

Human Rights in a 'State of Emergency': Protest Politics and Legal Activism in the 'Missing Persons' Cases in Pakistan

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Following the attacks of September 11, 2001, the US and its allies launched military campaigns and intelligence operations around the globe. The human rights violations, violation of international law and due process in these operations were justified in the name of state security and 'extra-ordinary' threat that '(Islamic) terrorism' posed to liberal democracies. And yet, human rights guaranteed by liberal constitutions were violated to secure 'freedom' and 'rule of law' abroad as well as at home as surveillance was deepened to fight home-grown 'terror threats'. Enforced disappearance of alleged militants in Pakistan, and elsewhere in states allied with the US, took place in this geopolitical context, and resulted in the extension of the so-called war on terror to war on political dissent. This paper examines protest and legal activism against extra-judicial abduction and detention of activists, militants, and nationalists in Pakistan. These men were picked up as security forces launched campaigns against militant groups in the north-western (formerly) federally-administered 'tribal areas' and undertook intelligence operations claiming to break their support networks in other parts of the country; internment centers were established in the tribal areas to hold persons rounded up in these operations or picked up elsewhere. Thousands were held there without trial or access to civilian courts. As detainees held in these centers continued to languish for years, their families mobilized outside and inside the courts to trace and free these men. The paper explores both political context in which judicial activism in the 'missing persons' cases emerged and how the struggle of the families of the missing advanced through the courts and became central to the struggle about legality and human rights in the country as it was living under yet another military rule. I suggest that the movement around disappearances is a case which illuminates

law as a site of a long durée of political struggle in Pakistan. The paper moreover reflects on the dialectic between law and social movements and the limits of forwarding human rights claims by means of courts.

Introduction

§1 On June 16th, 2020, Chief Justice of the Peshawar High Court, Waqar Ahmed Seth, set aside sentences awarded by the military courts to 196 suspected militants detained in internment centers run by the Pakistani security forces in Khyber Pakhtunkhwa province¹. These men had been held in the military's custody for years and many had been declared 'disappeared' or 'missing' by their families and the human rights activists. The internment centers that they had been detained in (without being formally charged) were established by the military forces to hold suspected militants captured and/or picked up during counterinsurgency operations in the northwestern tribal and semi-tribal areas of the country. In a previous judgment, the Justice Seth had questioned the constitutionality of *The Khyber Pakhtunkhwa Actions (in Aid of Civil Power Ordinance No. V of 2019)* which had given a blanket legal cover to these internment centers². These remarkable decisions were a culmination of over a decade long legal and political struggle waged by the families of the missing persons and the activists and lawyers who supported them. Their movement had sparked and reinforced judicial activism against enforced disappearances that had emerged in the early 2000s (as the country was enduring yet another military rule then) in the foreground of struggle over the implementation of the fundamental constitutional rights of Pakistanis, the rule of law in the country and the jurisdiction of the higher courts under a state of emergency declared against terrorism.

§2 This paper examines judicial activism and protest politics in Pakistan as mobilized by human rights activists and litigants seeking justice for people 'disappeared' — that is, extra-judicially abducted and detained on suspicions of engaging in militancy, separatism, and dissent — by the state's military and intelligence services³. Judicial activism by the Pakistani Supreme Court against enforced disappearances emerged in the broader context of *suo moto*⁴ interventions made by the Supreme Court headed by Chief Justice Iftikhar Chaudhry (in office from June 2005-March 2007, July 2007-November 2009 and March 2009-December 2013) in civil and bureaucratic governance of the country)⁵, whereas the families of the disappeared persons initiated litigation in the higher courts following the military's counterinsurgency operations in northwestern part of the country (formerly known as FATA [Federally Administered Tribal Areas] and PATA [Provincially Administered Tribal Areas]) after September 11, 2001, and the increasing detention and rendition of persons suspected of engaging in militant activities. Even though the Supreme Court questioned the "necessity of the state" and the "state of emergency"⁶ arguments presented by the state to justify actions of the security forces, the judicial activism of the Supreme Court abated with the retirement of judges who had early on taken interest in the 'missing persons' cases and the obdurate resistance of the military and intelligence services to Supreme

Court's rulings in these cases. The protest and legal activism of the families of the disappeared continued, however.

§3 The paper suggests that the courts became a key site for pushing the families' activism, despite their clear limitations as a venue for producing meaningful change. Legal mobilization even though invited in some respects by the 'activist' judges was also entangled with the political struggle between the higher judiciary and the military government. The movement's protest and legal mobilization provided a legal opening by the judges wanting to take up the cases, but that mobilization was in turn affected by the contention between the executive and the judicial powers. I therefore argue, following Critical Legal scholarship, that the movement around disappearances, in some respects, is essentially a case that illuminates law as a terrain of "social conflict and political contest" in Pakistan⁷.

§4 The struggle over the jurisdiction of the courts, their role in upholding the constitutional rights of ordinary Pakistanis and the limits of those rights under emergency rule, took place at a particular conjuncture in the country's turbulent history. This contention took place as the country was still under a military regime (the coup of 1999 had been given legal cover by the Supreme Court itself⁸; the state's violation of basic human rights claiming to fight 'terrorism' was under judicial scrutiny; and the courts' jurisdiction upon the federally-ruled tribal areas and its residents and over the military's counterinsurgency operations underway in those areas, was being questioned by the state.

