive, the real site of institutional struggle, a kind of protracted trench warfare, took place in the domain of administrative law. In several cases the Supreme Court aggressively pursued charges of corruption and crony capitalism against ministers and affiliates of the federal government, senior members of the federal bureaucracy, and appointees to public corporations and regulatory authorities.<sup>61</sup> Many of these cases were taken up *suo motu* upon reports of alleged corruption in print and electronic media and had a dramatically negative impact on the public perception of the executive's integrity and competence.<sup>62</sup> The Court's insistence upon impartial investigations into these allegations and periodic public disclosures on progress before the Court made these cases the subject of almost daily news reports and political talk shows. As the incumbent government resisted the investigations initiated on the Court's insistence and subjected to its supervision, the Court's proactive use of its “Original Jurisdiction” to exercise the judicial review of executive action became highly visible as well as politicized.

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<sup>60</sup> See, e.g., In re: *Suo Motu* Case No. 10 of 2009, (2010) SCMR (SC) 885 (complaint regarding establishment of Makro-Habib Store on playground).

<sup>61</sup> See, e.g., *Bank of Punjab v. Haris Steel Ind. Ltd.*, (2010) PLD (SC) 1109; *Yasin v. Fed'n of Pakistan*, (2012) PLD (SC) 132; *In the matter of Alleged Corruption in Rental Power Plants etc.*, (2012) SCMR 773; *Regional Director, Anti-Narcotics Force v. Khan*, (2012) SCMR 870; *Suo Motu* Case No. 11 of 2011, Supreme Court of Pakistan; *Suo Motu* Case No. 18 of 2010, Supreme Court of Pakistan.

<sup>62</sup> See, e.g., *In the matter of Alleged Corruption in Rental Power Plants etc.*, (2012) SCMR 773.

### A. *Mega-Corruption Scandals*

The NRO saga was arguably the quintessential example of the Supreme Court's administrative law jurisprudence. In addition to the constitutional questions concerning the validity of the NRO as a legislative measure, the organization and workings of NAB, the federal agency tasked with the investigation and prosecution of corruption offenses, came under intense scrutiny by the Court. NAB had played a central role in the implementation of the NRO and the withdrawal of cases domestically as well as internationally. As mentioned earlier, during the hearing of the NRO case the NAB's chairmen and senior prosecutors incurred the wrath of the court for their failure to exhibit autonomous decision-making. Proceedings in separate cases resulted in the dismissal of chairmen and lead prosecutors of the NAB on the Supreme Court's orders.<sup>63</sup> The government attempted to retain control over the NAB through subsequent appointments of beholden individuals to these posts, leading to continuous friction between the Court and NAB. The government's control over NAB also ensured that individual defendants secured acquittals through the special accountability courts set up to try corruption cases as NAB prosecutors presented weak cases, withdrew vital evidence, and made unwarranted concessions. As such, the government achieved indirectly and piecemeal through NAB what it could not get through the NRO.<sup>64</sup>

Lacking any confidence in the independence and competency of NAB, the Court sought alternatives. In several cases the Court painstakingly undertook the task of supervising investigations into corruption and other criminal cases by other federal agencies such as the Federal Investigation Agency (FIA),<sup>65</sup> regular police, and the Anti-Narcotics Force (ANF). These agencies also became the turf of a protracted battle between the Supreme Court and the federal government over the appointment of independent officials and investigators, and the conduct of impartial investigations.<sup>66</sup> The Court was cognizant of the ease with which influence over the provincial police and prosecution services enabled the government to shield its affiliates from effective

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<sup>63</sup> See *Bank of Punjab v. Haris Steel Ind. Ltd.*, 2010 PLD (SC) 1109; *Orakzai v. Pakistan*, 2011 PLD (SC) 365; *Khan v. Fed'n of Pakistan*, 2013 PLD (SC) 568.

<sup>64</sup> See, e.g., Syed Irfan Raza, *Record of another Zardari case missing*, DAWN (Jan. 7, 2016, 7:30 AM), <http://www.dawn.com/news/1231316>; Raza Khan, *Accountability court acquits Zardari in SGS-Cotecna case*, DAWN (Nov. 24, 2015, 3:39 PM), <http://www.dawn.com/news/1221946>.

<sup>65</sup> See, e.g., *Suo Moto Case No. 18 of 2010*, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/web/user\\_files/File/Constitution\\_Petition\\_No.18.pdf](http://www.supremecourt.gov.pk/web/user_files/File/Constitution_Petition_No.18.pdf).

<sup>66</sup> See, e.g., *Suo Motu Case No. 24 of 2010*, Supreme Court of Pakistan (regarding corruption in Hajj arrangements in 2010).

prosecution. Recognizing the limitations of a supervisory technique, the Court increasingly began appointing *ad hoc* fact-finding commissions composed of trusted members of the lower judiciary and bureaucrats to independently investigate cases.<sup>67</sup> However, as these commissions lacked any judicial capacity and the Court itself lacked the authority to make conclusive findings of fact in its judicial review jurisdiction, even these cases had to be sent back to agencies such as the NAB, FIA, etc. for investigation and/or prosecution.

A prime example of this kind of judicial review that involved important members of the political executive is the so-called *RPP case*.<sup>68</sup> The Court took *suo motu* notice of allegations of corruption and deliberate loss to the exchequer in the award of contracts to nineteen rental power projects (RPPs). After hearing *prima facie* evidence of wrongdoing, the Court directed the NAB to initiate criminal investigations against the concerned federal minister, Raja Pervaiz Ashraf, and senior officials in the ministry of water and power. While the Court was successful in undoing the contracts with RPPs and ensured the return of funds to the exchequer, NAB investigations against the federal minister and other officials remained pending throughout the previous government's tenure and Raja Pervaiz Ashraf was even made the replacement Prime Minister upon the disqualification of Prime Minister Gilani by the Supreme Court.<sup>69</sup>

Another such case involved suspected corruption in the allocation of import licences for the drug ephedrine, a controlled substance that is also used in the manufacture of narcotics, to suspect pharmaceutical companies.<sup>70</sup> Important political personalities implicated in the transaction included members of Parliament, Prime Minister Gilani's son Ali Musa Gilani, and the federal minister for health. Despite repeated hearings and directions by the Supreme Court, the ANF failed to make any significant headway in the case.

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<sup>67</sup> See, e.g., Imran Mukhtar, *Profile of Tariq Khosa*, THE NATION (Dec. 2, 2011), <http://nation.com.pk/national/02-Dec-2011/Profile-of-Tariq-Khosa>.

<sup>68</sup> In the matter of Alleged Corruption in Rental Power Plants etc., (2012) SCM (SC) 773.

<sup>69</sup> See Mateen Haider, *NAB to probe Parvez Ashraf for illegally awarding RPP contract*, DAWN (Apr. 14, 2015, 7:28 PM), <http://www.dawn.com/news/1175888>.

<sup>70</sup> Regional Director, Anti-Narcotics Force v. Khan, (2012) SCMR 870; see also Huzaima Bukhari & Ikramul Haq, *Politics and Drugs*, BUSINESS RECORDER (May 25, 2012), <http://www.brecorder.com/articles-a-letters/626/1193159:politics-and-drugs/?date=2012-05-25>.

### B. *Bureaucratic Appointments and Crony Capitalism*

Another notable example of a case in which the Court initiated investigations into corruption scandals and revealed a nexus between key appointments in regulatory agencies and public corporations is the OGRA case.<sup>71</sup> This case concerned impropriety in the appointment of the chairman of the Oil and Gas Regulatory Authority (OGRA) in clear disregard of the established process and required qualifications. The Court dismissed the chairman and directed the NAB to initiate criminal prosecution for alleged corruption in policymaking and the award of concessions and licences by OGRA. In another case the Court invalidated the extension of the President of National Bank of Pakistan’s tenure on the grounds that it violated the statutory prohibition on someone holding that office for more than two terms.<sup>72</sup> Likewise, the Court voided the appointment of the Chairman of the Securities and Exchange Commission of Pakistan as it lacked transparency.<sup>73</sup>

While the above cases focused on the appointments to key positions in public corporations and regulatory bodies there were underlying allegations of corruption and crony capitalism. In the *NICL case* the Supreme Court took up such allegations against the management of the National Insurance Corporation Ltd. (NICL), which had acquired land from leading government and opposition politicians at exorbitant prices causing the public corporation a loss of at least USD 500 million.<sup>74</sup> Another corruption scandal concerned the purchase of land at inflated prices by the government’s Employees Old-age Benefits Institution (EOBI).<sup>75</sup> The case concerned the purchase of properties in the military’s Defence House Authority in Islamabad, which allegedly caused a loss of nearly USD 400 million to EOBI.

