“State of Exception”: Enforced Disappearances in Pakistan

by

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Abstract

This research aims to look into the phenomenon of enforced disappearance in Pakistan through the classical Schmittian idea of State of Exception. National security forms the basis of the state of exception in Pakistan. The military decides on what constitutes a national security threat and the response to that threat. Hence, the military is the sovereign in this regard. Given its control over national security, the military decides its enemies and makes the decision as to who among its enemies will be subjected to enforced disappearance. Thus, sovereign power is manifested through enforced disappearances.

This research problematizes the context and critically analyse the limitations of classical theoretical understanding in explaining the political scenario of the country. At the same time, through the case study of the ongoing Pashtun Tahaffuz Movement (PTM), it attempts to demonstrate the implications and problematize the Schmittian ideas of State of Exception and the Sovereign Power.

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Introduction

"Da Sanga Azadi Da?" (G. Q. Khan 2018)

(What kind of freedom is this?)

These words have become the slogan of the on-going *Pashtun Tahafuz Movement* (PTM), Pashtun Protection Movement, in Pakistan. The essence of the movement is captured by this chant and its name: it demands from the state greater freedom through greater protection of the Pashtun ethnic population living in Pakistan. It attempts to change the coercive relationship between the state and some segments of its population. As citizens, it asks the state to protect the population from the state itself, not against external enemies. One of the demands of the movement is to bring the 'missing persons' before the courts for trial for their offences or to see them free (G. Q. Khan 2018). However, state has responded to this non-violent movement with a high-handed approach – threatening, harassing, censoring and even arresting some of its members (Report 2018).

This response of the state is not new, many peaceful movements before, such as Lawyers Movement against the regime of General Pervez Musharraf, were meted the same treatment. In spite of that, the movement is important because it challenges the security narrative of the military establishment by placing the blame openly upon what is often referred as the holy cows – the military – in the Pakistani context (Rumi 2012). Another popular slogan at these protest rallies is:

"Ye jo deshatgardi hai us k peeche wardi hai" (Naureen 2018)

(The uniform is behind this terrorism)

The uniform is a reference to the men in uniforms - the military. Broadly, this is an expression of erosion of trust; the protectors of the nation against the terrorist threat have become the threat themselves. One of the ways in which this threat is perceived is in the form of enforced disappearances. Estimate number of enforced disappearances in Pakistan varies widely depending upon the source. Though greatly underestimated, around 5000 cases of enforced disappearances have been reported to a government commission (Release 2018). This research is an attempt to theorize and explain the Schmittian idea of state of exception through analysing the predominance of military in Pakistan.

While some research has been done to map the dominance of military in different spheres of state in Pakistan, there is a significant paucity of research drawing on enforced disappearances and the hegemony of the military over different administrative arms (as self-appointed sovereign), and operating through extra-constitutional means.

Chapter 1: Theoretical Framework

According to International Convention for the Protection of All Persons from Enforced Disappearance, the term enforced disappearance refers to "arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (Assembly 2006).

Not just international law, enforced disappearances are also not sanctioned by any law in Pakistan's Constitution. Thus, it is a form of extra-legal power used by the state. The research looks at the location of this sovereign power in relation to the practice of enforced disappearances, and the (in)compatibility of this power with law. Furthermore, it looks at normative considerations associated with this practice.

In the case of Pakistan, national security forms the basis of the state of exception. The military decides on what constitutes a national security threat and the response to that threat. Hence, the military is the sovereign in this regard. Given its control over national security, the military decides its enemies and makes the decision as to who among its enemies will be subjected to enforced disappearance. Hence, sovereign is manifested through enforced disappearances.

The 9/11 terrorist attacks saw the beginning of the global War on Terrorism. Pakistan under the rule of General Pervez Musharraf joined the war. This was followed by various military

operations and terrorist attacks in the country. According to government estimate, since 2003, the war has claimed the lives of almost fifty thousand civilians in Pakistan (News Desk 2018).

The use of the word 'war' in War on Terror has been a point of criticism. According to Bruce Ackerman, War on Terror is not a war because it is not between sovereigns. More importantly, wars have an end point that can be reached through various measures such as negotiations and truce. However, given the proliferation of terrorist networks, war on terrorism will be continuous. Ackerman fears that in the context of US, the discourse surrounding an endless war might end up creating an alternative criminal justice system for the trial of alleged terrorists. But, also that it presents the risk of subjecting everyone to emergency powers, such as power to detain, endlessly (Ackerman 2004, 1033). In case of Pakistan, the current terrorist threat is defined as War on Terror. In one statement, the Director General of Inter Services Public Relations, the military wing of armed forces, emphasized that Pakistan's victory in the War on Terror will set an example for other countries in the world (News, The 2016). The statement demonstrates how the borrowed vocabulary of 'war' in Pakistan presents the possibility of the endless nature of the emergency power, as highlighted by Ackerman. Similar point is made by Sanford Levinson, when he argues that War on Terror is defined in a way to assure that there would be no end to it. Thus, this makes the emergency situation permanent. But, in the context of US, it also makes the claims of presidential authority with regard to emergency power permanent (Levinson 2006, 745).

In literature, different theorists have tried to tackle the question as to what degree legality can be protected when state faces an emergency situation. These theorists attempt to draw models, in light of theoretical and practical considerations, that attempt to preserve legality. In one such case, Owen Gross's acknowledges that officials might need to take extra-constitutional steps to

deal with an emergency. For him, this can strengthen rule of law because after committing the act, the officials acknowledge their actions publicly. Then, it is in hands of public whether they ratify the act or not (Ramraj 2008, 7). Gross attempts to ensure rule of law through political and democratic checks (Ramraj 2008, 8). Dyzenhaus criticises his model because it provides officials with no middle ground to respond to extra-ordinary circumstances other than the strict distinction between zones of legality or illegality (Dyzenhaus, David 2008, 54). Ackerman's model, meanwhile, includes both democratic checks but also judicial checks. He suggests various measures such as setting up a time limit for emergency powers in order to counter their normalization. However, Ackerman acknowledges that such proposals can only work in places that are affected by "episodic terrorism", where acts of terrorism happen only occasionally (Ackerman 2004, 1045). Thus, for Ackerman, places like Pakistan that experience frequent terrorist attacks might not be able to secure their civil liberties through any sort of legal structure. The theorists above, despite disagreement among themselves regarding the efficacy of their proposals, attempt to preserve legality in an emergency.

However, other theorists might argue that this goal may not be achievable in an emergency. Carl Schmitt is one such theorist. As coined by Schmitt, a state of exception is characterized by a crisis that requires the application of extra-ordinary measures (Schwab 1985, 5). According to Schmitt, in such a state, though law wanes, but order still prevails. A legal order cannot exist without the existence of a normal situation. The norm only applies to normal situations. Therefore, the norm stands annulled in this state, whereas the decision prevails (Schwab 1985, 12-13).

Schmitt's state of exception also helps locate the point where sovereign power is concentrated. According to Schmitt, the one who decides whether normal condition exists is the sovereign.

The state of exception shows the essence of state authority. The essence is vested in the power to make the decision, rather than the power to coerce or to rule. Authority reveals that it does not have to be vested in law, in order to make law (Schwab 1985, 12-13).

Political actions can be narrowed down to the political division between a friend and an enemy (Schmitt 2007, 26). According to Schmitt, the political enemy is the *other*, but that does not mean he is morally evil. The enemy cannot be determined on the basis of a historical norm or the judgment of an impartial third party. The enemy can only be decided by the real participants who can do analysis about the actual situation. The distinctions such as evil and ugly exist independent of the political distinctions of friend and enemy; the evil or the ugly might not necessarily be enemy, while the morally good might not be a friend. However, strength is drawn from other distinctions when it comes to emotions which is who the enemy is labelled as evil (Schmitt 2007, 27). The enemy is not a private enemy but a public enemy that comes about due to confrontation between groups of people (Schmitt 2007, 28). The state as a political body makes the decision as to who it is friend and enemy (Schmitt 2007, 29-30).