§5 The Supreme Court's taking up of the enforced disappearance cases became one of the major provocations to General Musharraf's military rule (he held power from 1999-2008). Alarmed by growing Supreme Court's intrusions in the governance of the state and the likely challenge from the Court to his re-election as the President while holding the office of Chief of Army Staff, Musharraf retaliated by suspending Chief Justice Chaudhry in March and then, again, in November 2007. The missing persons cases continued after Chaudhry's restoration and became a site for continuing a "war of position" — a protracted and passive public challenge — against the powerful military and its invasive intelligence services⁹. As these cases stretched well over a decade — the period during which the Supreme Court gradually entrenched itself — the petitioners as well as some of the activist judges turned the Court into an arena of conflict, as a public site of accountability of the state's security services¹⁰. In the past, the Supreme Court had legitimized successive military takeovers (1958, 1977, 1999) under the doctrine of "necessity of the state"¹¹ and on a misinterpretation of Kelsenian notion of "revolutionary legality"¹² and so the judicial activism of a resurgent Supreme Court emerged to strengthen its ability to protect the citizens facing violence justified by the state's invocation, yet again, of emergency.

§6 The paper traces four stages of struggle in the missing persons cases: "the

legalization of the struggle”; the courtroom as the site of contestation; mobilization of “law against the state”¹³; and “the judicial verdict on the dispute”¹⁴. I discuss early proceedings in the missing persons cases in the Supreme Court, suggesting that even though the Supreme Court publicly questioned and threatened the civilian bureaucracy with the contempt of court charges, the judges struggled to enforce the Court’s writ to bring the powerful security and intelligence services under their jurisdiction. A brief examination of the protest activism of the families of the missing persons illustrates how the politically marginalized men and women themselves used the courts to resist dominant “coercive structures” through law and legal process and the limits of those challenges¹⁵. The paper broadly examines the dialectic of law and social movements, but also the limitations of these tacit alliances, under conditions of censorship, intimidation, and violence. The failure of the judicial as well as political system to compel the state military and intelligence services to formally present and charge the detained persons in civilian courts and to address the grievances towards the security forces in their counterinsurgency operations has resulted in the emergence of another social movement protesting disappearances, the *Pashtun Tahafuz Movement* (henceforth, PTM) — led by young Pashtun rights and political activists and the families of the detained and disappeared persons from the northwest of the country.

Background: ‘Terrorism’ and Human Rights

§7 The phenomenon of enforced disappearances emerged in Pakistan soon after September 11, 2001 as the United States sternly demanded the arrest and extradition of ‘terror’ suspects¹⁶. Soon after the attacks of September 11, 2001, the intelligence services of the western states and their allies elsewhere assembled behind the U.S. and together engaged in shadowy practices of rendition, torture and illegal detention in the global war against militant networks¹⁷. Allied states helped the U.S. forge these networks of detention and rendition. Suspects from around the world (particularly those who were caught fighting the U.S. and its allies forces in Afghanistan) were rounded up and collected at Guantanamo Bay, Cuba, and Bagram Air Base, Afghanistan. Labeled “unlawful combatants”, these men were denied rights as prisoners of war under international law and detained at these prisons for years without charges¹⁸. The legal contestations about what constitutes torture¹⁹, debates about the legal status of “enemy combatants” in the war on terror²⁰, and, most recently, the legal status of drone attacks in international law — and of those killed in these attacks — in the northwestern tribal and settled areas of Pakistan are part of the debate about the relationship between violence, emergency and human rights²¹. Extra-judicial detentions by security services in Pakistan and elsewhere were therefore part of the internationally-legitimized state practices alleging to capture and break global ‘terror’ networks at the expense of refusing the suspects their fundamental human rights and due process of *habeas corpus*²².

§8 Even though the Pakistani military and intelligence services deny extra-judicial detentions, the families and human rights activists have traced many of the ‘missing persons’ to internment centers run by the military forces authorized by The Actions (in Aid of Civil Power) Regulation, 2011 — an ordinance issued in 2011 but retroactively taken effect from February 1st, 2008. A majority of the abducted are secretly detained and are not charged or presented in the courts.

§9 It is important to note that along with the suspected ‘Islamist militants’, amongst the missing persons, can also be counted many activists engaged in separatist movements in the provinces of Baluchistan and Sind²³. Alarming, the intelligence services have extended disappearances as a tactic of fear, intimidation, and censorship to their public critics as well, many of whom are political and rights activists, students, journalists, teachers, and intellectuals²⁴. Extra-judicial detention has become a tacitly approved security measure to silence opposition to military’s intervention in politics and media, its narratives on security, terrorism, foreign policy, and counterinsurgency campaigns in the country.

§10 Over two thousand cases of the ‘missing persons’ are recorded by the DHRP

(Defense of Human Rights Pakistan - set up by Amina Janjua (whose husband has been 'missing' since 2005) in 2006. Janjua has organized the families of the missing persons under DHRP. The missing persons cases were also advocated by the HRCP (Human Rights Commission of Pakistan) - a prominent rights organization, led by human rights activists since the 1980s. The actual number of disappearances is believed to be much higher because: first, these are the figures based on disappearances reported to only one organization (DHRP), and second, the families of the missing persons are often intimidated by the intelligence services not to report the disappearance. Together, the DHRP and the families of the missing persons, have petitioned the higher courts, protested outside the Supreme Court and the Parliament, and organized sit-ins.

Legalization of the Struggle

§11 The movement against disappearances started in 2006 and broke publicly the tacit silence about these extra-judicial practices when a few months after her husband's disappearance, Amina Janjua set up a protest camp outside the Supreme Court. After weeks of protest, the Supreme Court finally admitted the petitions of Janjua and the family members of other missing persons who had joined her.