The Court’s struggles with ensuring independent investigation and prosecution in corruption cases against executive officials embroiled it in wider struggles over the nature and form of state structures, especially the civil bureaucracy, regulatory agencies and public corporations. As the Court attempted to break the shackles of political control over the state apparatus and coax a culture of rule-bound and autonomous action, it faced constant attrition and evasion. These battles took a similar form as the accountability cases, with the Supreme Court insisting upon

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<sup>71</sup> *Yasin v. Fed’n of Pakistan*, (2012) PLD (SC) 132.

<sup>72</sup> *Idris v. Fed’n of Pakistan*, (2011) PLD (SC) 213.

<sup>73</sup> *Tiwana v. Pakistan*, (2013) SCMR 1159.

<sup>74</sup> *Suo Moto Case No. 18 of 2010*, Supreme Court of Pakistan.

<sup>75</sup> *Constitution Petition No. 35 of 2013*, Supreme Court of Pakistan.



transparency and merit in appointments to key posts in the bureaucracy amid claims of executive prerogative in postings, promotions, and incentives.<sup>76</sup> The political executive historically developed several techniques for ensuring the subservience of the administrative setup including discretionary promotions to the senior-most ranks, discretionary transfers to powerful and lucrative posts in disregard of seniority, transfers to minor or sidelined positions as disincentive, and the retention of retired bureaucrats to key posts on short-term contracts.

The Supreme Court persevered in insisting upon transparent processes in promotions to the senior ranks and denied the government the option of retaining retired bureaucrats unless clear exigencies were manifested. It also subjected specific actions of senior bureaucrats to severe scrutiny for non-compliance with established rules and procedures. While it appeared that it was beyond the Court to undo the structures and culture of patronage-based administration that have a post-colonial history of more than six decades, the Court did manage to keep the crumbling state structure at the center of judicial, and hence public, attention.

### C. *Judicial Regulation of the State*

The scrutiny of appointments to executive posts in a vast array of public corporations, semi-autonomous bodies, and regulatory agencies exercising a tremendous portfolio of public powers outside the traditional administrative set-up, expanded the terrain of contention between the Supreme Court and the elected executive. These matters, mostly taken up in *suo motu* proceedings, entangled the Court in the political economy of policy-making, albeit in an indirect way. The Court confined itself to scrutinizing transactions that reeked of corruption and crony capitalism. In this way the Supreme Court identified faults in public agency structures and processes that enabled policy-making in a non-transparent fashion but without directly interfering in the workings of these public agencies and corporations.<sup>77</sup> As such, the implicit public law theory identifiable in the Court's actions involving corruption charges and appointments to state institutions appeared to center upon the need for an independent and politically neutral state apparatus capable of functioning within established rules and procedures, without being susceptible to

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<sup>76</sup> See, e.g., Human Rights Cases Nos. 8340, 9504-G, 13936-G, 13635-P & 14306-G TO 14309-G of 2009, (2010) SCMR 1301; Constitution Petition No. 23 of 2012, Supreme Court of Pakistan.

<sup>77</sup> See, e.g., *Suo Motu* Case No. 5 of 2010, (2010) PLD (SC) 731 (regarding huge loss to public exchequer by ignoring the lowest bid of Fauji Foundation and Multinational Energy from Vitol by awarding LNG contract).

undue pressure from the elected executive. This strand of judicial review culminated in the *Khwaja Muhammad Asif case*.<sup>78</sup> In a petition brought by an opposition politician, currently a federal minister in the PML(N) government, the Supreme Court directed the establishment of an independent commission for overseeing and advising on key appointments to regulatory bodies and public corporations.<sup>79</sup>

One visible weakness in the Supreme Court's role as a regulator of the state, however, was that the effects of the Court's administrative law jurisprudence were limited to either discursive gains or minimal changes at the top of the administrative hierarchy that took a long time to filter down to the bottom of the pyramid, if at all. Beyond obstructing or reversing questionable transactions and highlighting the nature and extent of the elected government's control over the high-level bureaucracy, the Court achieved little. While these cases also developed a public perception of endemic corruption amongst the political classes and the apex bureaucracy, as well as of the impunity of the elected government and state officials, the government was largely successful in thwarting the Court's campaign of de-politicizing the administration. Since the Court was dependent upon the executive for the enforcement of its actions, when its decisions were unpalatable for the executive, a prolonged tussle involving all manner of dilatory and avoidance tactics was inevitable. This involved the Court in the exasperating task of going up the bureaucratic hierarchy step by step in subsequent enforcement and contempt proceedings in an effort to identify the stumbling blocks and override them with the threats of sanction. As these cases dragged on, the Court also became visibly frustrated with its inability to counter this perceived culture of governmental impunity and lawlessness. Arguably, it is this frustration that ultimately manifested itself in the contempt proceedings against two Prime Ministers and the conviction and disqualification of an elected head of government in the NRO case. Ultimately, however, the Court failed in its endeavour as most of the corruption-related and other administrative law cases dragged on seemingly endlessly.

While the Court focused on issues of governance, especially at the highest levels, it did not engage directly in questions of socio-economic policymaking or anything that may be classified as Social Action Litigation (SAL) of the sort that the Indian Supreme Court engaged in the heyday of its judicial populism. There were hardly any *suo motu* cases to

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<sup>78</sup> *Asif v. Fed'n of Pakistan*, (2013) SCMR 1205.

<sup>79</sup> *Id.*

speak of that directly attacked elite privilege or advanced the claims of equitable development. There were no actions that placed demands on the federal or provincial governments to reorient their policies toward mass interests. This was not necessarily the Court's doing. Occasional actions on basic commodity pricing resulted in such concerted backlash from liberal intelligentsia and urban lawyers that such interventions into policy-making were quickly abandoned.<sup>80</sup> And yet, there were plenty of indirect actions—*suo motu* cases that undermined elite power, privilege and patronage, and its nexus with the state—that were framed in formal and procedural terms.<sup>81</sup> These included cases challenging the non-enforcement of rules governing urban planning and construction to the benefit of well-connected or wealthy developers;<sup>82</sup> exercises of discretion at the highest levels of bureaucracy that unduly favoured certain business interests;<sup>83</sup> and allotment of government land to the those occupying nodal positions in inter-connected networks of government, politics, and wealth.<sup>84</sup> Noticeably these cases were tied to the pursuit of accountability for political corruption and bureaucratic mal-governance, lending credence to the claim that the administrative law jurisprudence of the Court formed the core of its jurisprudence. This also provided a major hint to the Court's unarticulated political-constitutional theory—essentially a theory of liberal constitutionalism—that invested faith in the reform of institutions of formal democracy and semi-independent but rule-bound state structures as the pathway for long-term social and economic change.

The issues of mass interest that the Court did take up related to the abuse of authority by police and bureaucracy at the local level. The Court initiated human rights cases based on information in the media or on the applications of aggrieved persons sent to the Human Rights Cell of the Supreme Court. Often these applications were little more than letters or complaints written in lay terms containing basic factual information, which the Court converted into petitions exercising its *suo motu* powers. Between the years 2005 and 2013, the Chaudhry Court took up as many

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<sup>80</sup> See, e.g., *Suo Motu Case No. 10 of 2007*, (2008) PLD (SC) 673 (on sugar pricing); *Jhagra v. Fed'n of Pakistan*, (2009) PLD (SC) 363 (on oil and natural gas pricing); *Human Rights Commission of Pakistan v. Government of Pakistan*, (2009) PLD (SC) 507 (on bonded labor).

<sup>81</sup> For examples of cases involving abuse of police powers, see *Human Rights Case No. 66 of 2009*, Supreme Court of Pakistan; *Human Rights Case No. 3903 of 2007*, Supreme Court of Pakistan.

<sup>82</sup> See, e.g., *Wafi Associates Ltd. v. Hamid*, (2010) SCMR 1125. See also *Suo Motu Case No. 3 of 2009*, Supreme Court of Pakistan.

<sup>83</sup> See, e.g., *Human Rights Cases of Nos. 4668 of 2006, 1111 of 2007, & 15283-G of 2010*, (2010) PLD (SC) 759.