For Schmitt, war is the most extreme form of political means. Like other forms of politics, it is built upon the idea of friend and enemy (Schmitt 2007, 35). As discussed before, these notions present the possibility of physical killing of enemy (Schmitt 2007, 33). A grouping can be motivated by various reasons such as religious and economic reasons but when it involves the friend-enemy distinction, it becomes political (Schmitt 2007, 38). For Schmitt, political entity is the decisive authority that determines the friend-enemy distinction. If its exists then it is supreme. The fact that the state is a decisive authority is dependent upon its political nature (Schmitt 2007, 43-44).

Schmitt further argues that as a decisive political entity, the state has the power not just to wage war but also the power to publicly destroy lives. *Jus belli*- the law of war - creates a double possibility. It gives the state the right to demand of its citizens the willingness to die as well as the right to physically destroy its enemies. All of this is done in pursuit of security and peace, that are requirements for the validity of legal norms (Schmitt 2007, 46). War has an existential meaning; physical killings of a human being is only justified in the presence of an existential threat to one's way of life (Schmitt 2007, 48-9). In case members of the population announce that they can no longer recognize enemies, given the situation, either they join or abet the enemy. This means that the distinction between friends and enemies still holds (Schmitt 2007, 51).

As previously pointed, for Schmitt, war poses an existential threat (Schmitt 2007, 48-9). For Ackerman, terrorist attacks do not constitute a war. Also, Ackerman rejects the existential rationale for emergency measures that allows the government to take extraordinary measures for the sake of its survival against the enemy within and outside the country that aims to replace the regime that exist (Ackerman 2004, 1037). While Ackerman aims to contain the emergency powers by suggesting different measures, he acknowledges that the government can abuse its power with reassurance function (Ackerman 2004, 1040). Reassurance function of the government entails that when a terrorist attack threatens state sovereignty then the government takes measures to assurance its citizens that such an attack would not take place again. The government acts aggressively to deal with the threat (Ackerman 2004, 1037). Reassurance rationale tries to provide short term solutions by attempting to incur least damage to civil liberties in the long run. On the other hand, the urgency of the crisis inherent in the existential rationale makes it focus only upon short term solutions for survival (Ackerman 2004, 1040). Ackerman makes the distinction between prevention and relief rationale. In the former, the

government response is based upon the distinction between friend and enemy whereas in the latter, the victim is not considered a political enemy. Under prevention rationale, the emergency regime does not respect the protections that are afforded to citizens under criminal law. They detain people on the basis of their potential risk, without the presence of substantial evidence (Ackerman 2004, 1058).

With regard to the role of judiciary in emergency situation that allows for greater detention powers, Ackerman argues that judiciary's role can either be of macro-management in sense of separation of powers or of micro-adjudication of individual cases filed by detainees. In the context of US, Ackerman believes that most of the work by the judiciary would be of the latter type (Ackerman 2004, 1068). However, in the case of Pakistan, the issue should also be related to macro-adjudication, because the military oversteps its formal authority. According to Dyzenhaus, the role of judges during emergency is that they preserve the rule of law in its substantive conception (Ramraj 2008, 7-8).

Now, the paper looks at normative considerations that characterize this state of exception. These considerations can be read in terms of the impact they have upon people who suffer disappearance and the society at large as well.

According to Jeremy Waldron, post 9/11 rhetoric has centred upon the idea of balance. It has been argued that changing circumstances require reconsideration of the balance between civil liberties and security. (Waldron 2010, 21). However, for Waldron, such rhetoric is empty of content (Waldron 2010).

According to Waldron, the consequence of uneven distribution is one way in which the argument that new security requirements require a new balance of civil liberties is deceptive. The increase in security for everyone does not lead to similar decrease in civil liberties for everyone. Some people by virtue of their association with certain groups such as religious and ethnic groups will be considered more suspect. Thus, their civil liberties will suffer more of a diminution than other people. Their security will be compromised for greater security of others. For Waldron, the difference in how people come to be targeted is important. They can be targeted and suspected of terrorism because of the prevailing conditions. This implies that the officials take sort of a neutral stance, which puts everyone under suspicion. However, when this is not the case, the second reason for suspicion – that for Waldron is a different reason – comes about. This involves suspecting some people more than others due to their religious, ethnic and other affiliations. For Waldron, if safeguards in the form of civil liberties that protect people from undue suspicion due to their affiliations are removed for people, then injustice in this form becomes severe. The balancing approach becomes even more troublesome because it is not the rights of guilty that are balanced against the right of the innocent. Rather, the liberty of an innocent person, even more problematically on the basis of identity and group-affiliation, is being sacrificed for the security interests of the non-suspects (Waldron 2010, 38-9).

For Waldron, another issue that comes up in arguments for balancing liberty against security is that liberty is a relational term. If it is negative liberty, then a decrease in liberty possibly increases security to an extent by preventing some threatening action. However, on the other hand it also increases the power of the state. This gives rise to the possibility that the state may use this power to target other civil liberties (Waldron 2010, 40) and abuse its power. The threat from terrorism does not diminish the threat from the state. In fact, the possibility exists that the overall threat only increases when threat from the state is added to the already existing terrorist

threat. Further, the means that are provided to the state to fight the "enemies of the people" might be used by the state to fight its own enemies, that is, "enemies of the state" (Waldron 2010, 40). These two might overlap, but that might not necessarily be the case (Waldron 2010, 40). The main issue lies in how the line will be drawn so that the state does not abuse its power; for Waldron, there is no guarantee that the additional powers of detention without trial or judicial review will not turn into 'disappearance' itself (Waldron 2010, 43). Hence, greater powers given to the state will lead to greater threat from the state. Also, keeping in mind the difference between means and ends, the increase in government power will not necessarily reduce terrorist threat (Waldron 2010, 43-44). More powers might end up making government more effective in harming liberty and justice at home by targeting "vulnerable political dissents" (Waldron 2010, 45).

Consequentialist claims about increase in government powers are mostly symbolic in terms of the threat that they claim to deal with. They, rather provide "psychological assurance" to people that something is being done to counter the threat (Waldron 2010, 45).

According to a Waldron a government can be a terrorizer. One way in which it can terrorize its population is evident in the example given by Hannah Arendt of Nazi state's terrorization of its population. In this way, force is used against targets without reference to law; it does not matter if the target is innocent or guilty. The goal is not to make people act in a certain way or refrain certain action but to produce an intimidated population generally (Waldron 2010, 62). The effects of such form of state terrorism are social. The opportunities available to people to interact with one another and deliberate on issue are snatched from them, which, according to Arendt, leads to isolation that hampers capacity for moral thought (Waldron 2010, 63).

As pointed by Waldron, in the fight against terrorism, the goal is defined in terms of security. However, the term security is not precisely defined. On a basic level, security involves the prevention of people from bodily harm. However, this formulation is narrow. Acts of terror generate fear, and fear affects psychological health. Therefore, "absence of fear" of harm should be a key component of security (Waldron 2010, 125). Also, people do not want to be merely safe from attacks but they also want the assurance of safety from future attacks in order to be able to live their life fully in accordance with their future plans. Thus, safety should be reimagined as means to other ends (Waldron 2010, 127). According to Henry Shue, if a person is under physical threat for enjoying certain rights, then that person cannot fully enjoy other rights that are bestowed upon him by the society (Shue 1980, 21). According to Waldron, when it comes to security, even though the person might not be physically threatened for enjoying certain rights by terrorists, still it can be argued that physical security is a necessary condition for a person to be able to enjoy other rights (Waldron 2010, 129). If this is the case, it can be argued that security should take primacy over rights. However, even though security is a necessary condition, it does not follow that it should take primacy unless sufficient conditions are fulfilled as well (Waldron 2010, 129).

