

The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement*

Introduction

Contemporary literature on the judicialization of politics highlights its global expansion across a vast range of legal jurisdictions. It traces the “spread of legal discourse, jargon, rules and procedures into the political sphere and policy-making fora and processes,” as well as “the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and “ordinary” rights jurisprudence.”¹ At the same time, it underlines the emergence of a third and interrelated class of judicialization of politics, the “reliance on courts and judges for dealing with what we might call ‘mega-politics:’ core political controversies that define (and often divide) whole polities.”² Pakistan’s contemporary constitutional jurisprudence furnishes a significant case study for the sustained escalation of this latest and most controversial brand of judicialization of politics. This Chapter analyzes the background reasons for and the distinctive nature of the contemporary engagement of Pakistani judges in mega-politics as well as that engagement’s complex implications for democratic politics and the institutional balance of power. It also endeavors to explore the essential links between such judicialization and the persistence of unstable constitutionalism in the country.

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¹ See Ran Hirschl, “*The Judicialization of Politics*,” in THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira eds., Oxford University Press 2008) at 121.

² Id. at 123.

Extant scholarship attributes the global growth in the judicialization of politics to multiple institutional, political, and judicial behavioral factors. The existence of tangible rights, an enabling constitutional framework, and an independent judiciary with an activist outlook are widely accepted as vital prerequisites for judicial involvement in the political domain – whether as a consequence of political actors promoting their policy preferences through courts rather than through “majoritarian decision-making arenas” or as the outcome of legal mobilization by public and community groups in order to seek social change through constitutional litigation.³ Simultaneously, the level of receptivity of the political domain to any judicial overtures and excursions has a crucial bearing on the pace and scope of the judicialization of politics. Political tolerance of and indeed even support for judicialization may be driven by the imperatives of efficient monitoring of the expanding administrative state through the judiciary, the robustness and internal coordination of various players in a jurisdiction committed to rights advocacy litigation in society, and, the strategic use of the courts by politicians motivated by a range of reasons (e.g., in order to avoid responsibility and transfer politically contentious matters to the courts, to harass and obstruct opponents, to seek exposure or legitimacy, and the like).⁴ In important ways the evolution and growth of the judicialization of politics in Pakistan can be attributed at several levels and through different periods to these institutional and political factors.

Yet, this is not the entire explanation. The ideologies, behavior, tendencies, inclinations, and foibles of powerful individuals also seem to be unavoidable contributing factors. Existing scholarship recognizes the rise of “philosopher king courts” and the keenness of certain judges to delve deeply in public policy-making due to a host of institutionally strategic, turf-management, and personal power and prestige expansion considerations.⁵ However, while conceding that courts are first and foremost political institutions and that they do not operate in an institutional

³ Id. at 129-130.

⁴ Id. at 136-137.

⁵ Id. at 132-134

or ideological vacuum, Ran Hirschl finds it misguided to contend that courts and judges, and indeed their institutional and individual pursuit of power, can be the main source of the judicialization of politics.⁶ While emphasizing the necessity of political support for judicialization, this particular perspective highlights instances of political backlash against judicial activism. Hirschl cites episodes of politicians clipping the wings of zealous courts, legislative override of controversial rulings, court-packing, political tinkering with judicial appointments and tenure procedures, and the like as illustrating the necessity of a receptive political environment for the growth of the judicialization of politics.⁷ In this scholarly context, this Chapter examines the judicialization of politics in Pakistan over the past several years. It suggests that scholars may be underestimating the significance of charismatic, popular, and powerful judges and the pivotal role they may play, individually or as a group, in promoting a particularly aggressive, multifarious, and complex brand of the judicialization of politics. This is not to suggest that institutional and political factors have not played a multi-tiered role in placing the Pakistani judiciary in a position to embark on hyper-activism. Or, that there has been no political discontent with and consequent backlash against that activism. Nevertheless, this Chapter contends that the special circumstances generating the particular variant of the judicialization of politics prevalent in Pakistan – and the strategies, tone and tenor, and qualitative nature of judicial interventions – make it less amenable to being slotted in the currently understood categorizations of factors contributing to this phenomenon. Additionally, the Pakistani experience raises important questions about existing understandings of the relative significance of institutional, political, and judicial behavioral dimensions as contributory factors towards the judicialization of politics. It thus merits a close look to enrich and possibly recalibrate our current conception of this phenomenon.

Part I briefly discusses the broad nature and manifestations of the judicialization of politics in Pakistan during periods of martial law as well as democratic rule. Part II analyzes the particular

⁶ Id. at 134.

⁷ Id. at 138.

political and institutional circumstances under General Pervez Musharraf that contributed towards the emergence of the current judicial leadership and its distinctive ethos and method of involvement in political and policy spheres. Part III then examines the genesis and implications of the Pakistani Lawyers' Movement (hereafter the 'Movement') and its role in the transformation of the current Chief Justice of the Supreme Court from a pliant and relatively obscure judge in his early career to, along with his colleagues, a veritable power house in subsequent years. Part IV studies the background, nature, and political implications of the Supreme Court's highly controversial jurisprudence over the past five years. Part V concludes with some observations about the legacy and future of the most activist court in the region's history and the implications of its experience for our understanding of the phenomenon of the judicialization of politics.

Part I. The Emergence of the Judicialization of Politics in Pakistan

A brief overview of Pakistan's past constitutional history is helpful to contextualize the nature of the judicialization of politics the country has witnessed. At the cost of three different constitutional arrangements reached in 1956, 1962, and 1973, the military establishment and its civilian collaborators have routinely ushered different generals into power with their stark agendas and eventually aborted plans of political and social engineering. The coup-makers required regime legitimization and most judges were willing to oblige. Judicial legitimization of *coups d'état* was conjured from the sayings of Cicero – '*salus populi supreme lex esto*' (let the good of the people be the supreme law) or Henry de Bracton – '*illud, quod alias licitum non est necessitas facit licitum*' (that which is not otherwise lawful, necessity makes lawful).⁸ An Austrian legal positivist was invoked to the rescue of military adventurers as Hans Kelsen discovered to his shock at the Pakistan Supreme Court's interpretation of aspects of his

⁸ See Leslie Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity*, *Third World Quarterly*, Vol. 1, No. 4 (Oct., 1979) 98.

'*Allgemeine Staatslehre*' (general theory of law and state).⁹ Imam Abu Hanifa's philosophical postulations in the eight century CE on distinctions between an *Imam bil Haq* (*de jure* ruler) and an *Imam bil Fehl* (*de facto* ruler) were ascribed a positivist connotation for embracing a *khaki* (that is military) usurper; the concepts of *halal* (permissible) and *haram* (forbidden) under *Fiqh* (Islamic jurisprudence) that narrowly applied to certain areas of individual necessity were imaginatively upgraded as cogent parameters within the realm of state necessity. And, all of this, while principles belonging to criminal law or strictly applicable during times of war were found applicable to constitutional law or times of peace.¹⁰ These interpretive feats were as novel as they were disingenuous. They contributed to sustaining a milieu characterized by a truncated constitutional culture, weak democratic norms and institutions, and, an underdeveloped discourse on rights and obligations. Their resulting legacy is that of a highly 'unstable constitutionalism.'

Regime legitimization through judicial endorsement in the wake of direct martial rule during the 1950s, 1960s, 1970s, and most recently in the 1990s is the most overt example of the judicialization of politics in Pakistan. In the interregnums between martial rule there have been pale reflections of democratic rule; often in the limited sense that governments were at least elected. These truncated stints of civilian rule between the long days and nights of the Generals have been plagued by acute insecurity. They were contested and destabilized by an artificial political class and "Kings' Parties" imagined and fashioned by the junta. They were characterized by weak governance further exacerbated by entrenched political and economic interests and frantic rent-seeking. The perennial civilian anxiety is unsurprising since no elected Pakistani government completed its tenure and handed the baton to the next one until 2013.¹¹ As a consequence, the strategic employment of courts to stabilize power and/or to destabilize

⁹ Id. See also Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 Cornell Int'l L.J. 49 (Winter 1994).

¹⁰ See for instance, *Begum Nusrat Bhutto v. Chief of the Army Staff*, PLD 1977 SC 657.

¹¹ This was the Pakistan Peoples Party's (PPP) coalition government which gave way to its successors as a result of the general elections held in May, 2013.

political opponents – since politics was fragmented and the judiciary increasingly politicized – has been the norm rather than the exception. With majoritarian politics even more capricious than usual elsewhere, the law of the courts was molded into a potent tool for political perpetuation.

The 1990s presented an indirect and more pernicious mode of military control of politics. Unstable constitutionalism and an undesirable judicialization of politics were its unavoidable outcomes. The military dictator General Zia-ul-Haq amended the Constitution, thereby allowing the President – an office that he had usurped – to sit in subjective judgment over the performance and fate of elected governments. Ushering in electoral democracy, albeit a tightly controlled one, had become unavoidable as Zia's regime eventually lost international and local collaborators. Thus, Article 58(2)(b) allowed the President to dissolve the national assembly in his 'discretion' where in his 'opinion,' 'a situation had arisen in which the government of the Federation could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate was necessary.'¹² The adverse ramifications were deep and far-reaching. The basic structure of the 1973 Constitution fell into disarray. An essentially parliamentary form of government led by a Prime Minister and her Cabinet became a disharmonious hybrid with a very powerful, unaccountable, and increasingly partisan President.¹³

Between 1988 and 2007, four successive governments were dissolved by three different Presidents – the first being Zia himself, and the others having close links with the military establishment and its civilian allies. Each dissolution was taken to the courts, which were confronted with the ultimately political task of interpreting and applying a constitutional

¹² This amendment was introduced through The Constitution (Eighth Amendment) Act, 1985, § 5 (Pak.).