<sup>84</sup> See, e.g., *Suo Moto Case No. 14 of 2009*, Supreme Court of Pakistan (allowing regularization of 50 acres of land in Karachi at throw away prices); *Human Rights Case No. 21950-S of 2009*, Supreme Court of Pakistan.

as 113 such issues for hearing.<sup>85</sup> These cases related to matters such as allegations of harassment by the police and revenue bureaucracy;<sup>86</sup> refusal of the police to register and investigate rape, murder and other criminal cases;<sup>87</sup> torture in police custody and extra-judicial killings,<sup>88</sup> and the treatment of prisoners in jails.<sup>89</sup> Several of these human rights cases concerned discriminatory customary practices, honor crimes against women, and domestic violence.<sup>90</sup> Other cases related to discrimination in pension, illegal dispossession of land,<sup>91</sup> or compensation for death or personal injury caused by negligence of government departments and agencies.<sup>92</sup>

This was an extraordinary exercise of powers by the Supreme Court as it took up individual grievances and human rights violations directly under its Original Jurisdiction. Even more extraordinary was the

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<sup>85</sup> Qazi, *supra* note 4.

<sup>86</sup> *See, e.g.*, Human Rights Case No. 5466-P of 2010, Supreme Court of Pakistan.

<sup>87</sup> *See, e.g.*, Suo Moto Case No. 66 of 2009, Supreme Court of Pakistan; Human Rights Case Nos. 44 of 2008 & 14 of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/10th%20final/44of2008,14of2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/10th%20final/44of2008,14of2009.pdf); Human Rights Case No. 4095 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/2nd%20final/4095of2007.pdf](http://www.supremecourt.gov.pk/HR_Cases/2nd%20final/4095of2007.pdf); Human Rights Case No. 4860 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/2nd%20final/4860of2006.pdf](http://www.supremecourt.gov.pk/HR_Cases/2nd%20final/4860of2006.pdf); Human Rights Case No. 5443 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/2nd%20final/5443of2006.pdf](http://www.supremecourt.gov.pk/HR_Cases/2nd%20final/5443of2006.pdf); Suo Moto Case No. 12 of 2005 and Constitution Petition No. 22 of 2005, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/11th%20final/SMC12of2005.pdf](http://www.supremecourt.gov.pk/HR_Cases/11th%20final/SMC12of2005.pdf).

<sup>88</sup> *See, e.g.*, Human Rights Case No. 1109-P/2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/5th%20final/1109-Pof2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/5th%20final/1109-Pof2009.pdf).

<sup>89</sup> *See, e.g.*, Suo Moto Case No. 1 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/11th%20final/SMC1of2006.pdf](http://www.supremecourt.gov.pk/HR_Cases/11th%20final/SMC1of2006.pdf). *See also* M. Raheel Kamran Sheikh, *Taking Liberty Seriously*, in *POLITICS & JURISPRUDENCE*, *supra* note 2, at 131.

<sup>90</sup> *See, e.g.*, Human Rights Case No. 5466-P of 2010, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/10th%20final/5466-Pof2010.pdf](http://www.supremecourt.gov.pk/HR_Cases/10th%20final/5466-Pof2010.pdf); Human Rights Case No. 57 of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/4th%20final/57of2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/4th%20final/57of2009.pdf); Human Rights Case No. 4181-N of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/10th%20final/4181-Nof2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/10th%20final/4181-Nof2009.pdf); Human Rights Case No. 12912-P of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/6th%20final/12912-Pof2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/6th%20final/12912-Pof2009.pdf); Suo Moto Case No.1 of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/11th%20final/SMC1of2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/11th%20final/SMC1of2009.pdf); Criminal M.A. No. 396 of 2005, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/11th%20final/CP16of2004.pdf](http://www.supremecourt.gov.pk/HR_Cases/11th%20final/CP16of2004.pdf); Constitution Petition No. 16 of 2004, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/11th%20final/CP16of2004.pdf](http://www.supremecourt.gov.pk/HR_Cases/11th%20final/CP16of2004.pdf).

<sup>91</sup> *See, e.g.*, Human Rights Case No. 29 of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/4th%20final/29of2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/4th%20final/29of2009.pdf); Human Rights Case No. 11108-P of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/5th%20final/11108-Pof2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/5th%20final/11108-Pof2009.pdf).

<sup>92</sup> *See, e.g.*, Human Rights Case No. 2041-P of 2009, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/10th%20final/2041-Pof2009.pdf](http://www.supremecourt.gov.pk/HR_Cases/10th%20final/2041-Pof2009.pdf); Human Rights Case No. 2435 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/2nd%20final/2435of2006.pdf](http://www.supremecourt.gov.pk/HR_Cases/2nd%20final/2435of2006.pdf); Human Rights Case No. 4805 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/2nd%20final/4805of2006.pdf](http://www.supremecourt.gov.pk/HR_Cases/2nd%20final/4805of2006.pdf); Human Rights Case No. 8207 of 2006, Supreme Court of Pakistan, [http://www.supremecourt.gov.pk/HR\\_Cases/2nd%20final/8207of2006.pdf](http://www.supremecourt.gov.pk/HR_Cases/2nd%20final/8207of2006.pdf).

functioning of the Human Rights Cell itself, which received more than 200,000 applications between 2009 and 2013.<sup>93</sup> The Human Rights Cell disposed of more than 180,000 such applications of its own accord through administrative orders and directions under the threat of such applications being converted into human rights cases if the Court's directions were not complied with. Despite such a large number of abuse of power cases being taken up by the apex court, or by the Human Rights Cell under its aegis, it is questionable whether the Court succeeded in making any dent in the culture of abuse that pervaded civil administration, in particular the police and revenue bureaucracy, and its nexus with local politicians and those with power within rural social hierarchies. Nonetheless, the Court's efforts at regulating the administrative apparatuses unmasked the full extent of the postcolonial state's illegalities, including the mass of *de jure* and *de facto* discretionary and unaccountable powers built into the state structures that have historically rendered them amenable to the political purposes of both military regimes and elected governments. Furthermore, the Court's human rights jurisdiction revealed the absence of any other redress mechanism, whether internal to the administrative state or in the form of administrative tribunals or an effective ombudsman system.

#### IV. DECONSTRUCTING THE "JUDICIAL ACTIVISM" OF THE CHAUDHRY COURT

Having laid out in detail the political context and analyzed the important facets of its public law jurisprudence, it is possible to now deconstruct and demystify the charge of judicial activism levelled against the Chaudhry Court. In order to do that however, one must first define judicial activism, which appears to be a notoriously difficult task.<sup>94</sup> Generally the term judicial activism is used both in a negative and a positive sense, and often both at the same time by different people on the opposite sides of a debate on the role of the judiciary. It is also notable that the term is often employed in a binary configuration and in opposition to an alternate conception of the judicial role. When used in a

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<sup>93</sup> Faisal Siddiqi, *Public Interest Litigation: Predictable Continuity and Radical Departures*, in *POLITICS & JURISPRUDENCE*, *supra* note 2, at 77, 84.

<sup>94</sup> Arguably, the term judicial activism connotes a number of related meanings, including the invalidation of purportedly constitutional actions of other branches of government, disregard of precedent, judicial lawmaking, disregard of established interpretative methodologies, and result-oriented judging. See Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1463-76 (2004). As many as seven different kinds of judicial activism have been identified. See William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1219-20 (2002). See also, Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144 (2002); Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 236, 239 (1983).

positive sense it is opposed with judicial quietism or passivity, a tendency on the part of the courts to be excessively conservative, legalistic and pedantic in the interpretation and application of the law.<sup>95</sup> When used in a negative sense it is contrasted with appropriate judicial behaviour defined as judicial restraint, avoidance of political questions, and incremental development of the law.<sup>96</sup> Either use tells us how courts *ought not to act*, but very little about how they ought to behave. The dialectic set up by the negative and positive uses of the term judicial activism along with their respective counterpoises calls for a golden mean of judicial behaviour—neither too activist, nor too quietist—that may be intuitively discerned by a sophisticated legal intellect but is virtually impossible to define with any precision. The usage of the term judicial activism thus marks the special preserve of the pundits of law.