§12 I first met Janjua in June 2012 in Rawalpindi. Her husband, Masood Janjua, who had left for Peshawar on a *tablegi (dawa'h)* trip with a friend (Faizan Ahmed)²⁵, had been missing since July 7th, 2005. Masood and Faizan, Janjua alleged, were taken away, while enroute to Peshawar, by the men from the intelligence services. After failing to recruit the help of the law-enforcement agencies to trace Masood, Amina, first, filed a petition in the Supreme Court and by 2006, had set up the Defense for Human Rights Pakistan (DHRP) to support, organize and mobilize the families of the constantly increasing missing persons for protests as well litigation in the higher courts²⁶.

§13 During the next few years of proceedings²⁷ as the 'missing persons' cases continued to accumulate in the Supreme Court, the vexed judges ordered the Interior and Defense Ministries to trace the missing men. While the contestations over the exact number and location of the disappeared persons went on in the Supreme Court, on March 9th, 2007, General Musharraf suspended Chaudhry on charges of misuse of powers of the Chief Justice's office and sent a reference against him to the Supreme Judicial Council²⁸.

Courtroom as an Arena of Struggle

§14 The missing persons cases turned the courtroom into a site of contestation over the implementation of fundamental constitutional rights and the defining of the limits of judicial authority between the Supreme Court, the military and its intelligence services, and the claimants and families of the missing persons. The courtroom became a *public* site for “contests over the meaning and application of law”, that is, of the fundamental rights of the missing persons and the substance and application of the rule of law by the courts²⁹. The Supreme Court judges held the state accountable for the disappearances, on the account of the violation of the rule of law, which, for the judges, entailed not only following procedural law in placing these men under arrest and producing them in the courts (and thereby surrendering them to the civilian courts’ jurisdiction), but also a violation of the missing persons’ constitutional rights. The petitions against disappearances were therefore always filed by the activists on grounds of violating the human and constitutional rights of the missing persons³⁰.

§15 The Supreme Court’s intervention in the enforced disappearance cases had provoked Musharraf’s military regime which retaliated by suspending Chief Justice Chaudhry in March and then, again, in November 2007. It is important to note that, under Chief Justice Chaudhry, the Supreme Court had then increasingly been taking interest (through *suo moto* notices) in the executive domain in matters to do with public interest³¹. The civilian bureaucrats had to respond to the Supreme Court in the missing persons cases too and often had to face the judges’ ire over their incompetence, ignorance (about the events of the disappearances) and helplessness in tracing, let alone returning, the missing persons.

§16 Chief Justice Chaudhry’s dismissal was protested by the lawyers and their bar associations across the country³². The DHRP and the families of the missing persons joined the protesting lawyers and political and human rights activists too. According to Janjua, her organization and the families were, in fact, amongst the first protestors to support the lawyers outside the Supreme Court, soon after Chaudhry’s suspension. On July 20th, 2007, fellow judges reinstated Chaudhry. This was to be a rare, albeit short lived, triumph of the Supreme Court against the powerful military establishment. However, the restoration emboldened Chaudhry and soon after his return to Court No. 1, he restarted presiding over the enforced disappearance cases.

§17 Even during the suspension of the Chief Justice, proceedings in Janjua’s case had continued. Mirza³³, a key witness in Masood Janjua’s disappearance case³⁴, was in the Army’s custody. The state prosecutors admitted in the court that Mirza was under arrest on allegations of spying for “foreign elements” and was currently “facing court field marshal general”³⁵.

§18 In its proceedings on June 20th, 2007, the Supreme Court threatened to charge the Secretaries of Defense and Interior ministries with contempt of court, if they failed to stop the military proceedings against Mirza and produce him in the court. In South Asia, contempt powers have often been used by the higher courts to enforce their jurisdiction and consolidate their authority against the state bureaucracy³⁶. The Supreme Court was incensed to learn that, despite its orders, Mirza had been sentenced to eight years in prison for the charges he faced by a military court. The Supreme Court was annoyed over the illegitimacy rendered to its proceedings and denied the military jurisdiction over the persons in its custody. The judges ordered the Interior and Defense Secretaries to produce Mirza along with the proceedings of his court martial. On August 20th, 2007, the Supreme Court was informed that Mirza was on his way and would be soon produced in the court.

§19 In the hearing on October 5th, 2007, the Secretaries again appeared in the Supreme Court. The Chief Justice, frustrated because of the obtrusiveness shown by the intelligence agencies in the other missing persons cases, demanded that the state respond to the Supreme Court responsibly and trace the missing persons. He asked the Secretaries to question the chiefs of intelligence agencies. On the Interior Secretary's suggestion that the provincial governments should be answerable in these disappearances and not the federal, the Chief Justice responded, "Police say that these people were not lifted by them and that they are in the custody of federal agencies. If the Defense Secretary says he cannot do anything *we will summon the heads of intelligence agencies. Uniformed generals of ISI and MI will be standing here and [be] questioned*"³⁷. He further told the secretaries that there was evidence that the disappeared persons were detained by the intelligence services and those responsible for their "illegal custody" will be charged by the Supreme Court³⁸. Hinting at the state necessity to holding its legality, the Chief Justice stated: "The court could not abdicate its responsibility of protecting fundamental rights of the people as guaranteed in the Constitution... The court did not want to take any extreme step but if it was forced to do so, the responsibility would lie on the government. If we abrogate the whole system, these agencies will be free to do anything. *The people will not come to us. They will decide things in streets*"³⁹. This was a direct challenge, however, formulated in the language of the rule of law, from the Supreme Court to the powerful Pakistani Army, its intelligence services and the subservient civilian bureaucracy serving their interests.