In terms of distribution of security population, maximization approach as pronounced by Hobbes dictates that sovereign should try to provide security to as many people as possible. But, for Hobbes, this distribution will be compatible with the consequence that some people will suffer for security of majority (Waldron 2010, 135). For Waldron, however, human rights are underpinned by the principle of equality. Following Shue's argument that physical security is a basic right necessary for enjoyment of other rights, Waldron argues that security as a right should be distributed equally among everyone in the population, so that everyone can enjoy other human rights as well (Waldron 2010, 136).

The moral rights that people have against government are called political rights (Dworkin 2006, 31). Ronald Dworkin argues that these rights protect interests of individuals that cannot be sacrificed for the benefit of everyone. Human rights are the rights to be treated in a manner that recognizes and affirms the importance of a person's dignity. He calls them baseline human rights that set the parameter of government actions. This is based upon the idea that everyone's life has an equal intrinsic value and everyone has a personal responsibility for their lives. Governments are supposed to act consistently according to good faith understanding of these ideas. The second set of rights make it imperative upon the government to act in a way that is in accordance with its own interpretation of these ideas, without denying benefit of that interpretation to anyone. The ideas come from laws and practices of the government (Dworkin 2006, 36). According to the demands set by second set of rights, if a government does not provide procedural justice to alleged terrorists then it implies that the government does not regard them as fully human (Dworkin 2006, 45).

Similar to Waldron's position, for Dworkin the metaphor liberty versus security is misleading. Rather, it should be replaced by the metaphor of security against honour. According to Dworkin, by not regarding the other person as completely human, we denigrate our own intrinsic value as well. We act in a biased way that shows concerns for our own security only. Thus, this damages our own dignity (Dworkin 2006, 50-1). Thus, a lot of justifications employed for emergency powers as well as extra-legal powers are morally undesirable.

Chapter 2: Pakistan's State of Exception(s)

A lot of the literature that has come out recently employs the idea of Schmittian state of exception in the context of the post 9/11 scenario and is written mostly with reference to the liberal democratic states of West in mind (Sherwood 2018). This usually involves the use of extra-legal power by the elected executive, such as President, as in the case of United States of America. Therefore, in it, sovereign power in the Schmittian sense is often said to rest in the hands of the elected representative.

Different Conditions Leading to Different States of Exceptions

Nonetheless, when it comes to Pakistan, the conditions are quite different from liberal democratic states in the West. Pakistan's democratic history is chequered with military rule. This can take the form of a martial law or a state of emergency. This constitutes one form of a state of exception, where the Constitution is in suspension. Let's call this the Proper State of Exception.

Another form of exception occurs due to the existence of emergency based powers that come about through various statutes and regulations. They grant the military, the sovereign, extensive powers of derogation. Most of such legislation in Pakistan has come about around or after 9/11, and is mostly targeted against terrorism. This is somehow akin to the extensive powers given to executive heads in the West. A question can be raised whether such a situation can even be categorised as a state of exception because Constitution is operative and the origin of these emergency powers is in the legal order itself. My argument is that such a state can be characterized as a state of exception. We can classify it as an Ambiguous State of Exception.

Origin of Exceptions

The sources of both these states of exception are different. In Proper State of Exception, the sovereign derives the power to abrogate the Constitution by going against the legal order. In that, the sovereign appeals that his violation of law is based upon his judgement that there exists an emergency that requires action in order to ensure preservation of the state. In case of Pakistan, this can be seen through the military's repeated usage of Doctrine of Necessity whenever it has subverted the Constitution. For that reason, the source of such authority does not reside in the legal order, which endeavours to contain the arbitrariness of political actions. By resorting to such an action, the very goal of reigning in the uncontrolled power of political actions is defeated. The source of such authority of the sovereign stems from morality - he is the one who makes the correct decision regarding the prevalence of emergency (Dyzenhaus, David 2008, 35).

This presents a difficulty for natural law theorists. For them, the moral authority of judgements that are enacted through law comes from the fact that they have been enacted through the instrument of law (Dyzenhaus, David 2008, 34-5). Thus, in this sense, rule of law is seen as a "moral good" because serves as a check to contain randomness of political actions (Dyzenhaus, David 2008, 35). Therefore, anyone who acts outside the legal order has no authority, despite the fact whether the judgment is morally correct or not. As pointed before, argument from morality is employed for this purpose (Dyzenhaus, David 2008, 35). Likewise, legal positivists end up in a similar dilemma. For them, law's authority comes not merely from law but also when it becomes the tool to produce a morally correct judgement. Thus, a morally correct judgement in an emergency could also involve abrogation of Constitution (Dyzenhaus, David 2008, 35-6). Thus, in both cases, it can be said that "sovereign's moral but not his legal authority is prior to law" (Dyzenhaus, David 2008, 36).

In case of a Proper State of Exception, sovereign's power exists outside the legal order. This is a form of external normativity, which does not derive its authority from law but from "superior insight into how best to respond to what they perceive as an emergency" (Dyzenhaus, David 2008, 40).

In the case of Ambiguous State of Exception, law itself becomes the source of extensive sovereign power; thus, sovereign power is located within the legal order. Such emergency powers often have the effect of "legalizing illegality" (Dyzenhaus, David 2006, 2009). This response constitutes internal normativity in which the judiciary lets the executive exercise extra-legal powers as long as the source of such authority is law itself (Dyzenhaus, David 2008, 39).

Can Ambiguous State of Exception be Characterized as a Proper State of Exception?

In order to evaluate the case of Ambiguous State of Exception, the distinction between thin and thick conceptions of legality becomes important. Some people subscribe to the idea of formal legality, which is merely concerned with existence of rules which can be obeyed and applied (Ramraj 2008, 4). On the other hand, a substantive conception of legality is also concerned with the content of the laws in terms of their correspondence with principles of justice (Ramraj 2008, 4).

The law can create a legal black hole when it excludes executive action from judicial scrutiny or any of the requirements posed by rule of law (Ben-Asher 2009, 1). Or, on the other hand, it can create a legal grey hole - "a legal space in which there are some legal constraints on executive action - it is not a lawless void - but the constraints are so insubstantial that they pretty

well permit government to do as it pleases" (Dyzenhaus, David 2006, 2018). In another article, Dyzenhaus argues that for Schmitt the fact that sovereign decides on when exception exists and the response to it means that it empties legality of meaning in the sense that only "guise of legality" remains (Dyzenhaus, David 2008, 45). The laws in Pakistan, that have surfaced as a result of Ambiguous State of Exception in Pakistan, are not legal black hole because they include certain safeguards against political actions that exceed their legal authority. These safeguards give a veneer of legality. Therefore, the presence of checks can be interpreted as creating legal grey holes through which the law itself acts against the rule of law.

My argument is that, following the substantive conception of legality, Ambiguous State of Exception is similar to a Proper State of Exception. With regard to this argument, an objection can be raised that the Ambiguous State of Exception does not tantamount to a Proper State of Exception. In view of the fact that even if such emergency powers lack moral basis of authority, they do possess legal authority. Thus, this presence of legal authority cannot be equated with absence of any authority at all (Dyzenhaus, David 2008, 36). This argument is quite problematic. Suppose there exists a Law X. Law X entails negative discrimination on the basis of gender and religious beliefs. Thus, in that sense, even if Law X has legal authority, the mere presence of that legal authority is not sufficient to justify law's claim to authority. In fact, in some cases, it might be argued that it is moral to disobey such laws (Love 2014).