¹³ See Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents*, 23 *Ariz. J. Int'l. & Comp. L.* 624-636 (2006), [hereinafter *Jurisprudence of Dissolutions*].

amendment that was completely at odds with the Constitution's ethos and overall framework. The dissolutions were invariably *mala fides*, based on controversial facts and overbroad allegations. They took place in settings where the elected governments were weak, besieged by innumerable problems inherited from the martial law era and by parochial political opposition, with barely any time to settle down.¹⁴ With the motivations for dissolution being blatantly political, it came as no surprise when the eventual judicial dispensations were equally political. According to one study, not only did the purportedly objective legal and interpretive 'test' to gauge the legitimacy of a dissolution change in an *ad hoc* manner from case to case – with as many as four different 'tests' emerging in this short timeframe – but judges who employed one test to gauge the ambit of the presidential power in one particular case did not even adhere to the same 'test' a few years later. The goal posts shifted remarkably rapidly.¹⁵

This new brand of the judicialization of politics – with constitutionally cloaked indirect control of political governments rather than regime legitimization after direct martial rule – lasted for almost a decade. The decade was characterized by unstable constitutionalism. Article 58(2) (b) was eventually repealed by the government elected after the fourth dissolution. When that government was in turn displaced by General Pervez Musharraf's coup in 1999, Musharraf – who like Zia eventually swapped his uniform for Presidential robes – resuscitated it. Though repealed again by the government that succeeded Musharraf, it has spawned a perfidious legacy and several adherents – including judges. They claim it to be an essential 'safety valve' that keeps unruly political governments in check by providing a constitutional mechanism to show them the door, thereby keeping direct martial laws at bay.¹⁶ Recent reflections by certain judges on Article 58(2) (b) reveal a lingering nostalgia for the unprecedented power that the judges had

¹⁴ Id.

¹⁵ Id. at 120-122.

¹⁶ See Mahmood Khan Achakzai and others v. Federation of Pakistan and others, PLD 1997 SC 426, 446-47; see also Zafar Ali Shah and others v. General Pervez Musharraf and others, PLD 2000 SC 869, 1218, [hereinafter *Zafar Ali Shah*].

enjoyed in the realm of mega-politics.¹⁷ The exercise of judicial power during those years continues to influence the judiciary's self-perception of its role in politics.

Part II: The Musharraf Era and the Rise and Fall of Justice Chaudhry

The seeds of the next and most recent phase of the judicialization of politics in Pakistan lie in the years after Musharraf ousted Prime Minister Nawaz Sharif through a bloodless military coup on October 13, 1999. Following in the footsteps of his predecessors, he first issued a Proclamation of Emergency and then promulgated a Provisional Constitutional Order (PCO) – PCOs being the standard device for displacing constitutions in whole or in part, whether through outright abrogation or under the thin veil of ‘holding in abeyance.’ Like clockwork, the incumbent judges were required to take oath under the new dispensation to ensure loyalty and *quid pro quo* legitimization. Quite a few judges declined and were sent packing. Others promptly agreed, including Justice Iftikhar Muhammad Chaudhry. At the time, few could have foretold that some of these judges, including Chaudhry, would later be anointed as champions of untainted constitutionalism.

In 2000, a unanimous twelve member bench of the Supreme Court hearing the *Zafar Ali Shah* case, including Justice Chaudhry, not only fashioned a protective umbrella of justifications for the coup – reemploying the much abused ‘doctrine of necessity’ – but also echoed Musharraf's disdain for politics and supported his intention and proposed mechanisms for remedying matters. At the same time, without the question having been posed, they further obliged by granting Musharraf *carte blanche* power to amend the Constitution.¹⁸ The underlying justification replicated other regime legitimization judgments of the past: “In such matters of extra constitutional nature, in order to save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people which is of paramount consideration for

¹⁷ Id.

¹⁸ See *Zafar Ali Shah*.

the Judiciary . . . we have to make every attempt to save “what institutional values remained to be saved . . .”.¹⁹ Over the following years, Musharraf took over the office of President while retaining the post of Chief of Army Staff, introduced many contentious legal, political, and structural changes, and ensured the backing of a pliant judiciary for his consolidation of power.²⁰

In hindsight, we can broadly identify a new era in Pakistan's experience of the judicialization of politics – one which started under the Musharraf regime and continues to date. Under Justice Chaudhry, appointed as Chief Justice on June 30, 2005, and retiring on December 12, 2013, the Pakistani Supreme Court has undertaken steps that make its performance and output unprecedented in the indigenous constitutional milieu. It may even remain germane to international juristic discourses for a considerable time, particularly for its persistence to arguably ‘go where no judge has gone before.’ Obviously not all the jurisprudence from this period involves the entire bench or larger benches of the Court, or Justice Chaudhry himself. However, the term ‘Chaudhry Court’ is befitting for two reasons: (i) The most important judgments from this era have always involved benches led by Justice Chaudhry and share several common characteristics in terms of ideologies, methods, arguments, and outcomes; and, (ii) Despite the controversial and complex issues involving mega-politics adjudicated by the Court during this period, its judgments are unusual for a near absence of any dissenting notes. On major matters, the Chaudhry Court has essentially operated as a monolith.

Because this Chapter argues that Justice Chaudhry is central to the special strain of judicialization of politics that is currently on display in Pakistan, it is essential to trace his career and evolution as judge and as Chief Justice. The youngest person ever to be appointed as Chief Justice and also the longest serving one when he retired, Justice Chaudhry's fairly complex and paradoxical career can be divided into three distinct periods: (i) The first, began when Musharraf

¹⁹ Id. at 1169-1170.

²⁰ See Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 N.C.J. Int'l L. & Com. Reg. 485 (2010), [hereinafter *Pervez Musharraf's Executive Assault*]. See also *Jurisprudence of Dissolutions*, at 110-120.

usurped power and required appellate court judges, including Justice Chaudhry, to take the oath under the PCO. This was followed by years of acquiescence and justification for the military intervention – all under the dubious rationale that such concessions were necessary to keep the constitutional and legal edifice intact. The judicial pronouncements from this period are no different from the regime legitimization-driven judicialization of politics of the past; (ii) The second period began when Justice Chaudhry was appointed Chief Justice in 2005. This period witnessed a vast range of activist interventions that helped develop the general impression of Justice Chaudhry becoming his own man. (iii) The third period involves the dramatic events of Justice Chaudhry's removal by Musharraf, his reinstatement, Musharraf's declaration of emergency and ouster of sixty odd appellate judges, and the subsequent Movement. These events provide the backdrop to Justice Chaudhry and his colleagues' eventual 'rehabilitation' in the nation's eyes and their collective self-assertion as the most confident and proactive apex court in the country's history.

The contours of Justice Chaudhry's characteristic judicialization of politics first became visible in the second phase of his career. Justice Chaudhry made several strategic pro-citizen forays into diverse areas, such as, *inter alia*, construction safety and urban planning,²¹ deregulation of price controls,²² privatization of public enterprises,²³ illegal detentions and missing persons in the wake of the War in Afghanistan,²⁴ and larger constitutional questions such as the authority for

²¹ See for Instance, Saad Mazhar v. Capital Development Authority 2005 SCMR 1973; and, Moulvi Iqbal Haider v. Capital Development Authority, PLD 2006 SC 394.

²² See Zafar Iqbal Jhagra v. Federation of Pakistan, PLD 2009 SC 363. See also Feisal Naqvi, *The economics of judicial interventionism*, The Friday Times, March 19, 2010.

²³ See for instance, Watan Party v. Federation of Pakistan PLD 2006 SC 697.

²⁴ For various Supreme Courts orders relating to illegal detentions and missing persons see the Supreme Court website at http://www.supremecourt.gov.pk/HR_Cases/1st%20final/1st.htm. See also, "Pakistan Denying the Undeniable: Enforced Disappearances in Pakistan," Amnesty International Report 2008, available at <http://www.amnesty.org/en/library/asset/ASA33/018/2008/en/0de43038-57dd-11dd-be62-3f7ba2157024/asa330182008eng.pdf>.

Musharraf's bid for a second term as President during the regime's final years.²⁵ This was an era of increasing economic liberalization coupled with political illiberalism, multiple levels of public discontent, and a mushrooming electronic media willing to highlight and dramatize judicial challenges to executive authority with intense regularity.²⁶ Some commentators showcase this period as evidence of judicial activism driven by public demand. They argue that the employment of public interest litigation to respond to popular dissatisfaction with failed economic liberalization policies provided the Chaudhry Court with a different mode of gaining power – so that, for a change, judicial ascendancy was not a function of compliance with the existing regime or governmental expectations.²⁷ It is worth adding here that while traditional political and institutional arguments do explain some of the main drivers of judicial activism during this period, the judicial behavioral dimension was also not insignificant. Justice Chaudhry's proclivity to use available openings strategically and to create new opportunities for expanding judicial power – and also his own profile – was already on display.²⁸ This aspect became much more pronounced in the third period of his career.