When one begins to deconstruct the specific uses of the term, such as in Pakistan’s context, it appears to carry several distinct but often related meanings. First and foremost, in both the positive and negative senses, the term refers to judicial lawmaking: expanding, broadly interpreting or even disregarding the literal meanings of constitutional or statutory text or established precedents.<sup>97</sup> Anyone remotely familiar with the workings of a common law system knows that even the most conservative courts do occasionally expand upon established interpretations of text and depart from precedents, especially in the domain of public law.<sup>98</sup> The real issue then is how much,<sup>99</sup> how often,<sup>100</sup> and in what circumstances are the courts entitled to push the boundaries of precedent and legal text? However, determining whether a court is suitably restrained or improperly activist is by its very nature based on the assessment of a threshold or danger line on a slippery slope that a court is not meant to cross.<sup>101</sup>

Second, the term judicial activism can be used to refer to result-oriented judging. It connotes a court that goes beyond the “law” and

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<sup>95</sup> See generally P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561 (1984).

<sup>96</sup> The Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism*, 73 U. COLO. L. REV. 1401, 1401 (2002).

<sup>97</sup> See Bhagwati, *supra* note 95, at 563, 565. One must distinguish between the treatments of different types of precedents. Apex courts often make noticeable distinctions between constitutional, statutory, common laws, and precedents and accord them different treatment. See Kmiec, *supra* note 94, at 1469–70.

<sup>98</sup> Judges who are political conservatives are often as open to the charge of judicial activism as political liberals and progressives. See, e.g., Marshall, *supra* note 94.

<sup>99</sup> See Young, *supra* note 94, at 1151–52.

<sup>100</sup> See Canon, *supra* note 94, at 241–42.

<sup>101</sup> See Young, *supra* note 94, at 1163–64.



relies instead on its understanding of political or policy considerations to deliver an expansive interpretation that unsettles established law.<sup>102</sup> Unless a court is prepared to slavishly confine itself to established precedents and a strictly literalist mode of interpreting a constitution's inherently vague and open-ended language, it will be susceptible to a charge of judicial activism on this plane. When courts expand or depart from precedents, they cannot be said to be basing their decisions on law, strictly speaking. What do such courts base their decisions on: understandings of constitutional politics? Good governance? Underlying policy? Understandings of social good? Again, all lawyers know that common law courts do take into account such non-legal considerations at least to some extent. The use of the term judicial activism is meant to convey that some result-oriented decision-making is acceptable but beyond an abstract line in the sand it becomes problematic.<sup>103</sup>

Increasingly, judicial activism has also been understood as judicial over-reach or even adventurism, and as adjudicating upon matters that lie more appropriately in the political domain, i.e., the "judicialization of politics." In this permutation, the term conveys the meaning that the courts are overstepping constitutional bounds and intruding on the terrain of other state institutions.<sup>104</sup> If courts start laying down too much law too quickly they start acting like political institutions and hence, as per democratic theory, usurp the power that legitimately belongs to the elected institutions of the state. The use of the term judicial activism in this meaning is thus also inherently designed to convey the idea that courts ought to be reasonably conservative. If fundamental questions of justice, the nature of the state, basic liberties and entitlements arise, these questions ought to be left to the other institutions to determine.<sup>105</sup> If courts do not abide by this dictate they will become politicized.

This notion of judicial behaviour articulated imprecisely, sometimes in a positive but more often in a negative sense with an overtone of emotive-rationality, rests on certain foundational assumptions. Leaving aside the question of whether these assumptions are true in more stable political and legal systems, it can be argued that

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<sup>102</sup> See, e.g., Steven G. Calabresi, *The Originalist and Normative Case against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1091, 1094 (2005); Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 298 (1996); Young, *supra* note 93, at 1149–50. See also Canon, *supra* note 94, at 245.

<sup>103</sup> When used in a negative sense, the term judicial activism often means that the critic disagrees with the decision(s) and not much else. See Marshall, *supra* note 94, at 1217.

<sup>104</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–18 (1962).

<sup>105</sup> See, e.g., Graglia, *supra* note 102, at 296.

they are misplaced in most jurisdictions of the Global South. The key assumption—borrowed often from legal systems whose colonial burden is still carried with a great deal of gratitude—is that the law is by and large functional and fair, and hence strict enforcement and legal stability are positive in and of themselves. This idea of the judicial role also rests on the assumption that other democratic institutions are doing their job, or more appropriately in our context will do their job if the other centers of state power—the military, and now more recently the superior courts—stop interfering and let them get on with it. The socio-economic fruits of democracy and rule of law will trickle down in due time, of course. Apolitical, moderately activist and yet reasonably restrained courts are thus of value as they ensure a stable system of governance, democratic continuity, and basic elements of the rule of law.

In a place like Pakistan, with deeply entrenched inequalities in the social, economic, political, and legal domains, there is no terrain of neutrality—no possibility of an apolitical court that simply does the law and very little politics or policy.<sup>106</sup> The courts have three choices. First, the courts can either play their part in bolstering the status quo passively through quietism or actively through politically conservative decision-making. Second, they can challenge the governance system in small ways through moderate activism that does not pose a serious threat but at the same time indirectly legitimize the system by creating a sense of some possibility of relief and incremental reform. Alternatively, the judiciary can destabilize the political dispensation in significant ways. It is simply easier to determine the overt politics of so-called activist courts. It is much harder to discern the subterranean politics of quietist or less activist courts that reinforce the status quo.

As such, there is an altogether different dimension at which the usage of the term judicial activism ought to be understood and evaluated. Courts are considered activist when their politics are out of step with the kind of politics espoused by elected institutions and, even more importantly, the political settlement amongst the dominant elites and so-called civil society. It is then that the negative sense of the term judicial activism is employed most viciously to bring the courts back into line. Another kind of context in which the use of the term becomes salient, and which is much closer to the situation in Pakistan, is when the political establishment is in flux or there is conflict amongst the elites or between the entrenched elites and the middle classes. In such a scenario the courts are put in a difficult position when called upon to act as the arbiters or

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<sup>106</sup> See Bhagwati, *supra* note 95, at 567–68.

mediators of such conflict. There is no pleasing all sides. Invariably the courts are politicized.

Therefore, in a socio-political context such as Pakistan's the question we ought to be asking is not whether the courts are doing law or engaging in politics. Rather, we should be asking what kind of politics the court in question is engaging in. What are the consequences of its politics? Who benefits? Who is disadvantaged? However, before we can meaningfully ask these questions, we need to be open and candid about our own politics. Employing such euphemistic terms as judicial activism or judicial overreach—or rule of law, separation of powers, or even democracy as they are often employed in the public discourse in Pakistan—is designed to hide the user's own politics while critiquing (or legitimizing) the politics of institutional players. This article thus jettisons the use of such loaded and mystifying terminology. It puts the politics of the court front and center. One may or may not agree with the substantive positions advanced herein, but one should heed the call of this article to take the politics of courts seriously.

A. *The Constitutional Politics of the Judicial Activism Critique*

Analyzing the Chaudhry Court's constitutional law jurisprudence in terms of the above discussion on judicial activism, it is evident that while the Court pushed the doctrinal boundaries on several issues, it is difficult to claim that the Court completely disregarded precedent and established law. There were sound legal reasons for the Court's decisions as much as there were for the alternatives that the critics advocated. As such, the criticism centered on the choices made by the Court within legal alternatives available to it. Therefore, the critique of judicial activism was as inherently political as the actions of the Court. For example, Prime Minister Gilani's conviction by the Supreme Court rested on cogent arguments that the refusal to follow the Court's directions in the NRO case amounted to contempt of court.<sup>107</sup> The decision not to argue the defence of presidential immunity before the Court left his legal team with a much more limited defense, arguing the Prime Minister's qualified immunity on the basis that he had acted in good faith, believing the President to be immune from prosecution. This was bound to be a difficult argument as it implied that the Prime Minister had an independent capacity to interpret the constitution even if such an interpretation contradicted an express order of the apex court. In a

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<sup>107</sup> See Criminal Original Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010, (2012) PLD (SC) 553.

similar vein, the subsequent disqualification of the Prime Minister by a three-member bench of the Court was questioned mostly on the grounds of the political impropriety of such an action, rather than its legal basis.<sup>108</sup> Critics argued that the Supreme Court ought to have left the question of disqualification to the Speaker of the National Assembly, a difficult argument as the established case law held that determinations of the Speaker were justiciable in such circumstances.<sup>109</sup> Ironically, the critics of the Court argued for judicial restraint on political rather than legal grounds while at the same time arguing that it was the Court that was acting politically.