Those who endorse a thin conception of law might argue that the Ambiguous State of Exception does not amount to legal grey holes, because legal checks exist. However, this line of reasoning is problematic because these grey holes, which provide a semblance of legality, are in substance black holes (Dyzenhaus, David 2006). Even though the presence of legal checks provides political actions with legal authority, however this authority does not amount for much.

Substantively, these grey legal holes provide arbitrary powers to the executive in the same way as in the Proper State of Exception. In this case, the fact that even though in terms of Proper State of Exception, the source of authority is moral judgement, whereas the source of authority for Ambiguous State of Exception resides in legality, both of them often resemble in their operation.

State of Exception as a Function of Sovereign Decision

Even if the locus of sovereign power is the legal order itself, still the decision rests with the sovereign whether he lets his power be regulated through the legal order. Or, if the sovereign decides to override the order and use the moral argument of necessity as the governing principle for his actions outside the parameters of law.

In order to demonstrate this point, let's assume that Ambiguous State of Exception has authority and it does not constitute a state of exception. Similar to Schmitt, it is built upon the idea that extra-ordinary situations require extraordinary responses (Schwab 1985, 5). However, that response is crafted within the bounds of law. One of the arguments made in favour of emergency powers is that these powers help contain the sovereign's response to extraordinary situations through establishment of a parameter of permitted political action. Thus, Dyzenhaus makes a similar point when he critiques Owen Gross's Extra-Legal Measures Model, which he claims has its basis in Business-as-usual model. According to him, Gross's critique of Business-as-usual model, where no changes are made in legal order to accommodate emergencies, is that it provides no flexibility for officials to operate because of the existence of strict demarcation between legality and illegality. This same critique, according to him, is also applicable to Extra-Legal Measures Model (Dyzenhaus, David 2008, 53-4). Therefore, an established criterion might fail to contain political actions.

When it comes to Pakistan, it could be said that the existence of emergency regime has failed to limit the power of the sovereign. The fact that the practice of enforced disappearances exists alongside emergency powers is an illustration of a Schmittian sovereign power. A state of exception seems to operate parallel to ordinary laws of emergency. In it, the sovereign makes the decision of whether there exists a situation which requires the sovereign to bypass not just the ordinary law but also the limits established by emergency powers and resort to extra-legal action i.e. disappearance. Sovereign's discretion is of utmost importance here – on the basis of his own calculations, he can either let the alleged security threat go through the process that operates on the basis of emergency powers or if he deems the other option as better than the first one, then he can disappear the person, and remove him from the scene altogether.

Thus, there exists two parallel zones; one is a grey zone that is based on legally sanctioned emergency powers, Ambiguous State of Exception, while the other zone is constitutive of the practice of enforced disappearances that exists outside of the space of law. In a way, the operation of both these zones is dependent upon the decision of the sovereign. The sovereign can refer to the grey zone if he wants to or he can choose to bypass it. In that sense, emergency powers do not effectively limit sovereign power rather the sovereign can limit the operation of these emergency powers.

This can be seen in terms of preventive detention laws in Pakistan. Pakistan's Anti-Terrorism Act (ATA) was enacted before the suspension of Constitution by Pervez Musharraf. It gives armed forces the power to detain an alleged terrorist for a period of 9 months (The Anti-Terrorism Act 1997). The Actions (in Aid of Civil Power) Regulation gives armed forces the power to detain people in internment centres, but it has safeguards such as the requirement

regarding the issuance of internment order of the detained person (The Actions (in Aid of Civil Power) Regulation 2011). Furthermore, Protection of Pakistan Act stipulated that the armed forces can detain an "enemy alien" or a "militant" but a notification has to be issued (The Protection of Pakistan Act 2014). The specification of time limit and issuance of notification are checks that are inserted in the law to ensure that this form of legalized illegality does not take the form of "unlegalizable" i.e. the detained people do not turn into disappeared people. Unlegalizable means that the act is "legally and morally doomed to take place in extra-legal space" (Dyzenhaus, David 2008, 53). The issuance of notification, more importantly, is a mechanism by which the detained person becomes formally registered in the system through acknowledgement of the person's detention, thus countering potential threat that the act may end up crossing over into extra-legal space. The sovereign might see the situation as constituting an emergency in the sense that necessity dictates that the sovereign makes the decision to side-step the legal system, even the Ambiguous State of Exception. Thus, the military ultimately makes the decision whether the detained people enter or do not enter the list of 'missing persons'.

Since enforced disappearances are "unlegalizable", there is no legal backing for the practice (Dyzenhaus, David 2008, 53). In case of coups, the military employed the principle of necessity as the basis of its authority. As has been discussed before, this authority was not rooted in law. Owen Gross worries that if public officials' defence that national security required them to take extra-legal measures is given legal recognition, then it would have dangerous consequences. One is that acts which include official disobedience might become routinized because officials will keep resorting to defence on the basis of necessity (Ramraj 2008, 20). On the other hand, Simon Chesterman argues that such a situation might not arise in which officials have to resort to necessity because of the often "covert nature" of such counter-terrorist actions (Ramraj 2008,

21). When it comes to enforced disappearances in Pakistan, it is public knowledge that military is behind this practice. Mostly, though, there is an outright denial or silence from the perpetrators. Rarely, if ever, an official military source publicly acknowledges military's involvement in the practice. Mostly, the accounts of survivors point to military's involvement. Furthermore, as will be demonstrated in the following chapter, the Courts and, at times, the Parliament refers to military as perpetrators. Against the argument of Gross, official disobedience might still become a regular event by public officials even if they do not enjoy any legal cover. However, as Chesterman pointed, the practice of enforced disappearances is somehow covert, therefore officials do not have to resort to necessity openly. However, unlike the case of coups, even if the sovereign does not openly declare necessity, the context of terrorism and the sovereign's historical role as defender of the nation serves to functions as a sort of undeclared defence of necessity.

This can be seen in the case of Pakistan where the association between national security and military ends up placing most of its activities in the ambit of national security. Thus, among the list of its many other activities, military's activity in the case of enforced disappearances is also linked with national security. For this reason, in a court hearing on enforced disappearances, a former Senator complained that during a Senate proceeding, the senator was not even allowed to inquire about the law that governed agencies because, according to Ministry of Defence, it amounted to information that was "sensitive and secret involving national security" (Qasim, Muhammad 2007).

Thus, the authority for enforced disappearances, in a way, is derived from similar source as that for coups i.e. the from the fact the sovereign authority exists before legal authority. In the case of coups, this claim is not covert given that it is publicly pronounced. It authority comes from

fact that the sovereign sees himself as making the correct moral decision. This decision rests on the necessity to ensure the preservation of the state from threats. Thus, in ensuring that, the sovereign places himself outside the legal order (Dyzenhaus, David 2008, 14).

In Pakistan, military has, when it deemed necessary, used national security as a rationale for promulgation of coups. Pervez Musharraf gave the same reason when he undertook the military coup, and later when he promulgated state of emergency in 2007. Thus, as a sovereign, he applied the reasoning of necessity to locate himself above the legal order, under the assumption that he had superior insight into matters of security. In terms of its responses to the emergency situation under Musharraf, the military institutionalised the policy of enforced disappearances. This meant that the military as a sovereign was responding to an extraordinary situation, by placing itself outside of the scope of law.

Chapter 3: Who is the sovereign in Pakistan?

Conventionally, sovereign is understood as the one who holds supreme authority in a polity (Calabrese 2000, 66-7). However, in the case of Pakistan, situating the location of sovereign power is tricky business because it does not always correspond to constitutional provisions that established that authority. Another issue is present in discussion over sovereign power – whether sovereignty is absolute or non-absolute. According to Alan James, sovereignty cannot be non-absolute - it either exists or it does not exist (James 1999, 462-4). The issue seems to be that non-absolute character of sovereignty is understood as an aspect of sovereignty which in conflict with core feature of sovereignty i.e. it is supreme. However, whether sovereignty is absolute or non-absolute does not necessarily compromise sovereign's supremacy rather it points to the scope of that authority. This means that sovereign holds supreme authority in some matters of the state but not in others (Philpott 2003). The paper thus builds upon the idea of a non-absolute sovereign.