§20 By holding the state's security services accountable for the disappearances, and by claiming to enforce the rule of law, the higher courts addressed the uneven reach and influence of the courts across the country. By taking up enforced disappearance cases, new legal subjects and jurisdictions were being brought into the judicial orbit. The courts challenged the justification of violence carried out under (what the state considered) exceptional and emergency conditions and, in

the process, extended, albeit frugally, its jurisdiction to geographically and judicially-marginalized regions (such as the former FATA and PATA) and powerful state institutions (such as the military and civilian bureaucracy) – considered exceptional and supposedly beyond its authority; the Supreme Court brought new subjects, the claimants from the ‘tribal zone’ in the missing persons cases, under its jurisdiction⁴⁰.

§21 As the hearings in these cases went on and the Supreme Court reached the limits of its patience with the reticent higher bureaucracy, on November 3rd, 2007, General Musharraf, again, imposed emergency in the country, suspended the constitution, and sent the judiciary home. The provocations of the Supreme Court had irked the military and intelligence services and had become one of the main charges for the dismissal of Chief Justice. In his proclamation of emergency, General Musharraf had referred to the disparaging way in which the higher judiciary publicly reprimanded senior bureaucrats serving the state in the Supreme Court. However, most Pakistanis were aware that the impending Presidential election and challenges to General Musharraf’s candidacy, because of his holding of both the offices of Chief of the Army Staff and the President, were pending in the Supreme Court and had become consequential threats for the General. Nevertheless, the proclamation of emergency repeatedly cited ‘terrorist’ threats and held the higher judiciary responsible for their exacerbation. The proclamation read thus:

“Whereas some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the government and the nation’s resolve diluting the efficacy of its actions to control this menace; ...

Whereas constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations and urban planning, has weakened the writ of the government; the police force has been completely demoralized and is fast losing its efficacy to fight terrorism and intelligence agencies have been thwarted in their activities and prevented from pursuing terrorists;

Whereas some hardcore militants, extremists, terrorists and suicide bombers, who were arrested and being investigated were ordered to be released. The persons so released have subsequently been involved in heinous terrorist activities, resulting in loss of human life and property. Militants across the country have, thus, been encouraged while law enforcement agencies subdued; ...

Whereas the humiliating treatment meted out to government officials by some members of the judiciary on a routine basis during court proceedings has

demoralized the civil bureaucracy and senior government functionaries, to avoid being harassed, prefer inaction; ...

Whereas a situation has thus arisen where the government of the country cannot be carried on in accordance with the constitution and as the constitution provides no solution for this situation, there is no way out except through emergent and extraordinary measures”⁴¹

§22 As the protest movement, popularly known as the ‘Lawyers Movement’, to restore the Chief Justice and fellow judges continued to mobilize Pakistanis across the country, and after the parliamentary elections were held in February 2008 and Pakistan People’s Party (PPP) formed government in March 2008, the restoration of Chief Justice Chaudhry followed a year later (in March 2009). By then, General Musharraf had resigned as Chief of Army Staff (even though he continued to hold the civilian office of the President until August 2008). These political changes lifted the expectations of Janjua and other activists. However, after returning to office, Chaudhry gradually distanced himself from the missing persons’ cases. As his judicial grandeur grew, Chaudhry moved on to other politically attractive, populist cases, such as those to do with ‘corruption’ in the politics and governance of the country and embroiled himself in political tussle between the powerful military and the elected civilian government of the Pakistan Peoples’ Party.

§23 The Supreme Court’s avoidance of a direct confrontation with the powerful Army and intelligence services and Chaudhry’s judicial interventions in multiple other directions (again, by taking *suo moto* notices), however, didn’t deter Janjua and other human rights activists. Their movement for the recovery of the missing persons continued in the form of sit-ins, street protests, seminars, and publications. Their protest activism outside and the legal proceedings inside the courts had resulted in two substantial achievements: first, the legal topography of internment centers in the country was exposed and, second, by their activism, the families of the missing compelled the state to *admit* the *existence* of the practice of enforced disappearances.

Mobilizing “Law Against the State”

§24 The human rights activists and litigants in the enforced disappearance cases were aware of how their consistent protest action, outside the courts, morally impacted the judges - particularly when they noticed that their cases were intentionally delayed by the court clerks or because the state’s military and intelligence services refused to appear in the courts or even when they did, they obstructed the proceedings by various delaying tactics⁴².

§25 For instance, in March 2012, on Supreme Court’s Chief Justice Iftikhar Chaudhry’s visit to Quetta⁴³, Nasarullah Baluch organized a protest and daringly decided to take all the protesting families of the disappeared persons inside the courtroom⁴⁴. Baluch led a human rights organization, VBMP (Voice for the Baluch Missing Persons). His uncle, Ali Asghar Bangalzai, a Baluch nationalist, had been (and remains) missing since October 12th, 2002. On the Supreme Court’s orders, Baluch was provided residence and travel expenses as he had to fly from Baluchistan to appear before the court in Islamabad. Baluch considered his appearance at the Supreme Court crucial to the cases, because he was able to register the names, and details of those who have been ‘disappeared’ from the state’s registers as well as have been denied a place in public memory⁴⁵.

§26 On Chief Justice Chaudhry’s visit to Quetta Registry of the Supreme Court, Nasarullah Baluch wanted the court to hear VBMP’s petition on the missing persons cases. Although it’s the registrar who is responsible for fixing cases for the judges, in fact, Chief Justices of the respective courts influence the lists of cases to be taken up. Baluch’s petition had been pending in the Baluchistan High Court for months and was not even put up for Chief Justice Chaudhry. Baluch explained to me:

“I had organized about 80 families of the missing persons to go to the Quetta Registry of the Supreme Court because our cases had been pending for so long. So, on Chief Justice Chaudhry’s visit, we all went inside the courtroom. As we entered, the whole court got disturbed; the policemen threatened to throw us out, but we didn’t relent. When Chief Justice Chaudhry arrived, the women and children, who had come with me, began to cry and plea in front of him for help and to find their husbands, fathers, sons, and brothers. When the Chief Justice saw the crying and wailing women and children, he said, ok, I will take notice, and he started the hearing on our applications soon after”.