A couple of years of attritional judicial activism as well as the growing unpredictability of the Chaudhry Court caused the Musharraf regime to run out of patience. On March 9, 2007, Musharraf tried to send Justice Chaudhry on “compulsory leave” for misuse of office. He was intimidated but refused to oblige. Justice Chaudhry and some other judges along with their

²⁵ See *Jamaat-i-Islami v. Federation of Pakistan*, PLD 2008 SC 30. See also *Wajihuddin Ahmed v. Chief Election Commissioner, Islamabad*, PLD 2008 SC 13.

²⁶ See Shoaib 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: THE POLITICS OF THE LEGAL COMPLEX* (Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley eds., Cambridge University Press 2012), [hereinafter *Miscarriage of Chief Justice*], at 346-353.

²⁷ *Id.* at 371.

²⁸ For a detailed discussion of this see Maryam Khan, *Genesis and Evolution of Public Interest Litigation in Pakistan: A Political History* (forthcoming 2014), [hereinafter *Genesis and Evolution of Public Interest Litigation in Pakistan*].

families were then placed under house arrest. On March 13, 2007, instead of taking his official car, Justice Chaudhry decided to walk to the court premises in order to attend the case hearings against him. The police attempted to prevent him from doing so. Pakistan's political history contains many insufficiently recorded and inadequately celebrated acts of heroic defiance of dictators. Justice Chaudhry, however, had the benefit of being bold in the age of social media and primetime television. There was something strangely thrilling and of disturbing immediacy about television images of a lone judge being surrounded, pushed, and manhandled by regime functionaries. They caught the nation's and eventually the world's attention.²⁹ Furthermore, they helped develop an aura around the man and stimulated his escalating support.³⁰

On July 20, 2007, the Supreme Court unanimously found Justice Chaudhry's 'dismissal' to be unconstitutional. He was back, but not for long. High-stakes pending cases, including one challenging Musharraf simultaneously holding the dual offices of President and Army Chief were up for hearing. Musharraf decided not to take any risks with a potentially oppositional judiciary and a potentially vindictive Justice Chaudhry. On November 3, 2007, he declared a state of emergency in Pakistan. The incumbent judges – charged with a whole host of destabilizing activities, including their uncontrolled judicial activism – were “removed” from office. A new PCO was introduced and, predictably, Musharraf proceeded to pack the courts with more ‘judicious’ judges. Justice Chaudhry and his colleagues held an emergency meeting the same day to legally bar the imposition of any emergency as well as the new oath-taking. The regime responded with brute force, putting them under house arrest. They were to remain both physically and electronically isolated from the rest of the world for quite some time. While the judicial purge was underway, a new cadre of loyalists had queued up, and was ushered in to staff the courts. More than sixty ousted appellate court judges were either not invited to take the new oath or did not turn up or were neither invited nor intended to turn up.³¹

²⁹ See Shakeel Anjum, *CJ's mishandling five years on*, The News International, March 13, 2012.

³⁰ See Laura King, *For Pakistanis, fired justice is symbol of defiance*, Los Angeles Times, November 7, 2007.

³¹ See Pervez Musharraf's Executive Assault.

Part III. The Pakistani Lawyers' Movement and the Resurgence of Justice Chaudhry

Central to both the eventual restoration of Justice Chaudhry and his colleagues and the creation of circumstances that allowed them to engage in the latest and increasingly controversial phase of judicialization of politics in Pakistan, the Movement merits a closer look. The following analysis shows that: (i) Before the Movement, Justice Chaudhry and his colleagues were not even remotely perceived to be the popular champions for 'rule of law' that the Movement transformed them into; (ii) the Movement was essentially a reaction against Musharraf rather than action in aid of Justice Chaudhry and the other ousted judges; (iii) the Movement was not restricted to the legal fraternity with the narrow aim of restoring judges. Instead, it was galvanized, sustained, and made successful by political and social actors with broader agendas; (iv) the Movement successfully provoked popular sentiment around 'rule of law' issues that provided Justice Chaudhry and his colleagues a unique opportunity to gain traction and subsequent political leverage; they emerged as its primary beneficiaries; and, (v) though the popularity thereby gained by the judges helps explain the support and acceptance of their judicial activism in the early post-restoration years, much of their aggressive subsequent judicialization of politics – despite escalating political and civil society opposition and declining popular support – requires an additional exploration of underlying imperatives and catalysts.

Some assessments of the Movement have tended to valorize Justice Chaudhry as a savior from its outset.³² Such descriptions overlook the fact that despite his earlier judicial activist overtures – for instance, his steps to hold concerned authorities accountable for 'missing persons' in the wake of the U.S. 'War on Terror,' that won him the initial attention of the media and human rights community as well as some popular following – Justice Chaudhry was by no means the iconic figure that he subsequently became. As a matter of fact, the legal fraternity widely

³² See for instance, Joel A. Mintz, *Introductory Note, A Perspective on Pakistan's Chief Justice, Judicial Independence, and the Rule of Law*, ILSA Journal of International and Comparative Law, Volume 15, Number 1, fall 2008.

perceived him as untrustworthy and pro-establishment.³³ Justice Chaudhry and his colleagues began to enjoy greater support only as the Movement progressed. There are many reasons for this. The judiciary carried the baggage of repeated betrayals by pliant and self-serving judges at moments of greatest national need, and the memories of Justice Chaudhry and his colleagues' abject surrender to Musharraf were still fresh. The years after *Zafar Ali Shah* witnessed lawyers, politicians, and civil society persistently objecting to and protesting against the latest avatar of the military-judiciary alliance. In 2003, the Pakistan Bar Council – the highest elected body of lawyers in the country – issued a White Paper that castigated the judiciary for legitimizing Musharraf and condoning his maneuvers for entrenchment, in return for being allowed to keep their positions, extension in their retirement ages, and additional personal favors. It also rebuked them for favoring the regime in important cases, for rampant and widely known corruption, for a breakdown in judicial discipline and violations of its own code of conduct, for delays and inefficiency in deciding cases, and for poor institutional administration, and inadequate internal accountability.³⁴ Another event from the time merits attention. In February 2007, Naeem Bokhari, a well-known lawyer and TV personality, wrote a highly provocative 'Open Letter' to Justice Chaudhry that captured wide attention. He accused Justice Chaudhry of self-promotion, wasting public funds, rude and discriminatory behavior towards lawyers, and seeking inappropriate favors for his son.³⁵ Bokhari was close to Musharraf, and many saw this as a warning at Musharraf's behest to rein in the increasingly proactive Justice Chaudhry. Yet, despite Musharraf's palpable unpopularity, there was hardly any public criticism of the letter

³³ See White Paper on the Role of the Judiciary (Pakistan Bar Council), June, 28, 2003, at http://pakistanbarcouncil.org/wp-content/uploads/2012/07/White-Paper_Complete_.pdf.

³⁴ Id.

³⁵ See Naeem Bokhari's Letter to the Chief Justice, The News International, Sunday, March 10, 2007.

from the legal community. It was evident that in private, relatively few disagreed with the allegations.³⁶

Next, some demystification of the populist and transformative potential of 'judicial power' and 'rule of law' slogans is necessary. Some commentators have argued that occurring as it did during 'a vacuum of popular legitimacy among governmental institutions,' the Movement straddled both conventionally recognized sources of supportive impetus for judicial power – hence it was galvanized and led not just by those with narrow and partisan interests but also held together and boosted by the larger public.³⁷ However, they proceed to suggest, "[I]n short, there is a popular currency to judicial power and the rule of law that, when activated, might prove capable of transforming political parties, the judiciary, and the people alike."³⁸ Other commentators cite specific examples to contend that the Chaudhry Court's strategic influencing of bar politics at crucial junctures, in order to consolidate support for the judiciary, led to a 'politics of reciprocity.' This is what caused the legal bars and the larger 'legal complex' to come to the judiciary's rescue through a social and political movement, when the latter found itself under attack.³⁹ The centrality ascribed to Justice Chaudhry and the 'legal complex,' however, requires reconsideration.⁴⁰ A less personality-fixated perspective would reveal that the impetus

³⁶ Many of Bokhari's allegations subsequently appeared in Musharraf's Charge Sheet against Justice Chaudhry and other judges. However, his initial *cause célèbre* turned into ignominy only after Musharraf removed Justice Chaudhry. He then faced considerable ridicule and harassment by various segments of lawyers for possibly acting as Musharraf's henchman.

³⁷ See Note, *The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power*, Harvard Law Review, Volume 123, Number 7, May 2010, 1705, at 1725.

³⁸ *Id.*

³⁹ See *Miscarriage of Chief Justice*, at 371.

⁴⁰ In this context, more skeptical analysts point out that the so-called 'national' Movement's popular appeal was essentially restricted to north-central Punjab, which unsurprisingly is also the electoral bank for the main political parties supporting the Movement. They also highlight the media's opportunism to emerge as a power as well as its

and subsequent growth of the Movement had much more to do with Musharraf's regime than it did with Justice Chaudhry. The latter was primarily a beneficiary – and perhaps at times even a captive – of events much larger than him. The Movement provided a focal point and platform for already significant political and social discontent against a ruler who was weaker and less assured than ever before – a General now lost in his labyrinth. The Movement brought together detractors and critics from across the political and social spectrum, who fuelled and sustained it. Throughout the Movement, 'Go Musharraf Go' and other anti-regime slogans were as ubiquitous as any pro-Chaudhry chants. The Movement remained anti-Musharraf throughout; it also became pro-Chaudhry, but in a residual, ancillary kind of way at first, and more pointedly at a later stage when Musharraf declared the Emergency and removed the judges *en masse*. Thereafter, Justice Chaudhry evolved into the most visibly prominent symbol of defiance.