The campaign for the formation of the separate state of Pakistan from India was propagated by many of its leaders in terms of religion. Just after partition, a document known as Objectives Resolution was passed by Pakistan's Assembly in 1949. The purpose was to follow the spirit of the Resolution in creation of state's constitution. The Resolution, however, ended up becoming part of every constitution of the state as its preamble. Thus, the preamble of Pakistan's 1973 Constitution delegates sovereign authority over entire universe to Allah. But, the people of Pakistan can exercise authority within limits prescribed by God through their chosen representatives (Preamble, The Constitution of Pakistan 1973). Therefore, the constitution makes Parliament the locus of sovereignty. However, from the beginning of its creation, Pakistan has suffered from military's intrusion into civilian domain and even preponderance over civilian power. This resulted into three military coups (1958-1971, 1977-

1988, 1999-2008) that amount for almost half the time-period of state's existence. Even when the civilian government is in power, the military exercises de-facto control over civilian domains such as foreign policy (Rahman 2012). In terms of enforced disappearances, this is important because even though the policy of enforced disappearances was introduced by the military regime of General Pervez Musharraf, however it continued even after the installation of the civilian government in 2008. A few cases of disappearances were reported before 2001. However, after 9/11 attacks, when Pakistan became an ally in War on Terrorism, and enforced disappearances took the shape of an extra-legal norm. Building upon Schmitt's idea, it could be said when it comes to national security, that military possess the sovereign power in Pakistan. It decided to create a norm, outside the law, of enforced disappearance.

Other parts of the state apparatus, which ideally should have checked military's power or held the military accountable, could not do much when confronted with its power. This site of sovereign power is perfectly captured in this quote of a Pakistani official that was recounted by a survivor of enforced disappearance:

> "Even if the president or chief justice tells us to release you, we won't. We can torture you, or kill you, or keep you for years at our will. It is only the Army chief and the [intelligence] chief that we obey." (Watch 2011, 1).

Military power is exhibited through the fact the neither the civil government nor the judiciary have been able to contain its power in terms of enforced disappearance. The sections on civil government and judiciary demonstrate this by tracing different cases and developments in the history of the practice.

Civil Government

The constitutional provisions define civilian government and its executive head as the ultimate holders of authority in matters of security; it does so by establishing supremacy of the civilian

government over armed forces. According to Article 243 of the Pakistan Constitution, "*the federal government shall have control and command of the defence forces*" (C. o. Pakistan 1973). However, when it comes to the practice enforced disappearances, the civilian government does not possess the ultimate power of decision. Thus, civilian government employs various responses ranging from outright denial of charges of disappearance against military to acceptance of its inability to control the power of the military controlled agencies.

30th August is the International Day for Enforced Disappearances. On this day, in 2017, in Senate, Senator Farhatullah Babar asked the government to address the issue of enforced disappearances. He pointed that the perpetrators of this practice enjoy impunity to such an extent that they have never been rebuked or punished. Furthermore, he warned that "inability of the state to control its agencies" will lead to "resentment" and "alienation of the citizen from the state" (S. o. Pakistan, Senate Debates 2017, 56). In reply, the Speaker of Senate regretfully admitted that the parliament had failed in resolving this issue. He said that while senators had chased after individual cases however they had failed to stop such workings of "state within the state" (S. o. Pakistan, Senate Debates 2017, 56-7). In another event, four people disappeared, in response to which the Interior Minister assured the Senate that they would be recovered soon, and the practice would stop. However, within 36 hours, another person went missing. When the issue was raised in Senate, a senator asserted that the purpose of the second attempt at disappearance was to send a message to Parliament that the perpetrators will continue picking people up (S. o. Pakistan, Senate Debates 2017, 84-5). There were few debates in Parliament on this issue. However, in the ones that are held, like the one mentioned above, the parliamentarians are even fearful of openly naming the military as the perpetrator.

Even the attempts that have been made by civil government have been unfruitful. In 2010, the government created Commission of Inquiry for Missing Persons to investigate enforced disappearances. After the expiration of this Commission, another Commission, Commission of Inquiry on Enforced Disappearances, was made by Federal Ministry of Interior in 2011. The mandate of the Commission included tracing the location of disappeared persons, holding perpetrators responsible, registering First Information Report (FIR) against perpetrators and recommending Standard Operating Procedures (SOPs) for law enforcement and intelligence agencies (Ministry Of Interior 2011). The Commission tenure was repeatedly extended, making it one of the longest serving commissions in history of Pakistan. In 2013, United Nation's Working Group on Enforced or Involuntary Disappearances visited Pakistan. It noted that the Commission had limited power and capacity (Disappearances 2013, 1-2). Also, it was critical of Commission because if the accused agency denied the allegation of detention of any person than it was content with agencies' version of the event. Furthermore, the Working Group noted that the Commission had never brought about criminal proceedings against the accused agencies even though the Commission has the power to initiate criminal proceeding if its orders are not complied with (Disappearances 2013, 14). Fast forward to 2017, the Commission's tenure was extended for three more years. But, in Senate, there was a call to disband the Commission and establish another inquiry Commission. According to one Senator, the cases in which the Commission was able to recover people, it did not further pursue them for information on the event. Thus, it failed in its performance to the extent that not even in a single case it was able to fix responsibility or initiate criminal proceedings against the perpetrators (S. o. Pakistan, Senate Debate 2017, 64). Part of failure for the Commission can be attributed to resource constraints. However, more importantly, the Commission is reluctant to confront the perpetrators therefore it is no incidence that responsibility was not fixed in a single case.

Furthermore, despite being invested with legal authority, this authority does not amount for much in front of military's power.

During proceeding of various cases of enforced disappearance, the Courts pushed the civil government to recover people as per its responsibility. However, in many cases, the government was not able to do so. While the lack of civilian authority's institutional control over military and its agencies is an open secret, it is rarely acknowledged officially. In 2006, during proceedings of a habeas corpus petition related to the enforced disappearance of people belonging to different religious and political organizations, the Defence Secretary informed Sindh High Court that the Ministry of Defence had only administrative but not operational control over intelligence agencies. Thus, it could not ensure their compliance with Court's orders (PPI 2006). While this case had a direct connection with the issue of enforced disappearances, another case involved a broader issue of national security. But, it also reveals the larger problem of asymmetry of power in the civil-military relationship. The event involved a memorandum that was written by Pakistan's Ambassador to United States, Hussain Haqqani, to Obama administration that asked for United States' help in averting possible overthrow of civilian government by military after US' raid in Pakistan against Osama bin Laden. When this matter came out in public, Supreme Court conducted an investigation. During one of the hearings, the Federal Government through Ministry of Defence wrote to the Court that it could not submit any reply on behalf of armed forces and the intelligence agencies. It confessed that it did not exercise any operational control over them (Iqbal 2011). During another case of enforced disappearances, despite repeated orders from the Supreme Court, the government was not able to locate all of the missing persons. Thus, the Chief Justice issued a warning to the Defence Minister:

> "Intelligence agencies think they are above the law. They have no idea what we can do. We have made you bridge but you are also doing nothing…. Defence minister should realise that

another government is running parallel to his government. And this is not a good omen." (Reporter/Agencies, Staff 2013)

Commenting upon this development, a newspaper editorial noted that the Court proceeding had brought into light Defence Minister's but more broadly civilian government's helplessness. It "who should be in charge" but is "still playing catch-up with the men in uniform" (T. News 2013). A few days later the Defence Minister even denied that these people were in military's custody (Sigamony 2013).