§27 Baluch and the family members of the missing persons turned the courtroom

into a public arena of performance and protest. They manipulated the legal context through their performance. Their moral protest triumphed in the procedural hierarchy, according to which their petition was not even on the list of cases for the judges' review on that particular day.

§28 The Chief Justice swiftly acted on Baluch's petition. Four members of a family, illegally detained by the FC (Frontier Corps, a paramilitary force officered by Army officers and under the authority of the Federal Government) were produced the next day⁴⁶. The next hearing took place in the Supreme Court, in Islamabad, and six more of the missing Baluch men were released. As these hearings went on and missing Baluch men continued to be located, litigants in increasing numbers began to file their petitions and appear at the higher courts, both in Quetta and Islamabad.

§29 After the release of these men, the success of the moral protest of the families of the missing Baluch men reached its end as the military and intelligence services reverted to their delaying tactics. The protest action and legal activism of the families and litigants however had compelled the military and intelligence services to engage in contestations about the practices of enforced disappearances in the higher courts publicly and, occasionally, to free some of the detained men.

The Judicial Verdict: Mohabat Shah Case and the Limits of Judicial Activism

§30 Two days before his retirement, Chief Justice Chaudhry delivered the verdict in one of the notable missing persons cases. On December 7th, 2013, Pakistani security agencies had presented seven men in the Supreme Court of Pakistan reportedly missing according to the petitions filed in the *Mohabat Shah Case*⁴⁷. Two of these men's fellow detainees had already died in the custody of the security agencies in an internment center. In the next hearing of the case, on December 10th, the bench headed by Chaudhry declared that the Army had illegally removed (i.e., 'disappeared' after detaining) thirty-five persons from an internment center in Malakand Garrison out of whom only seven had been produced so far in the Court. Yasin Shah, brother of Mohabat Shah, was among those 35 and it was now established that he was no more a missing person, as his custody had been traced to the Army. The in-charge of the internment center had testified in the court that the Army had removed these men and he had made a note about them in the register he kept recording all internments.

§31 Even though considered "light and toothless" by the critics, the ruling irritated the Army, which immediately sought a review through Ministry of Defense (MOD). In its judgement, the three-member bench, headed by the Chief Justice, ruled that "no intelligence or security agencies, including the Inter-Services Intelligence (ISI), Military Intelligence (MI), Intelligence Bureau (IB) and Frontier Corps, could secretly detain a person for a long time without sharing information relating to his whereabouts with his relatives"⁴⁸. The bench affirmed that "except for the regulations relating to the Federally Administered Tribal Areas (Fata) and Provincially Administered Tribal Areas (Pata), there was no other law which allowed security agencies to confine people without any authority"⁴⁹. Even though the Court acknowledged the limits of its jurisdiction in the federally and provincially administered areas, it nevertheless wrapped its challenge to the provocation posed by the Army to its jurisdiction in the constitutional rights of the detained persons and the protection of all Pakistanis against the violence of the state and its military and intelligence services.

§32 The judgement focused on the Army and its detention of the persons claimed to have 'disappeared' by human rights activists, and so the ruling went on to state that "the army authorities under the Pata regulations had taken away 35 detainees from the Lakki Marwat internment center but only seven of them had been produced before the court and the whereabouts of the remaining could be known only to them"⁵⁰. The judgement stated that "since no law existed about the detention of the undeclared internees, except in KP and that too under Pata regulations, the other three provinces should also come up with proper legislation to discourage the tendency of enforced disappearances. The chief executives of the

provinces should also ensure that enforced disappearances do not take place in future”⁵¹.

§33 The counsel for the Army and MOD immediately filed for a review of the judgement. Raising the ‘state of exception’ argument, the counsel argued that the “Supreme Court had failed to take into consideration that the armed forces were called in Swat and Malakand under Article 245 of the constitution to act in aid of the civil powers *and to fight the worst form of terrorism in the area. And when the army is called to assist the authorities to carry out a constitutional duty, the jurisdiction of the high court as well as the fundamental rights guaranteed in the constitution are suspended*”⁵². The Army’s counsel further argued that “without proper assistance through a probe, the Pakistan Army should not have been held responsible for having detained these missing persons... The court’s finding that those missing were with the armed forces was based on assumptions not supported by facts or record”⁵³. The petition asked the Court to remove any references that may disrepute the Army and any comments or findings against the Army and its intelligence agencies.

§34 The Supreme Court, under Chief Justice Chaudhry, had become a public platform — Chaudhry’s courtroom was often crowded by journalists ready to record and broadcast dramatic and bombastic proceedings taking place daily — whence even the actions of the most powerful institutions of the state could be questioned openly. Chaudhry’s judicial populism fed upon the humbling of the civilian bureaucracy and questioning the actions of the security forces that considered themselves beyond the jurisdiction of the courts. The higher courts’ interventions ranged from passing orders fixing the prices of everyday commodities and restricting police excesses against the poor to questioning disappearances by the intelligence services. However, as I mentioned above, the Supreme Court was engaged in a war of position with the military and restrained from challenging its extrajudicial actions outright.