Third, in recent scholarship, some commentators have over-emphasized the narrow intent of the Movement, i.e. restoration of the deposed judges. For such analyses the larger transformation of the country's politics through the restoration of democracy was a byproduct.⁴¹ In this vein, they further contend that no societal actor other than the lawyers presented a serious challenge to the regime during the Movement; hence the mobilization of the legal community also deserves primary credit for laying down necessary groundwork for the return of democracy.⁴² The Movement was as much (if not more) supported, galvanized, and sustained by the political workers and civil society – in pursuit of democracy, constitutionalism, and civilian supremacy –

deliberately eclipsed role of political parties, which according to them, were the most significant force in the latter part of the Movement. See Haris Gazdar, *One Step Forward, Marching to the Brink*, Economic and Political Weekly, April 11, 2009.

⁴¹ See Daud Munir, "From judicial Autonomy to Regime Transformation: The Role of the Lawyers' Movement in Pakistan," in FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX (Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley eds., Cambridge University Press 2012), at 378.

⁴² *Id.*

as it was led by lawyers advocating, *inter alia*, the narrower goal of 'judicial independence.'⁴³ To fully understand the milieu in which the Movement is situated, the Charter of Democracy (COD) signed in 2006 between Benazir Bhutto and Nawaz Sharif requires special attention. It has been persuasively argued that the COD set into motion new political processes and normative coalitions which contributed to greater political and constitutional maturity, new anti-regime alliances, and an organized and coalesced bipartisan opposition to military rule – a tangible departure from the 'dog eat dog' politics of the 1990s.⁴⁴

Further, the Movement was not historically unique. Pakistan has a long history of brave, organized, and sustained defiance of dictators.⁴⁵ Nevertheless, the Movement was remarkable for its eventual scale, perseverance, and longevity, as well as for the international attention it garnered. It also provided Justice Chaudhry and his colleagues a spot in the limelight that they could have never imagined. In this context, real time news coverage by the media played a vital part in internationalizing the fast developing events and boosting Justice Chaudhry's profile.

Finally, while debate continues on the relative importance of the various factors contributing to the Movement as well as on its essential features and dynamics, much less contested is one of its primary outcomes. Almost two years of sustained and highly publicized mass protests elevated Justice Chaudhry and his colleagues' status from dubious obscurity to celebrated symbols of resistance against autocratic rule. The eventual restoration of Justice Chaudhry as Chief Justice –

⁴³ See Anil Kalhan, 'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan, Vanderbilt Journal of Transnational Law, Vol. 46, No. 1, January 2013, [hereinafter 'Gray Zone' Constitutionalism], at 11.

⁴⁴ Id. at 46 – 52.

⁴⁵ Interview with prominent constitutional lawyer, labor unionist and human rights activist, Mr. Abid Hassan Minto, April 10, 2013. See also Ayesha Jalal, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE (Cambridge University Press 2007).

a highly protracted affair – took place on March 22, 2009.⁴⁶ The popular and institutional support accumulated by the restored judiciary acted as an important catalyst for its judicial activism in the early post-restoration years. It remains the primary reason for the unprecedented judicialization of politics in the years thereafter.

Part IV: Post Resurrection – Salient Characteristics of the Chaudhry Court's Judicialization of Politics

The period since the restoration of Justice Chaudhry and his colleagues is astonishing for its range and extent of judicial interventions. Even at this writing, many of its key features are still unfolding – or in some cases falling apart. ‘Judicial independence’ was one of the resonant mantras of the Movement. Despite being frequently espoused in the post-restoration days to pursue strategic institutional goals of gaining turf, popularity, and power, ‘judicial independence’s’ inherent limitations and potential for obfuscation became all too evident. The new elected government was perceived as the primary competitor for public accolades by a resurgent judiciary ambitious enough to envision itself as the ultimate and completely autonomous custodian of not just law but also politics. The collateral victims of this institutional contestation were democratic and constitutional stability. As Anil Kalhan has recently observed:

[J]udicial independence is neither an all-or-nothing concept nor an end in itself. With the return of civilian rule in Pakistan, a series of clashes between Parliament and the Supreme Court has raised concern that the same judiciary celebrated for challenging the military regime—while invoking exactly the same abstract notion of judicial independence—might now be asserting autonomy from weak civilian

⁴⁶ Justice Chaudhry was the last of the deposed judges to be reinstated. For a good analysis of the various legal and political perspectives, tussles, and contestations that impeded the reinstatement of Justice Chaudhry and other deposed judges, and also the events and factors that led to their eventual return to the bench *see* ‘Gray Zone’ Constitutionalism, at 56-61.

institutions in a manner that undermines Pakistan's fragile efforts to consolidate democracy and constitutionalism.⁴⁷

Given Pakistan's historical imbalance of power between elected governments and state institutions, the new government was always going to find the path arduous. The fate of four elected governments in the period between Zia-ul-Haq's departure and Musharraf's arrival (at the cost of a fifth elected government) had demonstrated the civil-military establishment's capacity to control politics from a distance.⁴⁸ Politics and politicians have also historically been the favorite whipping boys of the civil-military establishment and the judiciary, and routinely characterized as the bane of national progress and prosperity. At the same time, politics and politicians were stronger after the Movement than ever before. The Movement after all marked not just the success of the coalition of lawyers and judges but indeed the triumph of united democratic forces. The trouncing of Musharraf's political allies in the 2008 elections – while he was still President – and indeed his eventual ouster from that office clearly demonstrated the extent of public support for transition to democratic politics and renewed faith in politicians. However, the restored judiciary soon revealed its aspiration to invade the political space. The underlying judicial calculus is not fully explicable by conventional explanation of factors that allow the judicial organ to expand its ambit of operations – the expansion was neither the outcome of strategic use of courts by competing political forces nor was it in response to popular citizen demand. Notwithstanding the existence of some enabling factors, the expansion was predominantly a function of unilateral judicial ambition to intervene in mega-politics.

⁴⁷ See 'Gray Zone' Constitutionalism, at 2.

⁴⁸ Recent scholarship has again highlighted the Pakistani military establishment and its civilian allies' (the 'deep state') legal, political and institutional steps to ensure preservation of their various interests during periods of civilian rule – a process referred to as 'transformative preservation.' It elaborates on the establishment's aggressive manipulation of the political process; an effective 'colonization' of the state's administrative process; the creation of a vast economic empire; and, considerable influence over the media. These entrenchments have been supplemented, justified and reinforced through an antidemocratic legitimizing discourse, and, the military's self-projection as the country's most competent institution, not just in security matters but also in governance and development, see 'Gray Zone' Constitutionalism, at 14-23.

The essentially judge-driven judicialization of politics most prominently manifested itself in the Chaudhry Court's preoccupation with holding the Pakistan Peoples' Party (PPP) led coalition government accountable at several levels, most notably, governance, policy-making, legislation, regulation, and administration. The principal example was its legal autopsy of the National Reconciliation Ordinance ('NRO') – a transitional mechanism extending controversial amnesty to politicians from multiple Musharraf era criminal cases as well as a workable modus for Musharraf's eventual exit from Pakistani politics. It is noteworthy that elections and transition to civilian rule did successfully take place due to this arguably unavoidable pragmatic deal-making to reassure insecure politicians as well as a fading autocrat. It would be naïve to imagine that the process of restoring a derailed democracy was going to be anything but political or that the transition would involve a clean break with the past and could be achieved without laborious negotiations with Musharraf and his allies as well as U.S assurances for his future.⁴⁹

Admittedly, the resulting arrangements had several political fallouts, such as adverse ramifications for the ruling party's political and moral credibility as well as straining relations among the political parties that benefited from the NRO and those that did not.⁵⁰ The Chaudhry Court, however, was not content with mere political ramifications. The NRO provided it a tremendous opportunity for stirring populist support, scoring political points, and gaining moral ascendancy. Hence, the NRO was dramatically dismantled – seventeen judges and a 287 page judgment was overkill given that the controversial arrangement could have been struck down on the narrower ground of unconstitutional extension of protection to an arbitrarily defined set of people.⁵¹ Yet, the case helped generate a rhetoric that aimed to elevate the Chaudhry Court as not just the arbiter of political contestations but also as the enunciator of the national interest and the

⁴⁹ See Haris Gazdar, *Judicial Activism vs. Democratic Consolidation in Pakistan*, Economic and Political Weekly, August 8, 2009.

⁵⁰ See 'Gray Zone' Constitutionalism, at 49-51, 58.

⁵¹ Id. at 64-65.

custodian of political morality and integrity. In this regard it is quite telling that in its judgment the Chaudhry Court felt comfortable using lines of argument, parameters, and rhetoric similar to that employed by the military in the past for characterizing politicians as corrupt and emphasizing *its* self-appointed duty to uproot corruption.⁵² Ironically, it even regurgitated past chronicles of political corruption, benchmarks of uprightness, and personal piety tests, from judgments, laws, and frameworks that directly owed their existence to military rule.⁵³

The Chaudhry Court also appeared oblivious to the fact that both the judiciary and the democratic system shared a traumatic past, had grievously suffered under dictators, and were taking uncertain new steps towards some modicum of stability and redemption. While the Movement was conveniently deemed to have washed away the past sins of the restored judges who themselves had once struck an unholy deal with Musharraf, the transgressions of the NRO beneficiaries, who had ultimately ensured the restoration of both the judiciary and democracy, were regarded as unforgivable. At the same time, the Chaudhry Court removed over seventy judges who had been appointed during Justice Chaudhry's absence as Chief Justice both before and after the restoration of democracy.⁵⁴ While anointing themselves as cleansed, the Chaudhry Court's judges were unwilling to extend ratification to judges who (like them) had opted to take oath under Musharraf and even those who were clearly 'purer,' having been appointed under the Constitution by a civilian President. The effect was to strip the judiciary of many seasoned jurists.⁵⁵

Once the Chaudhry Court assailed the NRO arrangements, it also opened up the door for it to demand that the government proceed against the new civilian President of the country – also the

⁵² See *Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265.