Furthermore, the critique of judicial activism in this domain was based more on what the Court was perceived as threatening to do than what it actually did. In the NRO case, for example, the Court’s judgement did not question the validity of the legislation itself.<sup>110</sup> The fears underlying the critique of the Court’s decision, particularly its efforts at enforcing the order regarding the reinstatement of the Swiss case against President Zardari, included the Court threatening to strip him of presidential immunity, thereby preparing the ground for his subsequent disqualification.<sup>111</sup> That threat never materialized and resulted in the government pursuing the flawed legal strategy of never arguing presidential immunity before the Court in either the NRO case or the contempt proceedings against Prime Minister Gilani. Similarly, the main controversy in the 18th Amendment case was based on the Court’s perceived inclination or implied threat to repeal a constitutional amendment on the touchstone of the “basic structure” doctrine as the Indian Supreme Court had done at the height of its activism.<sup>112</sup> Again, the Court did not take such an unprecedented step and the matter was resolved through the 19th Amendment, which accommodated most of the Court’s recommendations. The subsequent decision to hold the findings of the parliamentary committee justiciable and other cases concerning

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<sup>108</sup> See, e.g., Markandey Katju, *Pakistan’s Supreme Court has gone overboard*, THE HINDU (June 22, 2012), <http://www.thehindu.com/opinion/op-ed/pakistans-supreme-court-has-gone-overboard/article3553558.ece>.

<sup>109</sup> See *Siddique v. Fed’n of Pakistan*, (2012) PLD (SC) 660 (Khilji Arif Hussain, J., concurring). The author served as the Judges’ Associate to the Supreme Court bench that decided the so-called Prime Minister’s disqualification case and assisted Justice Khilji Arif Hussain in the research and drafting of his note.

<sup>110</sup> See *Hassan v. Fed’n of Pakistan*, (2010) PLD (SC) 1.

<sup>111</sup> See, e.g., *Court, jirga must be differentiated: Asma Jahangir*, THE INTERNATIONAL NEWS: THE NEWS BLOG (Dec. 23, 2009), [http://old.thenews.com.pk/blog/blog\\_details.asp?id=413](http://old.thenews.com.pk/blog/blog_details.asp?id=413). Compare Moeen Cheema & Shahzad Akbar, “*Liberal*” *Fundamentalism in Pakistan: Objecting to Islamic Arguments in NRO*, JURIST (Jan. 20, 2010, 8:01 AM ET), <http://jurist.org/forum/2010/01/liberal-fundamentalism-in-pakistan.php>.

<sup>112</sup> See *Ahmad v. Fed’n of Pakistan*, (2010) PLD (SC) 1165. On the use of the basic structure doctrine by the Indian Supreme Court, see *Bharati v. State of Kerala*, (1973) 4 SCC 225 (India).

judicial appointments did indeed push doctrinal boundaries.<sup>113</sup> However, such aggressive activism by a court locked in a conflict with the executive and looking to safeguard its hard-won independence is understandable, if not fully justifiable, and certainly not unheard of. After all, both the Pakistani and Indian Supreme Courts exhibited such self-interested jurisprudence in the 1990s.<sup>114</sup>

*B. Back to the Future of Administrative Law: Reincarnation of the Public Interest Litigation of the 1990's*

Just like in the constitutional cases discussed above, the Chaudhry Court's administrative law actions exhibited a limited form of judicial activism. The Court's administrative law jurisprudence was built upon the robust foundations of empowering constitutional text. Landmark precedents of the superior courts had laid the doctrinal groundwork for intrusive judicial review of executive action in the late 1980s and throughout the 1990s. However, the key difference between the administrative law activism of the superior courts in the 1990s and that under the Chaudhry Court was the locus of action. The administrative law activism of the superior courts in the 1990s was centered on the exercise of the writ jurisdiction by the High Courts under Article 199 of the Constitution. Article 199 empowers the High Courts to undertake judicial review and grant the writs of *certiorari*, *mandamus*, *habeas corpus*, and *quo warranto* (without employing those Latin terms).<sup>115</sup>

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<sup>113</sup> See Moeen Cheema & Shahzad Akbar, *Pakistan: New "Judges' Case" in the Making?*, JURIST (Feb. 14, 2010), <http://www.jurist.org/forum/2010/02/pakistan-new-judges-case-in-making.php>.

<sup>114</sup> See *Al-Jehad Trust v. Fed'n of Pakistan*, (1996) PLD (SC) 324. Amongst other things, the Pakistan Supreme Court held that the requirement of consultation with the Chief Justice in judicial appointments entailed effective, meaningful, purposive, consensus-oriented consultation. This meant that the Chief Justice's opinion could not be rejected in the absence of concrete reasons to the contrary. Furthermore, the President could not appoint someone who had been rejected by the Chief Justice. This is often referred to as the "Judges' case." Likewise, in 1994 the Supreme Court of India held in the so-called "second Judges' case" that in judicial appointments the Chief Justice's view held primacy. See *Supreme Court Advocates on Record Association v. Union of India*, AIR 1994 SC 268 (India). The motivation behind this decision was to avoid political appointments. The Court held that no judge could be appointed without the Chief Justice's approval. However, a judge recommended by the Chief Justice could be refused appointment if cogent evidence were provided. In the "third Judges' case," the Supreme Court clarified in a presidential reference that consultation with the Chief Justice effectively meant that the Chief Justice was required to consult with a plurality of judges. See *In re Appointment & Transfer of Judges*, AIR 1999 SC 1 (India). It is notable that the position of the superior judiciary's role in its own appointment has effectively converged in India and Pakistan in the aftermath of the recent decisions of the Supreme Court of Pakistan.

<sup>115</sup> See PAKISTAN CONST. arts 199(1)(a), (b): "(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,—

(a) on the application of any aggrieved party, make an order – (i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of

Article 199 also provides for the High Court’s human rights jurisdiction in rather broad terms: the court can make any “order giving such directions to any person or authority, including any Government [. . .] as may be appropriate for the enforcement of any of the Fundamental Rights . . . .”<sup>116</sup> In the 1990s, the High Courts considerably expanded their writ and human rights jurisdictions with the support of the Supreme Court. Many of these cases had visible political undertones.

For example, it was held that the executive’s interference in appointments of the subordinate judiciary or granting of judicial powers to the bureaucracy violated the trichotomy of powers principle.<sup>117</sup> The superior courts also sought to curtail the powers of the executive to legislate through ordinance.<sup>118</sup> In matters related to criminal process, the High Courts were held to have considerable power in terms of directing the registration or quashing of criminal cases, but not to the extent of continuing control or supervision of the trial.<sup>119</sup> The High Courts also scrutinized preventative detention and went to the extent of awarding compensation for illegal detentions by the police.<sup>120</sup> While the High Courts considerably expanded their judicial review of executive action jurisdiction in the 1990s, with the backing of the Supreme Court, the text of Article 199 imposed some constraints nonetheless. Writs could be brought only upon application of an “aggrieved person” and, except in cases of *habeas corpus* and *quo warranto* writs, only in circumstances

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the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order – (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office[.]

<sup>116</sup> See PAKISTAN CONST. art. 199(1)(c) (“Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law . . . on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II.”).

<sup>117</sup> See *Gov’t of Sindh v. Faridi*, (1994) PLD (SC) 105. The Supreme Court upheld the Sindh High Court’s directions to the provincial government to separate judicial magistracy from executive magistracy and place judicial magistrates under the authority of the High Court. *Faridi v. The Fed’n of Islamic Republic of Pakistan* (1989) PLD (Karachi) 404 (*aff’d*, (1989) PLD (SC) 105). In *Gov’t of Balochistan v. Memon*, (1993) PLD (SC) 341, the Supreme Court upheld the High Court’s decision that a 1968 ordinance was unconstitutional to the extent it gave powers to the bureaucracy to take cognizance of and try certain offenses.

<sup>118</sup> See, e.g., *Khan v. Fed’n of Pakistan*, (1993) PLD (Lahore) 70; *Harvi v. Fed’n of Pakistan*, (1999) PLD (Lahore) 320; *Government of Punjab v. Ziaullah*, (1992) SCMR (SC) 602.

<sup>119</sup> See *Dogar v. Qasim*, (1994) PLD (SC) 281.