§35 The intelligence services and their proxies retaliated by defaming any judge of the higher courts who took a serious interest in the enforced disappearance cases. For example, because Justice Khawaja (of the Supreme Court) had presided over a number of missing persons cases and had sternly demanded a response from the military regarding its alleged role in the disappearances, he was allegedly maligned in the media by the journalists considered close to the intelligence services. The “establishment-fed journalists”, Amina Janjua explained, systematically disreputed Justice Khawaja and his judgments because he was sympathetic to the missing persons cases. When he succeeded to become the Chief Justice in August 2015, banners smearing him were even erected in the Red Zone (a highly secured area of the capital, Islamabad)⁵⁴.

§36 After the retirement of activist judges like Khawaja and the passage of the

Pakistan Protection Act 2014 (which provided legal facade to extra-legal detentions not covered by The Actions [in Aid of Civil Power] Regulation, 2011) by the Parliament, the missing persons cases lost the public attention, judicial interest and the media's sympathy, which these cases had attracted over the years. Soon after the Taliban's bloody assault (on December 16th, 2014) on a primary-secondary school, APS (Army Public School), in Peshawar in which 132 children died, and following the attack, the military's public relations campaign, couched in the nationalist language of sacrifice and saving the nation from the 'terrorists and miscreants', the Supreme Court became extremely cautious in the missing persons cases and about the alleged role of the military forces in the disappearances.

§37 However, during their lengthy and exhausting struggle, whenever the families and claimants of the disappeared persons noticed the judges' reluctance to hold the state's security services accountable, they reinforced their legal activism with moral protest outside the courts — particularly when their cases were purposely stalled in the higher courts. The mothers, sisters, wives, and children of the missing persons mobilized for protests too and, albeit *not always successfully*, morally induced the judges to proceed in their cases. These men and women were never passive actors in these cases — inside as well as outside the courtroom.

§38 The protests following Naqeebullah Mehsud's⁵⁵ killing in an alleged Karachi police encounter on January 13th, 2018, reignited the dwindling protest activism against enforced disappearances⁵⁶. By then, the legal activism of the families of the disappeared had almost fizzled out. A married, young aspiring model, Mehsud was killed in a staged encounter by an Anti-Terrorism squad of Karachi Police, headed by a notorious officer, Rao Anwar⁵⁷. Rao himself 'disappeared' after the protests against Mehsud's killing began. Appearing months later, eventually he was granted bail by an Anti-Terrorist Court⁵⁸.

§39 Mehsud's killing mobilized young tribal Pashtuns, who have paid heavily for the militant activities as well as counterinsurgency operations in their homeland. Led by 27-year-old Manzoor Pashteen, *Pashtun Tahafuz Movement* (PTM) took on the pleas of the families of the missing persons and demanded accountability from the Pakistani military forces for their operations in their areas. The young men and women who formed PTM have taken to the streets to demand the release of the extra-judicially detained and disappeared persons — seeking answers from the powerful Army and its intelligence services for the destruction and violence committed to fight 'terrorism' in the former FATA⁵⁹. With PTM's mobilization of Southern and tribal Pashtuns to demand accountability, the protest politics of the disappeared has taken a popular and political, rather than solely judicial or legal, form. Anti-Terrorism laws and FIRs have been weaponized against PTM activists and even used against their elected MNAs (Members of National Assembly)⁶⁰.

Conclusion

§40 The analysis of what social movements achieve or lose by taking their struggles to the courts has to be a contextual one. The “war of position” engaged in by the Pakistani Supreme Court against extra-legal actions of the security services had stretched over a decade; and it had populist overtones as the Supreme Court exercised its jurisdiction to protect fundamental constitutional rights of the detainees. The examination of the activist postures of the higher judiciary, when contextualized within Pakistan’s judicial history, show us that the Supreme Court had consistently extended legal cover to successive military coups⁶¹. Therefore, the higher judiciary’s challenge to the powerful military and its intelligence services in the missing persons cases had laid the grounds for a decolonization of judicial practices, in the context of an emerging judicial activism that encouraged human rights activism. The activism of the families of the missing persons fueled this budding transformation in Pakistan’s higher judiciary.

§41 It was an activism that helped judges turn the court into a place of struggle in order to retain legitimacy of the state. The judges who stood up to the military government worked not to resist ‘the state’ per se, but rather to strengthen its legality, whose validity came from precisely adhering to rule of law norms. Human rights activists fight for these norms has been one of the more effective strategies to create legal regimes that respect basic human rights. The paper’s discussion of protest and judicial activism shows how to reframe the focus on state abuse of its powers in the name of ‘war on terror’ into one about legality.

§42 The judges who followed Justice Chaudhry and Justice Khawaja’s tenure and were reluctant to take action in the missing persons cases, extinguished judicial activism that the latter had sparked. The cautious and indifferent judges, who distanced themselves from their activist predecessors, have set poor precedents for social movements’ use and/or aspiration to use law for social and political change in Pakistan, and for the protection of fundamental rights, especially of the socio-economically marginalized by powerful private or state security interests. The Peshawar High Court’s Chief Justice Waqar Ahmed Seth’s judgements on the constitutionality of the military courts and the internment centers run by the Army have renewed contestation regarding the fundamental rights of persons extra-judicially detained on charges of militancy and ‘terrorism’ and the jurisdiction of the courts in the context of the invocation of emergency by the state. In the appeal filed in the Supreme Court against these decisions, the state has once again raised the ‘necessity of state security’ argument. The Deputy Attorney General argued in the courtroom that the military forces were asked to aid civilian power under extraordinary circumstances and therefore, constitutionally, the High Court cannot exercise jurisdiction in the area they were called to assist in⁶². By highlighting the violation of basic rights of the detainees, Justice Seth has taken on the broader challenge posed by the executive powers, by invoking security of the state, to

justice and state accountability in the country and, therefore, in his judgement, he raised objections regarding the absence of fair trial, representation and evidence in the military courts⁶³. The appeal proceedings against Justice Seth's judgements continue in the Supreme Court and it is yet to be seen if the highest court of the country will take on the challenge or once again safely retreat into a judicial slumber.