⁵³ See 'Gray Zone' Constitutionalism, at 65-66.

⁵⁴ See *Sindh High Court Bar Association v. Federation of Pakistan*, PLD 2009 SC 879.

⁵⁵ For further analysis of the rationale and modus behind this move see 'Gray Zone' Constitutionalism, at 62-64.

main leader and co-chair of the ruling party –to pursue the trail of money allegedly transferred to Swiss bank accounts. This was despite the absolute Presidential immunity under the Constitution against any criminal proceedings, as well as the slim likelihood that the Swiss authorities would revive long stalled proceedings. The Chaudhry Court consistently skirted around the clear-cut immunity. The issue provided it another opening to dominate the country's political discourse, to assert itself as the apex moral authority on questions of financial integrity, and to roundly castigate politics and politicians. Though the case was a non-starter, the Chaudhry Court persisted and eventually sent one Prime Minister packing in 2012 by holding him in contempt for not doing what it thought required to pursue the case; it came close to also bringing down his successor.⁵⁶ Eradicating corruption has remained the preoccupation of the Chaudhry Court in a host of additional cases. Day to day hearings of high drama and sensational television coverage have involved impugned illegal appointments; postings and transfers in various government departments; invalidation of parliamentarians with fake or inadequate degrees; and, investigations of corruption in state institutions and projects.⁵⁷

The Chaudhry Court has been most prominent for its willingness to admit public interest litigation (PIL) cases as well as the extensive invocation of its *suo motu* powers to take cognizance of issues purely or largely political or falling squarely within the policy, governance, and regulatory frameworks of other State institutions. To its growing band of critics, the

⁵⁶ Id. at 84-86.

⁵⁷ See for instance, Zafar Iqbal Jhagra v. Federation of Pakistan, 2013 SCMR 352; Ch. Nisar Ali Khan v. Federation of Pakistan, PLD 2013 SC 568; Ashraf Tiwana v. Federation of Pakistan 2013 SCMR 836; Tariq Aziz-ud-din v. Federation of Pakistan, 2010 SCMR 1301; Muhammad Yasin v. Federation of Pakistan, PLD 2012 SC 132; and, Watan Party v. Federation of Pakistan, PLD 2006 SC 697. See also C.M.A.3470/2013 in C.M.A.1536/2013 in C.A.191-L & 409/2010 (Action taken on News Clipping dated 4.6.2013, published in Daily Jang, against the Parliamentarians having fake/bogus degrees) available at <http://www.supremecourt.gov.pk/web/page.asp?id=109>. Some critics question why the judiciary always reserves its harshest crucibles for the very political parties that have always been persecuted by the military and other establishment forces, and why it is always political excesses and not military excursions which face the toughest trials. See Asad Jamal and Muhammad Badar Alam, *On Trial*, The Herald Magazine, February 16, 2012.

Chaudhry Court has invariably pursued popularity and aggressively extended the boundaries of judicial review to the extent that there now seem to be no boundaries.⁵⁸ It has, for example, assailed a constitutional amendment (discussed below) and raised legal questions about the accumulation of rainwater outside the Supreme Court registry in Lahore after a heavy monsoon downpour.⁵⁹

There is now a vast literature on the emergence and evolution of PIL in South Asia, the activist role played by judges, their justifications for it, and the various tools and strategies employed by them. Despite sharing various points of convergence with India, Pakistan has followed a different trajectory while defining areas of prioritization and desirable levels of PIL. Recent scholarship has explored the political roots of judicial activism in Pakistan by examining the development and expansion of the PIL movement in the 1990's. It maintains that Pakistani judicial activism was a manifestation of the larger crisis of governance and democratization in the country after the departure of Zia's military government. It goes on to persuasively argue that it was motivated by various political agendas and considerations of the appellate courts. It highlights the judge-led creation of novel jurisprudential tools selectively borrowed from India as well as the hierarchical institutional structure of the Supreme Court of Pakistan and the vast discretionary powers of its Chief Justice.⁶⁰ Carrying on in the same tradition but raising it to unprecedented levels, the Chaudhry Court's PIL jurisprudence has increasingly blurred the lines between law and politics at several levels.

Suo motu notices have, for example, been issued and proceedings held over increases in utility, fuel, and commodity prices (raising questions about legally insurmountable dynamics of market forces, economic variables, and policy choices); imposition of taxes (raising questions about how

⁵⁸ For a good critique of frequent judicial intervention in complex economic matters see Mirza Nasar Ahmad, *Judiciary's gain is economy's loss*, The News on Sunday, December 23, 2012.

⁵⁹ See *SC takes notice of poor City Sewerage*, The News International, August 16, 2013.

⁶⁰ See Maryam Khan, *The Politics of Public Interest Litigation in Pakistan in the 1990s*, Social Science & Policy Bulletin, Volume 2, No. 4, Spring 2011, [hereinafter *Politics of Public Interest Litigation*].

a government is expected to run without taxation); a popular kite flying festival and large wedding banquets (provoking queries about whether social regulation, public awareness, and appropriate legislation based on public choices ought to have prevailed instead); media regulation (attracting the criticism that media ought to be allowed to self-regulate and/or negotiate with the national media regulator instead); power outages, electricity breakdowns, and delayed airplane flights (involving issues of optimal administration, policy-making and institutional management in technical areas routinely left to governments and domain experts); specific episodes of crimes against women and extrajudicial killings (drawing condemnation to certain heinous actions but neither providing systemic and long-range solutions nor empowering the lower judiciary to institutionally deal with these crimes); sale of national assets (often raising complex economic, financial, political, governance, and policy issues unsuitable for purely legal prescriptions); unauthorized diversion of flood waters (with neither floods nor their supervision conceivably manageable by courts); and, deteriorating law and order situations in Karachi and the province of Baluchistan (given the complexity of politics and governance involved, quite predictably the outcome has been nothing more than the summoning and chastisement of various high officials sometimes accompanied by ineffectual directions).⁶¹

In this context, the Chaudhry Court has been further criticized for often glossing over how individual cases precisely meet the constitutional requirement that the cases raise a 'question of public importance with reference to the enforcement of any of the Fundamental Rights.' Additionally, an increasingly voiced concern is that to fit in all kinds of cases under the Article 184(3) original jurisdiction, judges routinely interpret the Fundamental Rights so broadly – a

⁶¹ See generally *Genesis and Evolution of Public Interest Litigation in Pakistan*. For a rigorous discussion of the Supreme Court's ventures in the areas of 'human rights,' 'policy reforms,' 'environmental and land use regulations' and 'legislative override,' in turn leading to a 'judicialization of pure politics' see also Maryam Khan, *Judicialization of Politics and the Supreme Court in Pakistan: A New Paradigm of Judicial Power* (manuscript available with the author on file). Many of these cases resulted in interim orders and the final judgments are pending or as yet unreported. These orders can be found on the Supreme Court of Pakistan website at www.supremecourt.gov.pk/

trend that started in the 1990s – that they risk losing any specific legally form and meaning.⁶² Additional disquiet is caused by some judges' occasional practice of underplaying doctrine, precedent and statute in favor of frequent quotations from English, Urdu, and Persian verse and citations from sufis, saints, and stoics, while adjudicating matters relating to law and public policy. A progressively obscure jurisprudence is further confounded by historical parables, poetic endeavors, allegories, diatribes, self-righteous *obiter* observations and moralistic condemnation.⁶³ The facts that the *suo motu* powers are centrally vested with the Chief Justice and that there are no established and publicly known parameters and filtering mechanisms regulating its use, make them completely ad hoc and fundamentally vulnerable to misapplication. Recently, the International Commission of Jurists recommended that, “The Supreme Court also ought to identify criteria for the decision to take up cases *suo motu*. These rules may be somewhat more flexible than those governing the allocation of cases to Chambers,” and that, “As far as the substance of these latter rules is concerned, they should take into account that *suo motu* procedures must be and remain an exceptional exercise of powers.”⁶⁴

A good illustration of the Chaudhry Court's penchant for taking cognizance of issues without convincingly meeting the requirements of maintainability and frequently evading any limits on judicial powers set by the doctrines of political question and separation of powers is what has come to be known as the ‘Memo’ case or ‘Memogate.’ For several months on end, Memogate consumed precious judicial time and sensationalized the nation. Mansoor Ijaz – an American of Pakistani ancestry and commentator for US mainstream TV – for as yet inexplicable reasons, alleged that a confidential memorandum had been written by the then Pakistani ambassador to the United States to the then head of the US Armed Services at the behest of the Pakistani

⁶² See Politics of Public Interest Litigation.

⁶³ See Osama Siddique, *A society without meaningful dissent*, The Express Tribune, August 19, 2013, [hereinafter *A society without meaningful dissent*].