<sup>120</sup> See, e.g., *Parveen v. District Magistrate*, (1988) PLD (Lahore) 611; *Mazharuddin v. State*, (1998) PCrLJ (Karachi) 1035.



where there was no suitable alternate remedy.<sup>121</sup> The High Courts loosened both the requirements of a lack of alternate remedy and *locus standi*, particularly in cases falling under their fundamental rights jurisdiction, but the text of Article 199 remained a significant obstacle.<sup>122</sup> As such, by the end of the 1990s the writ jurisdiction of the High Courts had become the preserve of urban elites who could afford to employ the better lawyers and increasingly found in the writ a more efficacious avenue for challenging governmental action that affected their interests.<sup>123</sup>

The Original Jurisdiction of the Supreme Court under Article 184(3) of the Constitution emerged as the avenue for a truer form of Public Interest Litigation (PIL) in the 1990s. Article 184(3) enables the Supreme Court to take up any matter of “public importance with reference to the enforcement of any of the Fundamental Rights” and grant any remedy in the nature of those provided for in Article 199.<sup>124</sup> While the language of the Article 184(3) had been enabling from the beginning, it took the Court nearly two decades to construct the jurisprudential basis for such a transformation. During the 1990s, the Supreme Court first whittled down the requirement of standing to the point that any *bona fide* representative could bring a petition on behalf of an effected group or class, then took it further to the point that the Court itself could initiate cases *suo motu*.<sup>125</sup> The Court also adopted the methodology of “rolling review” from the Indian Supreme Court, issuing interim orders in successive hearings rather than one final decisive judgment, and supervising executive action on a periodic basis.<sup>126</sup> Furthermore, the Court also acted as or appointed judicial commissions investigating various facets of governance. The ambit of fundamental rights was also broadened to include socio-economic rights within the umbrella of the right to life.<sup>127</sup> It must be noted, however, that such broadening of rights was designed mostly to bring cases within the Court's judicial review

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<sup>121</sup> See PAKISTAN CONST. art. 199(1)(a), (c).

<sup>122</sup> On the loosening of the requirement of no adequate alternate remedy, see *Adamjee Ins. Co. v. Pakistan*, (1993) SCMR (SC) 1798; *Ismail v. Zada*, (1996) PLD (SC) 246. Compare *Malik v. Assistant Commissioner*, (1996) SCMR (SC) 710; *Sharif v. State*, (1997) SCMR (SC) 1361. On the relaxation of the rules of standing, see *Multiline Associates v. Cowasjee*, (1995) SCMR (SC) 362; *Cowasjee v. Karachi Building Control Auth.*, (1999) SCMR (SC) 2883.

<sup>123</sup> See Werner Menski, *Public Interest Litigation: A Strategy for the Future, The Fourth Cornelius Memorial Lecture*, in PUBLIC INTEREST LITIGATION IN PAKISTAN 122–24 (W. Menski et al. eds., 2000).

<sup>124</sup> PAKISTAN CONST. art. 184(3).

<sup>125</sup> See *Bhutto v. Fed'n of Pakistan*, (1988) PLD (SC) 416; *Masih v. State*, (1990) PLD (SC) 513 (the *Masih* case, decided in 1989, was a *suo motu* case based on a telegram sent to the court by a bonded brick kiln laborer that was converted into a petition).

<sup>126</sup> *Masih v. State*, (1990) PLD (SC) 513, is a prime example of this.

<sup>127</sup> See, e.g., *Ms. Shehla Zia and others v. WAPDA*, (1994) PLD (SC) 693.

jurisdiction and not necessarily to enable the Court to grant substantive remedies and binding directions for their enforcement.

The one thing constraining the Court's Original Jurisdiction in the 1990s was the definition of “public importance,” which required that questions of public importance must affect people at large and not just identifiable groups or classes.<sup>128</sup> The Court thus took up a narrow set of issues related mostly to the elaboration of fundamental rights and increasingly issued directions to governments to amend existing laws and regulations. With this quasi-legislative power the Court resembled a potent law reform commission with the power to recommend, or at times compel, lawmaking. Nonetheless, the Supreme Court took up a relatively small number of cases under its Original Jurisdiction, and by and large confined itself to issuing guidelines or directions to the executive, which were generally ignored. This left the impression of a court making bold rhetorical pronouncements on fundamental rights, but having no impact on the ground. By the end of the 1990s, the Supreme Court's PIL had also lost its luster, partly due to its inefficacy and partly due to the politicization of the Supreme Court due to internal divisions.<sup>129</sup> The Supreme Court used the pretext of an increased backlog of cases and progressively curtailed its PIL jurisdiction. This was the jurisprudential legacy that the Chaudhry Court inherited, interrupted by the exigencies of military rule in the first half-decade of General Musharraf's tenure.

### C. *The Proactivism of the Chaudhry Court*

As such, the Chaudhry Court's public law jurisprudence can hardly be labelled as judicial activism because the term refers more appropriately to courts stretching established jurisprudential principles and developing novel interpretations of law. If anything, the Supreme Court exhibited “judicial proactivism” because it applied pre-existing principles, exercised established powers, and granted traditional remedies in an unprecedented number of cases, many of which were taken up on its own initiative and with an alacrity that kept the structural failings of the administrative set-up continuously in the spotlight. The Supreme Court

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<sup>128</sup> See, e.g., *Mehdi v. Pakistan Int'l Airlines Corp.*, (1998) SCMR 793.

<sup>129</sup> Of all the cases decided in the second half of the 1990s, none did more damage to the standing of the Supreme Court than *Ali v. Fed'n of Pakistan*, (1998) PLD (SC) 161. This case concerned a challenge to the constitutionality of the appointment of the incumbent Chief Justice. While a larger bench of the court was hearing that case, a three-member bench headed by the Chief Justice struck down the 13th Amendment to the Constitution, restoring the President's power to dissolve parliament that had been revoked by the amendment. The 10-member bench immediately stayed that order and restrained the Chief Justice from performing any judicial or administrative functions. Ultimately, the larger bench ruled unanimously that the Chief Justice's appointment was unconstitutional. The split on the Court and the dismissal of the Chief Justice marked a low in prestige for the Supreme Court.

thus transformed its Original Jurisdiction from an exceptional avenue for the enforcement of fundamental rights to an easily accessible forum for the deliberation of constitutional and legal questions affecting “public interest.” This transformation of the Original Jurisdiction under Article 184(3) began when the Court started to define questions of “public importance” more broadly.<sup>130</sup> In the Chaudhry Court's interpretation of the constitutional republic, any matter related to the interpretation and enforcement of the Constitution affected the public at large and was necessarily a matter of significance.<sup>131</sup> As such, any politically minded citizen had the right to challenge the interpretation and enforcement of the Constitution.

This principle was soon extended to the interpretation and enforcement of laws of general applicability so that any citizen could challenge the legality of any law subject to the court's inherent discretion. Accordingly, the Court began to hear cases involving individual grievances against the abuse of laws, police powers and bureaucratic discretion.<sup>132</sup> When Justice Chaudhry established the Human Rights Cell in the Supreme Court, it institutionalized the Court's proactivism in initiating *suo motu* and human rights cases. It was thus the Chaudhry Court that transformed Pakistan's constitutional and administrative law into a truly *public* law and the Original Jurisdiction of the Supreme Court into a tool of Public Interest Litigation (PIL) in an accurate sense of that phrase. It is debatable whether the Chaudhry Court's proactivism has been any more effective than the PIL activism of the Supreme Court in the 1990s in terms of undermining the culture of abuse of power that permeates the executive. Nonetheless, as noted earlier, the Court's efforts at regulating the administrative apparatuses have shown the pathology of the postcolonial state and unmasked the full extent of its illegalities, the mass of *de jure* and *de facto* discretionary and unaccountable powers built into the state structures, which have historically rendered them amenable to elite dominance. Most significantly, the Chaudhry Court's administrative law proactivism has highlighted the absence of any other form of redress, whether judicial or administrative, against the illegalities of the post-colonial state and its allied elites.

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<sup>130</sup> See, e.g., *Bank of Punjab v. Haris Steel Ind. Ltd.*, (2010) PLD (SC) 1109.

<sup>131</sup> See *Sharif v. Fed'n of Pakistan*, (2004) PLD (SC) 583 (noting that the two requirements of Article 184(3) are practically merged into one). See also *Siddique v. Gov't of Pakistan*, (2005) PLD (SC) 1.

<sup>132</sup> See, e.g., *Human Rights Case No.1356-P of 2009*, (2011) PLD (SC) 17 (Application of Bibi Fatima for recovery of her daughter Mariam),.