§44 Prior to Justice Seth's rulings, the judicial retreat in the missing persons cases had emboldened the state intelligence and security services and extra-judicial abductions, detentions and threats were extended to journalists, teachers and professors, and human rights and political activists critical of the military and intelligence services or their political proxies⁶⁴. On the other hand, the families of the missing persons and human rights activists felt deserted by the highest court of the country. The majority of these men and women joined the protests mobilized by the PTM, which has forwarded a counternarrative on the military's counterinsurgency operations and their socio-economic ramifications for the northwestern areas of the country. The PTM has provided the families of the missing persons and those who have been victims of prolonged detention, harassment and censorship, and extra-judicial encounters, an organized and a vocal site to raise their demands to the formal judicial system which has failed to provide them justice so far⁶⁵.

1. This paper is based on a research conducted in Islamabad, Rawalpindi, Peshawar, Lahore and Karachi, Pakistan, started in 2012 and carried on from 2014-2015, with shorter trips taken in 2016, 2018 and a stay lasting four months in Summer 2019.

Khan A., "The judge who stood up to Pakistan's military", in BBC News, uploaded on 20 November 2020, consulted on 11 December, 2020, in <https://www.bbc.com/news/world-asia-54961079>. Throughout this paper, I interchangeably use "military forces" and "security forces" to refer to military, para-military and military and civilian intelligence services. ↵

2. See Orakzai R., "Internment Centers", in *BBC Urdu*, uploaded on 25 October 2019, consulted on 17 May 2021 in <https://www.bbc.com/urdu/pakistan-50133662>, 2020. These internment centers had been given legal protection first under the Pakistan Protection Act 2014; the Act had become redundant after an amendment in the constitutional status of Federally Administered Tribal Areas where most of these centers were located. ↵

3. Throughout the paper used as synonym for various intelligence agencies, civilian and military (Inter-Services Intelligence, Intelligence Bureau, and Military Intelligence), paramilitary forces, and the Armed Forces of the country. ↵

4. "The practice of the constitutional courts [in South Asia] taking up matters *suo motu* (on their own initiative) without being petitioned by a claimant or party, to address a situation the judges regard as requiring extraordinary intervention on the part of the court". Galanter M., Vasujith R., "Suo Motu intervention and the Indian judiciary", in Rosenberg G. et al., *A Qualified Hope: The Indian Supreme Court and Progressive Social Change*, Cambridge, Cambridge University Press, 2019, pp. 92-122, p. 92. ↵

5. Cheema C.H., Ijaz G. (ed.), *The Politics and Jurisprudence of the Chaudhry Court 2005-2013*, Karachi, Oxford University Press, 2015. ←
6. Stavsky M., "The Doctrine of State Necessity in Pakistan", in *Cornell International Law Journal*, vol. 16, n° 2, 1983, pp. 341-394; Hussain N., *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, Ann Arbor, Michigan University Press, 2003. ←
7. Stone, M. et al. (ed.), *New Critical Legal Thinking: Law and the Political*, London, Routledge, 2012. ←
8. Zafar Ali Shah. *PLD 2000 SC 269*, Supreme Court of Pakistan, Islamabad, 2000. ←
9. Marxist activist and thinker Antonio Gramsci (1891-1937) differentiated between the "war of movement" and the "war of position" as follows: war of movement is a frontal assault on state, while war of position is a prolonged struggle mainly conducted on the terrain of civil society, the site of consent and hegemony and where the dominant class organizes its hegemony. See Gramsci A., *An Antonio Gramsci Reader: Selected Writings, 1916-1935*, (ed.) David F., London, Haymarket, 2012, p. 224. ←
10. Grossberg M., "Battling Over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict", in Mindie L. and Susan H. (ed.), *Contested States: Law, Hegemony and Resistance*, New York, Routledge, 1994, pp. 153-183, p. 154. ←
11. State necessity is a common law doctrine that provides justification for the use of emergency government powers and transforms violent "naked power" into "legal authority" and moreover, privileges 'collective interests' over individual rights. See Stavsky M., "The Doctrine of State Necessity in Pakistan", *supra* note 6, p. 344; see further Schmitt C., *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago, University of Chicago, 2006 [1922]; Schmitt C., *The Concept of the Political*, Chicago, University of Chicago, 1996 [1929]; Wolf-Phillips J., "Constitutional Legitimacy: A Study of the Doctrine of Necessity" in *Third World Quarterly*, vol. 1, n° 4, 1979, pp. 97-133; Kelsen H., *Pure Theory of Law*, Clark, The Law Book Exchange, 1967 [1932]. ←
12. See e.g., *Maulvi Tamizuddin Khan 1955* and *Begum Nusrat Bhutto 1977*. ←
13. Eckert J. et al. (ed.), *Law Against the State: Ethnographic Forays into Law's Transformations*, Cambridge, Cambridge University Press, 2012, p. 1. ←
14. Grossberg M., "Battling Over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict", *supra* note 10, p. 155. ←
15. Lazarus-Black M., Hirsch S. (ed.), *Contested States: Law, Hegemony and Resistance*, New York, Routledge, 1994, pp. 1, 13. ←
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17. Hafetz J., *Habeas Corpus after 9/11: Confronting America's New Global Detention System*, New York, NYU Press, 2011; Mamdani M., *Good Taliban, Bad Taliban*, New York, Doubleday, 2004; Wilson R., *Human Rights in the War on Terror*, Cambridge, Cambridge University Press, 2005. ←
18. Finkelstein C., Jens O., Andrew A., (ed.) *Targeted Killings: Law and Morality in an Asymmetrical World*, Oxford, Oxford University Press, 2012. See also, Musharraf P., *In the Line of Fire: A Memoir*, London, Simon and Schuster, 2008. ←
19. Greenberg K.J, Dratel J.L. (ed.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge, Cambridge University Press, 2005. ←
20. Ahmad M.I., "Resisting Guantanamo: Rights at the Brink of Dehumanization", in *Northwestern Law Review*, vol. 103, n° 4, 2009, p. 1684-1763. ←
21. Finkelstein C., Jens O., Andrew A. (ed.), *Targeted Killings: Law and Morality in an Asymmetrical World*, *supra* note 21. ←
22. Hafetz J., *Habeas Corpus after 9/11: Confronting America's New Global Detention System*, *supra* note 17. ←
23. "A Brief Report by Voice for Baloch Missing Persons (VBMP) about Human Rights Violations in Balochistan", in *Balochwarna News*, uploaded on 30 May 2016, consulted on 2 March 2017, in <http://balochwarna.com/2016/05/30/a-brief-report-by-voice-for-baloch-missing-persons-vbmp-about-human-rights-violations-in-balochistan/>. ←