⁶⁴ See Report on the ICJ Mission to Pakistan (Autumn 2011) at <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2012/06/Pakistan-ICJ-mission-fact-finding-mission-report-2012.pdf>, at 22.

President. The memorandum ostensibly sought U.S. assistance against an apprehended military coup and support for civilian takeover of key military assets.⁶⁵ The Chaudhry Court admitted a petition under Article 184 (3) declaring it both a matter of 'public importance' (which *prima facie* it was) and 'violative of Fundamental Rights under the Constitution' (which was fairly tenuous). Maintainability was key and strongly contested but the nine member bench found that a *prima facie* case for the enforcement of Articles 9, 14 and 19 (A) of the Constitution had been made out because:

The attempt/act of threatening to the dignity of the people, collectively or individually, concerning the independence, sovereignty and security of their country, *prima facie*, raises a serious question tagged/linked with their fundamental rights. The existence of Memo dated 10th May, 2011 may have effects of not only compromising national sovereignty but also its dignity. The loyal citizens have shown great concern, to live in the comity of nations with dignity and honour, as according to expanded meanings of 'life', the citizens have a right to ask the State to provide safety to their lives from internal as well as external threats.⁶⁶

As to the argument that the matter involved was purely political, the Court summed up:

This 'political question doctrine' is based on the respect for the Constitutional provisions relating to separation of powers among the organs of the State. But where in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination. In view of the above discussion it is held that this Court enjoys jurisdiction to proceed in all those matters which are justiciable. However, if there is an issue, which is alleged to be non-justiciable it would be the duty of the Court

⁶⁵ See Mansoor Ijaz, *Time to take on Pakistan's jihadist spies*, Financial Times, October 10, 2011.

⁶⁶ See *Watan Party and others v. Federation of Pakistan and others* PLD 2012 SC 292 [Constitution Petition under Article 184(3) of the Constitution regarding alleged Memorandum to Admiral Mike Mullen by Mr. Husain Haqqani, former Ambassador of Pakistan to the United States of America], at 43 (Available at http://www.supremecourt.gov.pk/web/user_files/File/Const.P.77-78-79%20%5BMemogate%5DDetailedOrder.pdf).

to examine each case in view of its facts and circumstances, and then to come to the conclusion whether it is non-justiciable or otherwise.⁶⁷

Critics vociferously rejected this circular reasoning. They pointed out that the controversy had direct nexus with structural issues relating to civil-military relations and required a political and not a judicial resolution. They further stressed that the ill-defined and military-centric notion of 'national security' allegedly at stake due to the memorandum did not even remotely fall within the ambit of the Fundamental Rights cryptically mentioned by the Supreme Court.⁶⁸ They added, "The fact that the Court did not even deign to raise the issue of maintainability of the memo issue when it first came to the Court indicates how trigger-happy our judges have become in encroaching upon the representative branches of government."⁶⁹ Some political commentators wondered whether the entire 'drama' around imperiled national security was orchestrated to destabilize democracy and to divert attention from the red-faced military establishment in the wake of the US operation against Osama bin Laden.⁷⁰ Others voiced dismay over the waste of time and resources that could have been used to address thousands of pending cases.⁷¹ Some drew attention to the fact that if Ijaz were to be believed then his more damaging assertions that the Pakistani security services were contemplating a coup also needed to be taken cognizance of – the two claims stood or fell together – and yet were not.⁷² Others exhorted against the dubious authenticity of the memorandum and argued that its existence was unlikely because a

⁶⁷ Id. at 59-60.

⁶⁸ See Maryam Khan, *Legal solution to a political question*, The News on Sunday, January 8, 2012.

⁶⁹ Id.

⁷⁰ See Ayaz Amir, *Death wish of the Pakistani political class*, The News International, Friday, December 16, 2011.

⁷¹ See Amina Jilani, *Lingering but futile*, The Express Tribune, February 8, 2013.

⁷² See Kamran Shafi, *Open letter to My Lord the Chief Justice*, Express Tribune, December 15, 2011. See also Omar Waraich, *Pakistan's "Memogate:" Was there ever going to be a coup?* The Independent, Thursday, 15 December, 2011.

government as weak as the incumbent could never envision and undertake what it allegedly suggested.⁷³

What followed was a media circus, attempts at summoning ambassador Haqqani (which eventually worked, though he then left and refused to return) as well as Mansoor Ijaz (which failed, making those taking him seriously indignant),⁷⁴ exhortations by the parliament to leave a purely political matter to the politicians, appointment of a judicial commission comprising of three provincial chief justices to determine the, 'origin, authenticity, and purpose' of the memorandum even though a parliamentary commission had already been set up for that task, frequent judicial outbursts at lack of headway, and belated forays by the main opposition party and the military to capitalize on the scandal to destabilize an already tottering government. The fact that neither strategic moves by political players nor public demand had provoked this intrusion became evident when the opposition party and the military quickly disassociated from the ruckus. In a textbook case of 'burnt fingers' the judiciary was left holding the baby. A new government eventually replaced the one besieged by this artificial crisis. Everyone the Chaudhry Court seems to have moved on. The Memo Commission remains intact at the time of writing. 'Memogate' remains a quintessential example of the divisive and resource draining judicialization of politics that the Chaudhry Court has pursued since its restoration. Additional tribulations for a struggling elected government; a brief window of opportunity for possible military adventurism; and, the consequent unstable constitutionalism have been its various negative externalities.

It is also worth noting how judicialization of politics under the Chaudhry Court has been consistently propped up and justified through an embellished narrative of the Movement that underscores the judiciary's exalted significance and its centrality to the order of things. For instance:

⁷³ See Zafar Hilaly, *Politics and Memogate*, Express Tribune, December 12, 2011.

⁷⁴ See Saroop Ijaz, *Moving on*, The Express Tribune, January 28, 2012.

[L]et us say that some of our greatest national problems will be relieved if only we realize the momentousness of what has transpired in this country since 2007 through the blood, sweat, tears and toil of our people. Those of us who continue to ignore the turnaround, do so only through denial of history.⁷⁵

On another occasion the Chaudhry Court observes, '[T]he past three years in the history of Pakistan have been momentous, and can be accorded the same historical significance as the events of 1947 when the country was created and those of 1971 when it was dismembered.'⁷⁶

Meanwhile, additional attempts to build a popular public profile are instructive. The Supreme Court website announces the establishment of a Supreme Court museum, which, *inter alia*, promises displays such as a 'panorama [of] struggle of lawyers and judges for the restoration of independent judiciary,' 'thematic presentation of Supreme Court's achievements for the country and society through its judgments,' as well as 'personal belongings' of various past judges.⁷⁷ Segments of electronic media regularly contribute to this hagiography. The Court's official website has a link titled 'Supreme Court and the Media,' displaying news report coverage of various orders and directions.⁷⁸ There is *quid pro quo* as certain judges are known to make direct statements to court reporters, allow them special seats in courtrooms, and welcome camera shots.⁷⁹ Another link on the website says 'Pictorial view of various Activities of the Chief Justice

⁷⁵ See *Suo Motu Action* regarding allegation of business deal between Malik Riaz Hussain and Dr. Arsalan Iftikhar attempting to influence the judicial process, PLD 2012 SC 664, at 668. [hereinafter *Arsalan Iftikhar case*].

⁷⁶ See *Dr. Mobashir Hassan v. Federation of Pakistan*, PLD 2010 SC 265, (J. Jawwad S. Khawaja concurring note paragraph 2).

⁷⁷ See http://www.supremecourt.gov.pk/Annual_Rpt/Supreme%20Court%20Museum.pdf (Accessed on August 17, 2013).

⁷⁸ See http://www.supremecourt.gov.pk/Annual_Rpt/Supreme%20Court%20and%20Media.pdf (Accessed on August 17, 2013).

⁷⁹ See *A society without meaningful dissent*.

and the Judges.⁸⁰ Electronic media coverage of court proceedings and judges' statements often has the frequency and urgency that surrounds an unfolding hostage crisis. Certain news channels have taken to reporting *obiter* observations by judges in politically charged cases, accompanied by drum rolls and other sound effects to create a dramatic environment of impending doom – ostensibly for recalcitrant politicians and bureaucrats.⁸¹

Apart from electronic media, the other crucial constituency regularly courted by the Chaudhry Court has been the legal profession. Another link on the website points to 'Other Activities of the Chief Justice and the Judges' and carries reports of Justice Chaudhry's meetings with various bar delegations.⁸² There has been a marked increase in violent protests against the district judiciary and physical altercations with policemen, media persons, and political opponents on part of sections of unruly lawyers.⁸³ Far from being disciplined by the bar or the bench for illegal and unprofessional behavior, these erstwhile foot soldiers of the Movement expect and receive indulgence. At times, the Chaudhry Court has directly come to their rescue through the ubiquitous *suo motu* notice.⁸⁴ In consequence, less scrupulous lawyers continue to leverage the Chaudhry Court's reliance on constituency politics to engage in extortion and build coercive clout. Such behavior has even led to the coining of a popular term – *wukula-gardi* (intimidation

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See

http://www.supremecourt.gov.pk/Annual_Rpt/Pictorial%20View%20of%20Various%20Activities%20of%20Chief%20Justice%20and%20Judges.pdf (Accessed on August 17, 2013).

⁸¹ *See* Osama Siddique, *The Lawyers' Movement and its Fragments*, The News on Sunday, February 19, 2012, [hereinafter *The Lawyers Movement and its Fragments*].