Thus, there is a pattern; even the change in regime type did not lead to an effective response from civilian government against the extra-legal power of the military.

Judiciary

As seen above, while judiciary has often blamed and censured the government for being ineffective, the judiciary itself has hardly been successful in constraining the power of military and bringing it in the circle of accountability.

Throughout its history, Pakistan has faced a crisis of judicial independence. Judiciary has aided various steps that established the ascendancy of military over civilian government and politics (H. Khan 2003). Directly, it validated various military coups through use of legal reasoning that rested upon the principle of necessity. The repeated coups have led to the entrenchment of the power of military. In terms of judicial independence, the result is that even when the military is not in power, the judiciary facilitates military's continued political power (Kalhan 2013, 10).

In terms of direct military rule, a critical juncture occurred during Musharraf's rule when the judiciary started being more assertive than usual against the military regime. The Courts started

taking cases on the basis of *suo moto* and public interest litigation powers. The Courts had earlier taken actions based on these powers but what was novel in this case was that the action was taken against military regime rather than its usual target, the civilian government (Kalhan 2013, 44). Around this time, in 2005, the Courts for the first time started hearing the cases related to enforced disappearance. At the same time, the Court was also hearing case related to Musharraf's eligibility to be a President while he was Chief of Army Staff as well. Fearing that the Courts might deliver an unfavourable judgement, Musharraf declared an emergency in which many key judges were ousted from Courts (Haider, Kamran 2007). Thus, the assertion of judicial power against military met with resistance. One case ongoing in Court at that time involved the disappearance of Dr. Imran Munir, who was accused of spying against Pakistan but his counsel told the Court that he was, in fact, having an affair with the relative of a brigadier in the ISI (Qasim 2007). In hearing Munir's case, the Chief Justice said that there was sufficient proof to establish that disappeared people were in the custody of intelligence agencies. He warned that the agencies produce the disappeared people otherwise the heads of agencies would be summoned in the Court (Reporter, Staff 2007). Later, the Court threatened legal action against agencies but before more hearings could take place, emergency was proclaimed by Musharraf in November 2007 (International 2008, 23). A few months later, in July 2008, a report on enforced disappearances was released by Amnesty International that was critical of the insufficient role of the judiciary. The report said that judiciary was "proactive" when it came to locating missing persons however, it did not attempt to hold the perpetrators accountable, even in cases when it could question the disappeared people who were released (International 2008, 34). Furthermore, the Courts themselves emphasized that its task was to locate the people and it would deal with the issue of accountability later. The report said that this was also an "indictment of the executive" itself which has made it "impossible" for the judiciary to perform its task (International 2008, 34). Musharraf lost the battle; after return of democratic

government, the threat of impeachment from political parties forced him to resign (Haider 2008).

Though the head of the military institution had resigned however, the power of the military as an institution persisted even with the return of democracy. In fact, another episode of military rule had further entrenched the power of the military apparatus (Kalhan 2013).

The Lawyers Movement's initial goal was confined to independence of judiciary. However, it transformed into a broader movement for democracy and constitutionalism (Kalhan 2013, 6). Since many of the judges deposed by Musharraf were restored, Lawyers Movement was seen as a success by many. Building upon its reputation based upon the resistance posed for judicial autonomy under Musharraf, judiciary again evoked the idea of judicial independence but now it was also brought forth against civilian government (Kalhan 2013, 7). While receiving the Harvard Law School's Medal of Freedom, the then deposed Chief Justice, Iftikhar Muhammad Chaudhary, who was later reinstated, made a similar point:

> "… Pakistani lawyers are now struggling to keep their autocrats, military as well as democratic, from influencing judges… Unprecedented and without any equal in human history, the whole movement is about three things: principles, principles and principles" (I. Chaudhary 2008)

The principles apparently were to apply to both civilians and the military. However, the principle of judicial independence was used against civilian government in such a manner that it further undermined the authority of the already weak civil government (Kalhan 2013, 7). As highlighted in the case of Turkey, in terms of democratic consolidation, independent judiciary can serve as a barrier to political liberalization (Bâli 2012).

This has important implications in terms of enforced disappearances. First, the Courts weakened power of civilian government versus the power of the military. As noted before, in various cases, the Court put the responsibility upon civil government and pushed it to locate missing persons. On various occasions, the officials of the civil government were summoned before the Courts as well. However, in many cases, the civil government was too weak to exert any control over military. So, it could not trace these people. As mentioned before, the government even had to confess to its lack of control over military agencies. Since the restoration of democratic government, the Supreme Court has taken various steps that have undermined civil government. These steps should be seen as backdrop against which the contests in Court over enforced disappearances were carried out. These measures include the disqualification of the Prime Minister Yousaf Raza Gillani under contempt of Court charge (Boone 2012). Another involved the judicial investigation against the Pakistani Ambassador to United States, Hussain Haqqani, who was accused of writing a memo to Obama administration against Pakistan military. Importantly, the Parliament was already conducting an investigation into the matter. Despite this, the military submitted its reply to the judiciary in which it pressed the judiciary to conduct an investigation into the matter. The government did not want this investigation and the replies by military were submitted without approval from its civilian higher-ups (T. E. Tribune 2012). Ultimately, the military prevailed and judicial investigation was conducted. Under the veneer of judicial autonomy, "…in the Memogate Case, the court directly invoked the deep state's interests to privilege its own investigation over that of Parliament" (Kalhan 2013, 86). Thus, it weakened the civilian government, whereas the military power increased (Kalhan 2013). Another episode that demonstrates the Court's assertion of judicial independence was the disqualification of Prime Minister Nawaz Sharif from holding public office due to allegations of corruption that came in public eye due to Panama Leaks (Rasmussen 2017). These are some major events that shed light upon how this

version of judicial independence has weakened the civil government, making it more difficult for the government to assert power over military and its agencies. Thus, rather than as an end in itself, judicial independence should be understood as means to the creation of a judiciary that works well (Ferejohn and Kramer 2002, 963-4). Furthermore, different states have different histories and systems. Therefore, with regard to judicial independence, "…each system must be examined in its own context and on its own terms" (Ferejohn and Kramer 2002, 976).

Broadly, judiciary has targeted officials of civil government over various charges. Specifically, in cases of enforced disappearances, judiciary places primary responsibility in the hands of the civilian officials. However, only in a few cases, it has put responsibility of enforced disappearance upon military agencies. Still, this has not paved way for accountability of military officials.

It is interesting to look at the cases that were heard before the Supreme Court, especially to see the difference between the hearings and the subsequent judgement. In one important case, a joint operation by police and army was conducted against terrorists in 2010, in which Yaseen Shah went missing. His brother brought the case before the Supreme Court. His family submitted that he was held at an internment centre in Malakand (Khurshid 2013). The Court directed the Additional Attorney General to produce him before the Court. The Additional Attorney General denied that he was in the Malakand internment centre. Later, however, a list provided by the official of the internment center confirmed that Yaseen Shah was in Malakand internment center but along with other 35 detainees he was taken away from the centre by army authorities without any orders (Chaudhary, Khawaja and Muslim 2014). Despite various orders by the Court to locate all the detainees the Additional Secretary was not able to locate them. Thus, Defence Minister was involved by Court to ensure recovery but out of 35 people only 7

people were located, excluding Shah. In the hearings, the Court held army authorities responsible while observing that "despite the court's restraint the Army authorities were deliberately disobeying the court orders" (Khurshid 2013). A few days later, upon failure of Defence Minister to produce the people, the Court witnessed a further increase in tension when the Chief Justice issued a warning to military agencies: "Intelligence agencies think they are above the law. They have no idea what we can do" (Reporter/Agencies, Staff 2013). Addressing the Defence Minister's failure, he said "We have made you bridge but you are also doing nothing. We will now issue orders in this regard. Arrests will have to be made today" (Reporter/Agencies, Staff 2013). The next day, again, when the government showed no progress in recovering people, Chief Justice issued a threat that "If the court can direct the prime minister to implement its order, why not a direction can be issued to the chief of army staff." (Sigamony, Terence J. 2013). However, these statements remained just that. This shows how the Courts can assert themselves against military in a narrowly circumscribed manner. It also brings into contrast the treatment that is meted out to civilian leaders who frequently appear in Courts (Hashim 2017), and even convicted, whereas in military's case, the issue doesn't move further than a mere statement.