24. Recently, a well-known journalist and a vocal critic of the military, Matiullah Jan, was abducted and released the same day. See Khan I., "Matiullah Jan: Pakistan anger as video shows reporter's abduction", in *BBC News*, uploaded 22 July 2020, consulted on 11 September 2020, in <https://www.bbc.com/news/world-asia-53495426>. ←
25. Pseudonym. ←
26. Both 'missing persons' and 'enforced disappearances' are terms used interchangeably by activists and family members of the disappeared. ←
27. Nationalist activists have been engaged in protest politics and mobilization for autonomy from the state in the provinces of Sindh and Baluchistan for decades. Military operation continues in Baluchistan to suppress Baluch independence movement there. ←
28. See Chaudhry M.I., "Text of Chief Justice Chaudhry's Affidavit", in *The News*, uploaded on 30 May 2007, consulted on 17 May 2021 in <https://www.thenews.com.pk/archive/print/650597-text-of-chief-justices-affidavit>. ←
29. Grossberg M., "Battling Over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict", *supra* note 10, p. 154. ←
30. See e.g., *Human Rights Case. HRC 965/2005*, Supreme Court of Pakistan, Islamabad, 2005. ←
31. See Siddiqi F., "Public Interest Litigation: Predictable Continuity and Radical Departures", in Moeen C., Ijaz G. (ed.), *The Politics and Jurisprudence of the Chaudhry Court*, Oxford, Oxford University Press, 2015, pp. 77-130. The Supreme Court had ruled against privatizing state assets (such as Pakistan Steel Mills) and dubious land deals which allotted state land and/or lease to favorable parties. See C.P no. 9/2006. ←
32. Hussain S., "The Rule of Law, Justice and Constitutionalism: Political Mobilization in the 'Lawyers' Movement for the Restoration of Judiciary and Democracy in Pakistan", in *NORIA, South Asia Papers*, June 2016, consulted on 17 May 2021 in https://www.academia.edu/26166867/The_Rule_of_Law_Justice_and_Constitutionalism_Political_Mobilization_in_the_Lawyers_Movement_for_the_Restoration_of_Judiciary_and_Democracy_in_Pakistan. ←
33. Pseudonym. ←
34. Mirza, according to Janjua, had crucial information about Masood, but she never elaborated on its details. ←
35. HRC 965/2005, 3. ←
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37. Amnesty International, "Denying the Undeniable: Enforced Disappearances in Pakistan", London, Amnesty International Publications, 2008, p. 24, *italics added*. ←
38. *Ibid.* ←
39. "SC Orders Production of 14 Missing Persons in Court Tomorrow", in *Dawn*, uploaded on 6 December 2013, consulted on 3 October 2017, in <https://www.dawn.com/news/1060883>, *italics added*. ←
40. Before the 25th Amendment (2018) to the Constitution and subsequent merger of FATA into KPK Province, Article 247(7) limited jurisdiction of the Supreme and High Court in FATA. ←
41. "Text of Pakistan Emergency Declaration", in *BBC News*, uploaded on 3 November 2007, consulted on 19 June 2017, in http://news.bbc.co.uk/2/hi/south_asia/7077136.stm, *emphasis added*. ←
42. Eckert J. et al. (ed.), *Law Against the State: Ethnographic Forays into Law's Transformations*, Cambridge, Cambridge University Press, 2012, p. 1. ←
43. Capital of Baluchistan province. ←
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49. *Ibid.* ↵
50. *Ibid.* ↵
51. *Ibid.* ↵
52. Iqbal N., "Army Seeks Review of SC Verdict in Missing Persons' Case", in *Dawn*, uploaded on 19 January 2014, consulted on 2 February 2019 in <https://www.dawn.com/news/1081304>, *emphasis added.* ↵
53. *Ibid.* ↵
54. Iqbal N., "Man behind Defamatory Banners Had Links with ISI, Court Told, " in *Dawn*, uploaded on 20 March 2015, consulted on 20 July 2017 in <https://www.dawn.com/news/1170764>; see also, Hussain S., "Justice Khawaja Urges Judiciary to be Fearless" in *Dawn*, uploaded on 10 September 2015, consulted on 20 July 2017 in <https://www.dawn.com/news/1206049>. ↵
55. Mehsud was a tribal youth living in Karachi was extra-judicially abducted and killed by the police. ↵
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