⁸²

See

http://www.supremecourt.gov.pk/Annual_Rpt/Other%20Activities%20of%20the%20Chief%20Justice%20and%20Judges.pdf (Accessed on August 17, 2013).

⁸³ *See* Ali Ahmed, *Lawless lawyers: from heroes to hoodlums*, The Express Tribune, April 25, 2013.

⁸⁴ *See* *Suo Motu Case No. 19 of 2010*, at <http://pakistanconstitutionlaw.com/suo-moto-case-no-19-of-2010/> (Accessed on August 25, 2013).

by lawyers).⁸⁵ The Court, it seems, was entirely oblivious of an important warning that Justice Aharon Barak, former President of the Supreme Court of Israel, issued some years ago:

We must distance ourselves from the erroneous view that regards judges as the representatives of the people and as accountable to the people much like the legislature is. Judges are not representatives of the people and it would be a tragedy if they became so ... It is sufficient that the judiciary reflects the different values that are accepted in society, and it should have an accountability that reflects its independence and its special role in a democracy.⁸⁶

Heavily infused still by the spectacle of the Movement, the Chaudhry Court has regularly endeavored to consolidate its power and prestige by directly courting public sentiment and support in an undisguised political manner; populism rather than conventional allegiance to a constraining Constitution promises greater freedom and maneuverability to an institution looking to explore new horizons. A self-appointed role as the peoples' champion is articulated in various judgments that consciously distance themselves from judicial thinking on limits on judicial power elsewhere. After describing the Constitution as embodying the 'will of the people,' a learned judge lays out a direct role and relationship for the Court with the people:

To find the will of the people, we, as Judges, are not required to embark upon any theoretical journey in the realm of abstract political philosophy or to try finding solutions to legal conundrums in alien constitutional dispensations materially different from ours; we need only examine our own Constitution to ensure that the people of Pakistan, the political sovereigns, are obeyed and their will, as manifested in the Constitution, prevails. This after all is the very essence of a democratic order.⁸⁷

He goes on to delineate the ascendance of judges over elected representatives: "The Court can effectively perform the role of the peoples' sentinel and guardian of their rights by enforcing

⁸⁵ See Khaled Ahmed, *Middle class gone berserk*, The Friday Times, March 23-29, 2012.

⁸⁶ See Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev, Vol. 116: 16 (2002), at 161-162.

⁸⁷ See Justice Jawwad S. Khawaja's Separate Note, The News International, July 4, 2012, at <http://www.thenews.com.pk/Todays-News-2-118456-Justice-Jawwad-S-Khawaja%E2%80%99s-separate-note>

their will; even against members of Parliament who may have been elected by the people but who have become disobedient to the Constitution and thus strayed from their will.”⁸⁸

Yet, the Chaudhry Court has also discovered that pursuit of popularity can come at a price. A popularity-seeking judge cannot always demand the decorum insisted upon by a staid and reclusive counterpart. The populace can chant praises and hurl abuses – politicians anticipate that, though judges do not. The Chaudhry Court's removal of the ruling party's prime minister did not go down well with various sections of the polity, which made their displeasure known. The judicial reaction was indignant and dismissive, and the mode quite unconventional in some cases. Inspired by the bestselling romantic Lebanese poet Khalil Gibran and borrowing the style of his poem 'Pity the Nation,' one judge's contemptuous disapproval was in verse and under the same title. He observed:

...Pity the nation that elects a leader as a redeemer
but expects him to bend every law to favour his benefactors
Pity the nation whose leaders seek martyrdom
through disobeying the law
than giving sacrifices for the glory of law
and who see no shame in crime.
Pity the nation that is led by those
who laugh at the law
little realizing that the law shall have the last laugh.
Pity the nation that launches a movement for rule of law
but cries foul when the law is applied against its bigwig
that reads judicial verdicts through political glasses
and that permits skills of advocacy to be practised
more vigorously outside the courtroom than inside.⁸⁹

One of the most problematic aspects of the Chaudhry Court's overreaching activism was its self-driven scrutiny of the parliament's constitution-making powers soon after democracy was revived. Constitutions inherited by elected governments in Pakistan are invariably

⁸⁸ Id.

⁸⁹ See Criminal Original Petition No. 6 of 2012 in Suo Motu Case No. 4 of 2010 at http://www.supremecourt.gov.pk/web/user_files/File/Crl.O.P.6of2012.pdf.

unrecognizable patchworks owing to self-perpetuating amendments, insertions, and ambiguities introduced under military rule. A major achievement of the new government was that it managed to create national political consensus, through a rigorous and transparent process, around revisiting the Constitution to address various such alterations, quite apart from introducing important new mechanisms, dispensations, and rights. Introduced in 2010, a salient aspect of the 18th Amendment to the Constitution was a new process for judicial appointments to the appellate courts. The previous mechanism was excessively open-textured, opaque, and politicized.⁹⁰ A model centered on individual discretion, it did not visualize any meaningful role for the parliament; vested inordinate power in the executive; was increasingly vulnerable to deadlocks between the President and the Chief Justice (there were growing tussles over who had the last word); and embraced processes that were opaque to any external scrutiny.⁹¹

The 18th Amendment introduced an inclusive and transparent two-level process, assigning the key role of making all appointment nominations to a 'Judicial Commission' headed by the Chief Justice with the majority of its other members senior judges, and the minority comprising legal representatives of the executive and senior lawyers. The nominations were to be evaluated and final acceptance extended by a 'Parliamentary Committee' comprising of four members each from both houses of parliament with equal representation from the governing party and the opposition.⁹² The Chaudhry Court overlooked the balance and mutual accountability presented by the new arrangement and unjustifiably imagined future parliamentary domination or foul play. Expressing open dismay at the amendment and once again raising the specter of the 'independence of the judiciary being under threat,' it admitted PIL petitions challenging the amendment, itself a controversial as action because it thereby seemed ascribed to the Court the

⁹⁰ See Osama Siddique, *Across the Border – A New Avatar for India's 'Basic Structure Doctrine*, in SEMINAR: A MONTHLY SYMPOSIUM, ON 60 YEARS OF THE INDIAN CONSTITUTION (1950-2010), 2010, at 52 -53.

⁹¹ Id. at 53.

⁹² Id. at 53-54.

power to review constitutional amendments.⁹³ Many months of judicial scrutiny followed. The Chaudhry Court even seriously contemplated embracing controversial ideas such as its own brand of the 'basic structure doctrine' and the controversial theocratic preamble to the Constitution (subsequently added to the operative part as Article 2-A by Zia) – both debunked by past Supreme Courts as possible 'grundnorms' to question other constitutional provisions. It eventually veered away from the temptation to grant itself the power to sit in judgment over constitutional amendments in view of sustained and wide-ranging criticism that equated its decision to question a constitutional amendment as 'judging democracy' itself.⁹⁴

However, the Court still pressed the government to review the amendment in order to further circumscribe the Parliamentary Committee's role by requiring it to record reasons for its decisions and to forward those reasons to the Judicial Commission (which reasons the Chaudhry Court subsequently declared to be open to judicial review) and to hold in camera sessions – changes incorporated in the 19th Amendment to the Constitution in early 2011. The same rigor of process and decision-making, though, were seemingly not required of judges. This became apparent at a later stage when the Parliamentary Committee objected to certain nominations by the Judicial Commission. The reason was that even though the provincial Chief Justices who had initially forwarded these names had made certain adverse remarks about the nominees' eligibility, the Judicial Commission had left the concerns unaddressed and gone ahead with their nominations. The Chaudhry Court responded by admitting a petition (once again under Article 184 (3)) and declared that the Parliamentary Committee lacked the technical expertise to gauge the competence of nominees or to sit in judgment over the Judicial Commission's deliberations, even if a member or members of the Commission itself had earlier raised any qualitative concerns about any candidates. The Parliamentary Committee was told to restrict itself to either accepting the nominations or rejecting them based on grounds falling within its domain (these grounds are never really specified in the 64 page judgment), and any such rejections were held to

⁹³ See Nadeem Ahmad v. Federation of Pakistan, PLD 2010 SC 1165.

⁹⁴ See for example the special issue of The Friday Times, 17-23 September, 2010, titled 'Judging Democracy.'

be open to judicial review.⁹⁵ As a consequence, there is now great ambiguity as to the remaining role and powers of the Parliamentary Committee. The Judicial Commission also formulated the Judicial Commission of Pakistan Rules 2010, under which only the Chief Justice of an appellate court can initiate the process of nominations, thus reverting once again to an individual-centric model. In essence, these developments have made the judicial appointment process even more judiciary dominated than the pre-18th Amendment model.

While courting public attention, the Chaudhry Court has at times demonstrated an intent to take on the military establishment – though such ventures have fallen short of other judicial intrusions in the political sphere. For example, in the *Asghar Khan* case the Court adjudicated allegations that the military establishment had masterminded and financed the outcome of national elections in 1990, which resulted in the defeat of Benazir Bhutto's party. While political pundits had always held serious reservations about the role of military agencies in those elections, the case had remained pending for sixteen years. In its judgment, the Chaudhry Court found that the then President (a Zia confidant), the Chief of the Army Staff, and the head of the country's premier secret service, and their subordinates had violated the Constitution and engaged in unlawful activities to make it easier for one group of politicians to prevail over their opponents, by means that included illicit distribution of funds. The Court stated that any unconstitutional act called for action in accordance with the Constitution and the law – which, most significantly, in the case of the now retired military men, directly pointed to the prospect of treason proceedings.⁹⁶

The verdict has tremendous symbolic value given the historical inviolability of the men in uniform, regardless of the dimensions of their anti-constitutional actions.⁹⁷ Still, one could argue that these are long retired generals and also estranged from the current leadership. Further, unlike cases against politicians the Chaudhry Court has not really pushed for further action. It has been

⁹⁵ See *Munir Hussain v. Federation of Pakistan*, PLD 2011 SC 407.