Simultaneous to Yaseen's case, the Court was hearing the case of missing persons in the province of Balochistan. The Court said that sufficient evidence existed that showed army-controlled Frontier Corps involvement in enforced disappearances in Balochistan (E. Khan 2013). Thus, the Court ordered the Inspector General Frontier Corps, IGFC, to show before the Court or face contempt charges (Iqbal, Nasir 2013). Later, after many delays, the Inspector General showed before the Court, and the charges of contempt were dropped (Agencies 2013). In the judgement of the case, the Court held that it was perturbed by the "kafkaesque" style of

operation of security forces and held military agencies responsible for disappearances. (Khawaja, Chaudhry and Muslim 2013).

During the proceedings phase of the cases, the judiciary's efforts were lauded as setting up a new legacy that would end the practice of enforced disappearance. Given the inability of other organs of state to restrain the power of military, one prominent newspaper hailed judicial intervention as the final option available to constrain the power of perpetrators (Editorial 2013). Subsequent to these heated proceedings, there was an expectation that the Court might issue an unprecedented judgement that breaks into the taboo territory of accountability for the military. As pointed out by a lawyer, the judgements of the Court were in reality a failure for Courts and for law because they were unable to recover the missing persons (Rasool 2013). Furthermore, attempts to bring the perpetrators to account were foiled (I. A. Rehman 2013). In a debate in Senate, the Speaker also pointed towards the performance of judiciary to highlight that it has mostly failed to have people produced before it under habeas corpus, and in putting an end to this practice (S. o. Pakistan, Senate Debates 2017, 57).

To conclude, during the rule of Musharraf, the Courts were not able to locate a lot of people. Furthermore, they did not, or at times could not, hold the military accountable even when they acknowledged their involvement. Similar pattern was followed after restoration of democracy.

More broadly, after Lawyer's Movement, judiciary's assertions of 'judicial independence' against the civil government undermined the power of the civilian government. Already, it had started from a weak position versus the military. Though a direct correlation does not exist, but it can be said that given judiciary's broader role during this time, the civil government was put on the back-foot. Especially, on issues of national security such as enforced disappearances, in

which military vigorously guards (and expands) its power against civilians, civilian government's capacity to act and assert its power against military was constrained.

National Security as basis for State of Exception

Since its creation, Pakistan has been an insecure state. Externally, right after its formation, Pakistan entered a military dispute with India over Kashmir, and feared its powerful neighbour (Jalal, Ayesha 1995). On its Western border, it was apprehensive of Afghanistan's irredentist claims to its land (Kukreja 2003, 22). Internally, Pakistan wanted to assert central authority upon provinces. However, for its defence purposes, the centre was redirecting the financial resources gathered from provinces to military, which became a point of confrontation with the provinces (Jalal, Ayesha 1995, 49). Thus, the political process was compromised early on. In order to assert central authority, the executive undermined the power of legislature and judiciary (Jalal, Ayesha 1995, 51,52). So, the representative institutions were undermined, and dominance of military was established as a result of Pakistan's "geopolitical situation" (Talbot 2012, 96) and the security situation influenced its domestic policy (Kukreja 2003, 22).

From the very beginning, the association between military and national security was established, whereby the military was seen as guardian of national security against existential threats (Kukreja 2003, 22). The military also actively propagated this idea, often to the disadvantage of civilian politicians who were (and are still) portrayed as incompetent, corrupt and at times even as threats to national interests and sovereignty. As highlighted by a political scientist, military "as an institution…deeply distrusts politicians and sees itself as the only force standing between stability and anarchy, intervening in politics whenever it decides that the politicians are not governing effectively" (Shah 2011, 70). The paper has previously looked at the Memogate case. It is instructive to note here that during the proceedings of the case, the

Court held that the contents of the memo written by the Pakistan's ambassador to US against possible military intervention were "tantamount to compromising the security, sovereignty and independence of the country" (Watan Party vs Federation of Pakistan 2011, 45-6). When the Army chief appeared before the Court, he said that Memogate had an impact upon national security in that it "unsuccessfully attempts to lower the morale of the Pakistan Army whose young officers and soldiers are laying down their lives for the security and defense of territorial integrity" (Denyer 2011). National security concerns permeated fundamental rights in Courts reasoning (Kalhan 2013, 84). Some people argue that this controversy was orchestrated by military against the civil government (Kalhan 2013, 83). While the authenticity of the claim cannot be established, it can be said that the case was a typical performance in the entrenched narrative that portrays the civilians as a threat to national interest, whereas military's credentials are unchallengeable.

Sometimes an argument is made that given the incompetence of civilians, the army has to intervene to ensure national security. However, as argued by Hussain Haqqani, the constant intervention of military in politics might have played a role in political incompetence. Also, its pursuit of political power domestically might be seen in terms of its enthusiasm for controlling the national security policy (Haqqani 2005, 292).

The prevalence of such thinking in Pakistan can be seen in the case of imposition of Martial Laws that were justified under Doctrine of State Necessity. Doctrine of Necessity is used in the situation when the government can only act in a certain way under law but the emergency situation demands of the government to act in a different way (Stavsky 1983, 343). The courts in Pakistan have used the doctrine extensively. It has been mostly used in cases where the Courts wanted to validate the extraconstitutional steps that included the abrogation of

Constitution and usurpation of civilian authority in favour of military coups. The "doctrine was born out of the perception that the only institution capable of handling Pakistan's complex problems is the military, and that the Army was a benevolent guardian of the state" (Husain 2012). The doctrine was first used in 1955 when Chief Justice Muhammad Munir in a judgement referred to the principle - "necessity knows no law". This, he argued, was backed by the maxims: "that which is otherwise not lawful is made lawful by necessity" and "the well-being of the people is the supreme law" (Qazi 2015).

The invocation of emergency powers allows an executive to push its power beyond the limitations that are proscribed by Constitution. In 1999, Musharraf declared state of emergency, rather than declaring his military coup as Martial Law, in his capacity as Chief of Army Staff and Chairman of the Joint Chief of Staff Committees, proclaiming that "the whole of Pakistan will come under the control of the Armed Forces of Pakistan" (G. P. Musharraf 1999). He assumed the role of chief executive and took several extra-legal steps such as suspension of Constitution, dissolution of parliament and creation of a governing body, National Security Council, that comprised of 8 members (Cushing 2003, 621). Furthermore, he issued Provisional Constitution Order (PCO) that was the replacement of the suspended Constitution. Judges were required to take oath anew under PCO, and it was declared that those who do not take oath would no longer be able to hold their public office (Siddique 2006, 696). The order proclaimed no Court shall challenge proclamation of emergency and that "no judgment, decree, writ, order or process whatsoever shall be made or issued by any court or tribunal against the Chief Executive or any authority designated by the Chief Executive" (P. Musharraf, Provisional Constitution Order No. 1 1999). Constitution was restored later but parts of PCO were incorporated in it. In 2000, the newly PCO constituted Supreme Court unanimously validated the coup under doctrine of state necessity. The Court declared that "…self-serving policies of

the previous government…threatened the existence, security, economic life, financial stability and credit of Pakistan" therefore "a situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people." (Syed Zafar Ali Shah and Others vs. General Pervez Musharraf, Chief Executive of Pakistan 2000). The Court however gave Musharraf a three-year time period for implementation of his agenda that included restoration of democracy. But, more importantly, the Court imbued the Executive with the power to amend Constitution. Also, while the Court stated that the fundamental rights provided in the constitution were to remain in operation, in reality, with a slight warning, it allowed the executive the power to erode fundamental rights provided in Articles 15, 16, 17, 18, 19, and 24 through the use of Article 233(1) in times of an emergency (Siddique 2006, 699).