D. *Explaining and Evaluating the “Judicialization of Politics” in Pakistan*

The public law proactivism of the Supreme Court under former Chief Justice Chaudhry brought the supposed distinction between law and politics to the forefront of public discourse in Pakistan. While the Chaudhry Court was increasingly criticized for engaging in judicial activism, that critique holds little analytical value as it rests on the conservative and unrealistic notions of an apolitical judiciary and hard distinctions between law and politics. These notions are unrealistic because the Supreme Court’s role, like that of any apex court with constitutional and administrative law jurisdiction, has always been deeply and structurally political. These notions are conservative because they seek to provide a veneer of apolitical legitimacy to inaction and pro status quo politics of courts. The increasing judicialization of politics is the norm around the world,<sup>133</sup> and most recently courts in Asia have become noticeably activist.<sup>134</sup> However, the judicialization of politics is as much a new reality as it is changing perception. As Martin Shapiro poignantly notes, the term implies that:

[C]ourts did not do much politics yesterday, but do a lot today. And surely there was some real global spread of and increased significance of judicial interventions in public policymaking in the latter half of the twentieth century and beyond . . . . [But] to a very large degree it is not so much that courts do more now as that students of politics now see more of what courts do.<sup>135</sup>

Therefore, a much more significant and rewarding mode of inquiry focuses not on whether courts are activist or restrained but rather on the underlying causes of judicial activism and restraint and the evaluation of the political consequences of the court’s actions and inactions. To borrow from Upendra Baxi:

[A] fruitful analysis of the activity of the Court can begin only when we broadly agree that judicial process at the

<sup>133</sup> See generally THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 7; ON LAW, POLITICS, AND JUDICIALIZATION, *supra* note 7; HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 7; RULE BY LAW, *supra* note 7.

<sup>134</sup> See generally JUDICIALIZATION OF POLITICS IN ASIA, *supra* note 7; NEW COURTS IN ASIA (Andrew Harding & Penelope Nicholson eds., 2010); ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

<sup>135</sup> Martin Shapiro, *Courts in Authoritarian Regimes*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 326, 329 (Tom Ginsburg & Tamir Moustafa eds., 2008).

Supreme Court (and appellate) levels is a species of political process and that constitutional adjudication is essentially a political activity expressed through the medium of legal and jurisprudential language and action. It is only when we accept that the Court is *doing* politics, in this sense, that the question can arise as to what *kind* of politics it ought to do in a free society: the politics of justice or politics of power? the politics of order or of change? the politics of status quo or that of innovation? the politics of survival or that of aspiration? the politics of establishment or that of opposition? the politics of today (the immediate present) or of tomorrow and the day after (the immediate future)? the politics for the people or politics *against* the people? the politics of hope or the one of despair?<sup>136</sup>

Ran Hirschl has advanced a highly influential account of the global phenomena of judicialization of politics.<sup>137</sup> Just as Baxi critiques the calls for judicial restraint on the touchstone of apolitical and neutral constitutionalism, Hirschl challenges the valorization of rights-based constitutionalism as inevitable and inherently valuable.<sup>138</sup> Hirschl sees judicial review centered on adjudication of constitutional rights not only in terms of unelected courts dominating political decision-making but as part of a broader movement whereby political and policymaking power is shifted to semi-autonomous and professional institutions and as a result to those classes and groups that have access to and influence upon such institutions.<sup>139</sup> As such, the “constitutionalization of rights is . . . often not a reflection of genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by threatened elites to bolster their own position in the polity.”<sup>140</sup>

Hirschl considers judicialization of politics to be a product of strategic interplay and alignment of the interests of otherwise competing elites: political elites seeking to shield policymaking from democratic political processes in which they are likely losers, economic elites that see constitutionalization of rights as a means to achieve security and stability of contract and private property rights, and judicial elites that are mindful,

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<sup>136</sup> BAXI, *supra* note 6, at 28.

<sup>137</sup> See HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 7; Hirschl, *The New Constitutionalism*, *supra* note 7; Hirschl, *The Judicialization*, *supra* note 7.

<sup>138</sup> HIRSCHL, TOWARDS JURISTOCRACY, *supra* note 7, at 218.

<sup>139</sup> *Id.* at 12.

<sup>140</sup> *Id.*

at least to some extent, of their own institutional interests.<sup>141</sup> These pro-judicialization elites are bolstered by urban intelligentsia, the legal profession, and the managerial classes, all of whom also stand to benefit from the judicialization of politics.<sup>142</sup> The voluntary ceding of power to judiciaries by political elites that are ascendant in the democratic processes can also be explained as attempts by such elites to avoid responsibility for politically costly decisions.<sup>143</sup> The motivation for such voluntary ceding is particularly strong when elected governments foresee losing power in the future and judicialization becomes a means to entrench policies and limit the future options of political opponents and successor governments.<sup>144</sup> Judiciaries are themselves an important strategic player in that they see judicialization as a means to improve the power of the judicial institutions in the state structure as well as a means to enhance the reputation and prestige of judges compared to other institutions.<sup>145</sup> This “hegemonic preservation thesis” thus sees judicialization of politics as “part of a broader process whereby self-interested political and economic elites, while they profess support for democracy and sustained development, attempt to insulate policymaking from the vagaries of democratic politics,”<sup>146</sup> and not as a “significant step towards egalitarianism.”<sup>147</sup>

The Pakistani situation seems to fit Hirschl’s framework, which helps explain several facets of the politics and jurisprudence of the Chaudhry Court. The constitutional actions of the Chaudhry Court, and the resultant judicialization of politics, appear at least partly to be informed by a strategy to enhance its public prestige and to advance the position of the judiciary relative to the elected executive and legislature.<sup>148</sup> At the same time, much of the administrative law proactivism of the Court was designed to secure some independence for the apex bureaucracy, policing institutions, regulatory bodies and economic policymaking from the elected executive dominated by the PPP. The PPP government voluntarily ceded considerable power to the judiciary consistent with Hirschl’s thesis except when it perceived its very existence and vital interests to be at stake. The opposition political parties, especially the PML(N), was often the petitioner in important public law cases, using such litigation as a means to elicit concessions

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<sup>141</sup> *Id.* at 12, 43.

<sup>142</sup> *Id.* at 44.

<sup>143</sup> *Id.* at 39–40.

<sup>144</sup> *Id.* at 41–42.

<sup>145</sup> *Id.* at 46.

<sup>146</sup> *Id.* at 217.

<sup>147</sup> *Id.* at 218.

<sup>148</sup> See Mirza, *supra* note 56.



from and embarrass the PPP government.<sup>149</sup> Most significantly, much of the jurisprudence of the Chaudhry Court aligned with the interests of the departing hegemon: the military establishment and its allied classes. The narrative of political corruption and the instability caused by the Court's persistent scrutiny compelled the elected PPP government to quickly cede national security and foreign policy-making power almost exclusively to the military.

However, there are also several noticeable aspects of the Chaudhry Court's constitutional politics and jurisprudence that do not fully accord with Hirschl's judicialization thesis. As noted in the preceding sections, while the Court indirectly assisted the military in regaining ascendancy in the national security and foreign policy domains, it also challenged the security establishment's impunity in cases of enforced disappearance and held certain of its actions justiciable. The Court's sporadic interventions in economic policy-making were more a challenge to elite economic interests rather than a means to assure security to contractual, private property and foreign investment related interests of the dominant economic classes.<sup>150</sup> Most significantly, the Court's attempts at garnering a broader political constituency that it could leverage in its jostling for position with the elected institutions and the military incentivized it to take up non-elite causes. The Court's human rights jurisdiction, the *suo motu* cases challenging abuse of police and bureaucratic powers, and the work of the Human Rights Cell were instrumental in gaining for it the necessary support from segments of Pakistan's broader population—and not just the support of opposition political parties and lawyers' collectives—which served as vital political capital in its protracted conflict with the elected executive.

The case study of the Chaudhry Court thus confirms as much as it complicates the judicialization of politics thesis. While much of the constitutional politics and jurisprudence of the Chaudhry Court aligns with strategic play of elite interests, including those of the judicial elite, there is at least one aspect—the proto-democratic dimension of the Court's public law proactivism—that cannot be fully explained within Hirschl's framework. While this does not raise a fundamental challenge to the explanation and evaluation of judicialization of politics on Hirschl's terms, it does certainly place a rider on the impulse to

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<sup>149</sup> See, e.g., *Asif v. Fed'n of Pakistan*, (2013) SCMR (SC) 1205. See also *Watan Party v. Fed'n of Pakistan*, (2012) PLD (SC) 292 (the "Memo case").