⁹⁶ See *Air Marshall (Retd) Asghar Khan v. General (Retd) Mirza Aslam Beg and others* PLD 2013 SC 1.

⁹⁷ See *Salman Akram Raja, Asghar Khan's vigil*, *The Daily Dawn*, October 31, 2012.

similarly careful when it comes to Musharraf, who, miscalculating his popularity while in exile, is currently back in Pakistan, under custody, and facing several charges. Hearing a petition exhorting the Chaudhry Court to direct the Federal Government to initiate treason proceedings against Musharraf, it readily accepted the Government's plea to set up a special team to investigate Musharraf's acts of November 3rd, 2007 to determine whether they constituted treason. Unlike its typical approach, this time the Chaudhry Court did not mandate any time frame for a decision. It further said that it was consciously and deliberately not touching the question of 'abrogation,' or 'subversion', so as not to prejudice the inquiry/investigation or subsequent trial, should that take place as a result of such investigation.⁹⁸ This is in dramatic contrast to its zealous approach while initiating and supervising investigations against current political figures and civilian institutions.

While the Chaudhry Court has chosen to embroil itself in various time-consuming and politically contentious matters, its initial support has steadily diminished due to unaddressed issues of access, corruption, and delay in the formal court system. Justice Chaudhry's court-centric and personalized administrative and policy-making approaches have largely failed to adduce any meaningful administrative, procedural, fiscal, and service delivery reforms.⁹⁹ Available data and surveys reveal low morale and a sense of neglect among the district judiciary and escalating discontent among the litigating public.¹⁰⁰ Justice Chaudhry has also recently been mired in a major controversy involving allegations that his son was the recipient of vast amounts of money and privileges from an influential and highly controversial property tycoon. The situation was not helped by the fact that Justice Chaudhry decided to take *suo motu* notice of the rumors and

⁹⁸ See Order dated July 3, 2013, in C. P. No. 2255 of 2010 & Constitution Petitions Nos. 14, 16, 17 and 18 of 2013 along with CM Appeal No. 157/2009 with CMAs 2335-2337 of 2013 and CMA 2368 and 2705 of 2013, at 3, at http://www.supremecourt.gov.pk/web/user_files/File/C.P.2255-2010-03.07.2013.pdf

⁹⁹ See generally, Osama Siddique, PAKISTAN'S EXPERIENCE WITH FORMAL LAW: AN ALIEN JUSTICE (Cambridge: Cambridge University Press, 2013), [hereinafter *Pakistan's Experience with Formal Law*].

¹⁰⁰ Id. See also Osama Siddique, Law in Practice – The Lahore District Courts Litigants Survey (2010-11), DPRC Working Paper, LUMS, 2011.

news reports – in clear violation of the Code of Conduct notified by the Supreme Court in 2009, which states that, “A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friend.”¹⁰¹ Doubts persist over the maintainability of the matter under Article 184(3), the Court's appointment of a controversial one-man commission to investigate the matter, as well as the neutrality of its adjudication by two judges known to be close to Justice Chaudhry (they heard the case after he eventually recused himself).¹⁰² The judges characterized the matter as a politically motivated conspiracy from the start, invoked the narrative of the Movement to extol the integrity of judges rather than meaningfully address the factual questions before them, and took additional steps and made comments that were widely perceived as over-protective of the accused.¹⁰³

Part V: Future Directions

The Chaudhry Court's judicialization of politics presents an important case study for the literature on the modes of growth in judicial power. Its most characteristic feature has been its 'proactive' involvement in mega-politics. As the analysis has shown, this is the outcome of a conscious choice and deliberate strategy on part of a coterie of judges. In other words, almost all the recent high profile political cases have neither been pulled into controversial contestations by political circumstances or by strategic politicians, nor has the momentum of public opinion

¹⁰¹ See Article IV, Code of Conduct for Judges of the Supreme Court and the High Courts, Notification dated, 2nd September, 2009, available at <http://www.supremecourt.gov.pk/web/page.asp?id=435>, [hereinafter *Code of Conduct for Supreme Court and High Court Judges*].

¹⁰² See *The Arsalan Iftikhar Case: Is the Pandora's Box really closed?* Pakistan Today, December 8, 2012; *Arsalan Iftikhar Case: Asma voices concern over one-man commission*, The Daily Dawn, September 3, 2012; Faisal Siddiqi, *Kinship, money and justice*, The Daily Dawn, September 14, 2012; Babar Sattar, *Rule of Judges?* The News International, September 8, 2012; and, Saroop Ijaz, *5–and– 5: The highs and lows of the outgoing CJ of Pakistan*, Express Tribune, December 10, 2013.

¹⁰³ See Arsalan Iftikhar case, at 671.

pressure propelled them into such embroilment. On the contrary, the judges have calculated and grasped the potential opportunities that such interventions present to occupy center stage and thereby progressively extend the ambit of judicial review, consolidate constituencies in the media and legal bars, build public support for their activism, and assume legal, political, and moral supremacy over the arbitration of matters of national significance – despite tenuous jurisdictional justifications and increasing criticism from diverse quarters. This is in contrast to historical factors for the judicialization of politics in Pakistan where the judiciary was coerced or co-opted in mega-politics by dictators or unavoidable political crises.

While engaging in unrestrained activism, the Chaudhry Court has also endeavored to ensure that its interventions are widely publicized and celebrated. Furthermore, certain judges have shown a propensity for self promotion. Their own Code of Conduct that says, “Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law,” has long become of mere academic value.¹⁰⁴ The fact that the *suo motu* jurisdiction in particular has been the standard *modus operandi* for assuming jurisdiction demonstrates that this type of judicialization of politics is fundamentally self-driven; even in typical PIL cases there are after all particular sectional interests in society that approach the court.

The initial public support for the Chaudhry Court in the wake of the Movement is an inadequate explanation for its subsequent trajectory. The Movement was an amalgamation of diverse anti-autocracy forces and the sustenance and consolidation of the democratic process was a greater priority for it as compared to abstract notions of judicial independence. When the Chaudhry Court opted for high profile duels with the government as the vehicle for institutional profile building and power accumulation, it started alienating many significant sections of its supporters from the Movement days, especially as it neglected its various promises to reform the overall

¹⁰⁴ See Article V, Code of Conduct for Supreme Court and High Court Judges.

system of justice for the benefit of ordinary people. Neither has it been able to sustain the loyalty of luminaries and foot soldiers from the legal fraternity.¹⁰⁵ Over the years, prominent leaders of the Movement have publicly parted ways and openly disparaged its key judgments. Elected officeholders of major bar associations now represent collectives of lawyers irate at its unrestrained activism and embroilment in controversies, and the media routinely engages in uninhibited critique of debatable aspects of its demeanor and jurisprudence. At times, it has waved the stick of 'contempt of court' at some of the more irreverent critics but that has only provoked defiance.¹⁰⁶ That the great judiciary-lawyer alliance is now deeply fragmented is an understatement – the Lahore High Court Bar Association recently filed references before the Supreme Judicial Council against four apex court judges, including Justice Chaudhry, seeking proceedings for misconduct and removal from office on the grounds of misusing the Court for personal and political ends.¹⁰⁷

Such has been the domination of the Court by Justice Chaudhry and some like-minded colleagues that institutional frameworks have taken a back seat to personality-driven rhetoric, decision-making, and judicial prioritization and course-setting.¹⁰⁸ The escalating backlash and controversies surrounding the Chaudhry Court's jurisprudence have not gone unnoticed by other judges who have not been at the forefront of its judicialization of politics, even if they seldom dissented in crucial cases in the larger interest of projecting the impression of an undivided Court. Some course correction is likely after Justice Chaudhry's departure. At the same time, the

¹⁰⁵ See Jon Boone, *Pakistan's chief justice Iftikhar Chaudhry suffers public backlash*, The Guardian, August 28, 2013. See also *The Lawyers Movement and its Fragments*.

¹⁰⁶ See Saroop Ijaz, *Contempt of the people*, The Express Tribune, August 3, 2013. The Lahore High Court Bar Association recently condemned possible coercive use of the law of contempt to inhibit free speech, see Rana Yasif, *Bar vs bench: LHCBA condemns 'abuse' of contempt law*, The Express Tribune, August 25, 2013.

¹⁰⁷ See *LHCBA files reference against CJP, three other SC judges*, The Daily Times, October 12, 2013.

¹⁰⁸ See Mohammad Waseem, *Judging democracy in Pakistan: Conflict between the executive and judiciary*, Contemporary South Asia, 20:1.

Chaudhry Court has brought the judiciary to the heart of several divisive national discourses and contestations. Any major immediate retreat to the periphery of mega-politics would be difficult to achieve, even if attempted. Meanwhile, allegations of self-promotion and politicking are more strident and uninhibited than ever before. Whether they linger on or withdraw, the judiciary is so inextricably caught up in the political life of Pakistan that further constitutional instability is likely the future.