<sup>150</sup> See, e.g., *Baloch v. Gov't of Balochistan*, (2013) PLD (SC) 641 (the Reko Diq case). For a detailed analysis of that case, see Sadaf Aziz, *The Politics of Anti-Corruption*, in *POLITICS & JURISPRUDENCE*, *supra* note 2 at 253.

characterize judicialization of politics everywhere and at all times to be of questionable value. In fact, the case study of the Chaudhry Court calls upon this judicialization framework to take its own fundamental premise seriously—that of the political contingency of judicialization. The politics of judicialization, like all forms of politics, is temporally unstable and rests on shifting alignments of class and group interests.<sup>151</sup> As such, while judicialization of politics may structurally and consistently advance elite interests and undermine democratic politics, it may occasionally and not insignificantly offer avenues of resistance and become a mode for re-energizing democratic politics. The Chaudhry Court of Pakistan offered us a fleeting glimpse of egalitarian political possibilities of judicialization.

#### V. A POSTSCRIPT IN LIEU OF A CONCLUSION

With the end of the Chaudhry Court era in December 2013, the Supreme Court faced an unenviable choice: to persist with a campaign to curb the illegalities of the executive or to make a strategic retreat and thereby effectively let itself be co-opted in the governance arrangement. It chose the latter option. The charge of judicial activism had resonated to such an extent that the Supreme Court, post-Chaudhry era, adopted a position of judicial restraint on a range of political questions that were raised before it. The *suo motu* and human rights jurisdictions dwindled and the Supreme Court progressively resettled into a more traditional judicial role. However, what has been learned, that is the extent of the illegalities of the postcolonial state and its nexus with political power and social hierarchy, cannot be unlearned; it can only be ignored. The range of grievances that were highlighted by the Chaudhry Court’s public law proactivism have not been resolved but only marginalized once again.

The post-Chaudhry Supreme Court went further than merely slipping back into a quieter mode. As various chief justices served relatively short tenures dictated by the constitutionally fixed retirement age and the vagaries of birth dates, at times the Court went to the extent of visibly reversing decisions of the Chaudhry era through a liberal use of its review jurisdiction. A remarkable example of this phenomenon is the Khwaja Muhammad Asif case.<sup>152</sup> In response to a petition brought by a prominent member of the opposition PML(N), the Chaudhry Court had directed the establishment of an independent commission for overseeing and advising on key appointments to regulatory bodies and public

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<sup>151</sup> See Bjorn Dressel, *The Judicialization of Politics in Asia: Towards a Framework of Analysis*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 1, 10–11 (Bjorn Dressel ed., 2012).

<sup>152</sup> *Asif v. Fed’n of Pakistan*, (2013) SCMR (SC) 1205.

corporations. In a complete reversal of its position after coming into power, the PML(N) government filed a petition for the review of the judgment arguing that the decision undermined the Prime Minister's constitutional prerogative. The Supreme Court overturned its earlier ruling upon such a review.<sup>153</sup> Which of the two decisions—the original one or the reversal on review—was legal and which political? Such decisions further highlight the artificiality of the law-politics distinction that the use of the term judicial activism is premised on.

Even in regards to the Supreme Court's restraint on political controversies, it has largely served to undermine rather than bolster democratic politics. Ironically, the decision of the Chaudhry Court that has left the most significant political legacy for post-Chaudhry political landscape of Pakistan was a rare instance of non-intervention. Having overseen the transition from one elected government to another for the first time in Pakistan's political history, the Chaudhry Court faced immediate demands from the Pakistan Tehrik-e-Insaf (PTI), led by cricketer-turned-politician Imran Khan, which emerged as the second largest party in terms of total votes polled, to probe allegations of systemic rigging. Relying on Article 225 of the Constitution which vests exclusive jurisdiction to determine election disputes in specially constituted election tribunals, the Chaudhry-led bench declined to set up a commission to investigate the charges of large-scale electoral fraud.<sup>154</sup> While strictly in accordance with the text of the Constitution and the established practice of the Court of not interfering in individual single-constituency disputes in electoral matters, the decision appeared to be a clear departure from its more recent interventionist stance.<sup>155</sup> Given that

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<sup>153</sup> See Nasir Iqbal, *SC revisits appointments case judgment*, DAWN (Nov. 15, 2014, 06:17 AM), [www.dawn.com/news/1144590](http://www.dawn.com/news/1144590). In another remarkable example, the Supreme Court recently reversed a decision delivered merely months earlier. See Asher A. Qazi, *Birds and judicial politics*, THE NATION (Mar. 11, 2016) <http://nation.com.pk/columns/11-Mar-2016/birds-and-judicial-politics>.

<sup>154</sup> See PAKISTAN CONST. art. 225 ("No election to a House or a Provincial Assembly shall be called into question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora [Parliament].").

<sup>155</sup> Contrast from the cases disqualifying members of Parliament for dual citizenship or fake degrees. See *Gill v. Aziz*, (2010) PLD (SC) 828; *Owaisi v. Waran*, (2013) PLD (SC) 482; *Naqvi v. Fed'n of Pakistan*, (2012) PLD (SC) 1089. Likewise, in the Prime Minister's disqualification case, *Muhammad Azhar Siddique v. Federation of Pakistan*, (2012) PLD (SC) 660, the court similarly grappled with the question whether the qualifications and disqualifications of a member of Parliament were matters exclusively to be determined by the Election Commission. See PAKISTAN CONST. art. 63(2) ("If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within thirty days and should he fail to do so within the aforesaid period it shall be deemed to have been referred to the Election Commission."); *id.* art. 63(3) ("The Election Commission shall decide the question within ninety days from its receipt or deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant.").

members of the lower judiciary had acted as the Returning Officers in the May 2013 elections, the judiciary’s institutional role in the conduct of elections became controversial.<sup>156</sup>

In August 2014, more than a year after the conduct of elections and while the overwhelming majority of election petitions remain unresolved, the PTI launched a protest movement beginning with yet another “Long March” on the capital Islamabad. By December 2014, a protest sit-in continued in front of the Parliament house in Islamabad, and the PTI organized public meetings and called for strikes and protest marches in various urban centers all over the country. The ghosts of eras past—speculations of tacit support of the protesters by the military or even threat of direct military intervention—re-emerged to haunt Pakistan’s political landscape.<sup>157</sup> All this while the Supreme Court, the only institution seemingly capable of resolving this toxic political deadlock in a constitutional manner, sat quietly on the sidelines implicitly adhering to a resurrected “political question” doctrine. This legacy of the Chaudhry Court’s non-intervention—the refusal to investigate allegations of electoral rigging—provides the starkest example of political instability caused by judicial restraint. The course of judicial restraint or judicial quietism is thus as political as the decision to pursue judicial activism. The proof of judicial politics, like all forms of politics, is in its consequences.

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<sup>156</sup> The PTI alleged large-scale rigging by the Returning Officers and criticized the Supreme Court’s refusal to investigate electoral malpractice. The Supreme Court charged PTI chairman Imran Khan with contempt of court. See Zahid Gishkori, *Rigging allegations: SC issues a contempt notice to Imran Khan*, EXPRESS TRIBUNE (July 31, 2013), <http://tribune.com.pk/story/584546/rigging-allegation-s-supreme-court-issues-a-contempt-notice-to-imran-khan/>. While the contempt charges were subsequently withdrawn upon the tendering of a carefully worded apology, the allegations persist.

<sup>157</sup> See Tim Craig & Shaiq Hussain, *Protesters march towards Pakistan’s Parliament in sign of deepening crisis*, WASHINGTON POST (Aug. 19, 2014), [http://www.washingtonpost.com/world/asia\\_pacific/pakistans-sharif-enlists-army-to-secure-high-security-zone-ahead-of-protests/2014/08/19/1ea58938-27a9-11e4-8593-da634b334390\\_story.html](http://www.washingtonpost.com/world/asia_pacific/pakistans-sharif-enlists-army-to-secure-high-security-zone-ahead-of-protests/2014/08/19/1ea58938-27a9-11e4-8593-da634b334390_story.html); *Rebutting allegations: Army, ISI not backing protesting parties, says ISPR*, EXPRESS TRIBUNE (Sept. 02, 2014), <http://tribune.com.pk/story/756813/rebutting-allegations-army-isi-not-backing-protesting-parties-says-ispr/>; Katharine Adeney, *Shadow of military looms large over Pakistan street protests*, THE CONVERSATION (Sept. 02, 2014), <http://theconversation.com/shadow-of-military-looms-large-over-pakistan-street-protests-31132>.