Soon after, the 9/11 attacks happened. Apparently, the warning from Bush to bomb Pakistan "back into stone age" marked Pakistan's entry and secured its cooperation in War on Terror as US ally (Goldenberg 2006). To an already real and perceived list of dangers, and with the state's heightened activity with regard to terrorism under US pressure, terrorists became prime targets. Around the same time, the policy of enforced disappearances was designed. In his memoir, Musharraf acknowledges boastfully the use of this practice against terrorists:

> "We have captured 689 (people) and handed over 369 to the United States. Various people have earned bounties totaling millions of dollars." (Musharraf, Pervez 2006, 237)

When the Court started challenging the regime, Musharraf declared emergency again in 2007. In his proclamation of Emergency, Musharraf pointed towards the existential threat from terrorists - "grave threat to the life and property of the citizens of Pakistan" and how interference

in executive power was encouraging terrorists while "law enforcement agencies were subdued" (P. Musharraf, Proclamation of Emergency 2007). He also blamed the judiciary for exceeding the limits of its authority to infringe upon the functions of legislature and executive (P. Musharraf, Proclamation of Emergency 2007).

While the emergency was lifted, i.e. the Proper state of Exception was brought to an end, the power of the military as an institution could not be reversed. This has happened because Pakistan's military has been involved in *preservative transformation* process. It includes "legal, political, and institutional transformations" by military that helped entrench its power even in period of civilian rule (Kalhan 2013, 15). One such example is of National Security Council (NSC). It was part of the Provisional Constitution that was proclaimed by Musharraf. However, after Constitution was restored, as part of the Legal Framework Order, NSC was included in the Constitution. Thus, through NSC Musharraf attempted to formalize military's role in political decision-making (Bahl 2007, 71).

Pakistan's reponse to emergency situation can partly be categorized under Accomodation in Gross's typology of responses to emergency powers. According to this model, the existing order is kept in place as much as possible but changes are introduced into it to accomodate security considerations. However, this model puts the ordinary system at risk with the inclusion of emergency measures (Dyzenhaus, David 2006). Proposed as a extraordinary measure, Anti-terrorism Act 1997 established terrorism courts that "displaced" civilian criminal system with the objective to provide speedy justice, though at the cost of denying fair trial rights, but they have sustained till now (Omer 2018). Also, in 2011, Pakistan's version of Patriot Act (Taj 2011), Actions (in Aid of Civil Powers) Regulation was promulgated in the region of Federally Administered Tribal Areas (FATA). Military forces, which had been conducting military

operations in the area, were given broad powers to detain people because according to the regulation, "…there exists grave and unprecedented threat to the territorial integrity of Pakistan by miscreants and foreign funded elements, who intend to assert unlawful control over the territories of Pakistan and to curb this threat and menace" (The Actions (in Aid of Civil Power) Regulation 2011). Furthermore, in response to the attack on school in Peshawar that killed 141 people, including 132 children (BBC 2014), Pakistan formulated a National Action Plan against terrorism. In accordance with it, through 21st amendment and with amendments to Army Safety Act 1952, military courts were established to try civilians alleged of terrorism. These amendments were unsucessfully challenged before the Court for being "incompatible with the independence of the judiciary; the right to a fair trial; and the principle of separation of powers recognized by Pakistan's Constitution" (Jurists 2006, 9). These courts had a sunset clause of two but they were extended for two years again in 2017 (Nation 2017).

Thus, after going through a period of Proper State of Exception, Pakistan is experiencing an Ambiguous State of Exception. The responses to such a state of exception has created legal grey holes, which hide their illegality behind the façade of legality. They include certain legal constaints but those constraints do not stop the soveiregn from doing what he wants to do. Thus, in such cases, the detainess have no power to effectively contest their detainment. Substanively, they are legal black holes, but their image of legality makes them even worse because they pave the way for "official lawlessness" (Dyzenhaus, David 2006). Thus, as argued before, substantively, Ambiguous State of Exception operates alike the Proper State of Exception. In both, national security serves as the basis for promulgation of both these states of exceptions.

Chapter 4: Who is the friend/enemy?

Schmitt's basis of political actions and motives involves the distinction between a friend and an enemy (Schmitt 2007). For him, the state is political unity which means that the friend/enemy distinction primarily applies against external enemies. However, in the domestic realm, the concept of political can be applied in a derivative sense from the political in general (Böckenförde 1998, 39). If the intensity of conflict between members of a political unity reach an extreme level, then it can become political in Schmittian sense (Böckenförde 1998, 39).Thus, the distinction can help to provide an illustration of sovereign activity within domestic political realm as well.

The Citizen as the Enemy

Many theorists argue that there exists a social contract between a state and its citizens. By virtue of this relationship, citizens are obliged to fulfil certain obligations towards the state, and the state confers upon citizens certain rights. While the debate over balance between liberty and security is an old one, however it was reinvigorated after the 9/11 terror attacks against US. One side of this balancing approach concerns the rights of citizens, whereas the other pertains to rights of non-citizens.

In the context of post 9/11 situation in US, a comparison between rights of citizens and noncitizens that brought about the skewness that was apparent in response to right of both these categories:

> "…in practice we have selectively sacrificed noncitizens' liberties while retaining basic protections for citizens. It is often said that civil liberties are the first casualty of war. It would be more accurate to say that noncitizens' liberties are the first to go. The current war on terrorism is no exception" (Cole 2002, 955).

Civil liberties of US citizens through various measures such as surveillance were sacrificed to some extent after attacks (Wilson and Wilson 2013). Nonetheless, US non-citizens, as is evident through the example of Guantanamo Bay, fared worse. When objections were raised with regard to abuse of detention powers at the centre, the Bush administration claimed in its defence that Geneva Conventions did not apply to these prisoners because they were "unlawful enemy combatants" (Seligson 2013). Therefore, the result of the fact that some of these people are *others*, that they exist outside of the national boundaries, the basic rights framework that govern people in these territories is not applicable to them.

My argument is that sovereign action in terms of enforced disappearances works in such a way that it closes the gap between the category of citizens and noncitizens, who are deemed as enemies. In the case of Pakistan, the Constitution stipulates that "enemy alien" can be detained indefinitely. Also, the safeguards against arrest and detention, as stated in Article 10 of the Constitution, do not apply to them (The Constitution of the Islamic Republic of Pakistan 2012). Pakistan adopted the British colonial law, The Enemy Agents' Ordinance 1943, in which enemy was defined as "any State at war with…Pakistan" whereas "enemy agent" was any "person, not operating as a member of an enemy armed force, who is employed by, or works for, or acts on instructions received from, the enemy" (The Enemy Agents' Ordinance 1943). This shows that enemy was seen in terms of people who belonged to the enemy state or had some association with the enemy. With the turn of the century, terrorism loomed as a threat, thus terrorists were now also labelled as enemies, though as the paper discusses later, there was tension within that narrative. One piece of legislation that was promulgated in response to threat of terrorism, the Protection of Pakistan Act, defined "enemy alien" as someone whose identity as a Pakistani cannot be established or someone who was deprived of citizenship that he/she had acquired as a result of naturalization (The Protection of Pakistan Act 2014). Thus, most of the rights that

are bestowed upon citizens are not given to noncitizens. This situation becomes even more acute given that War on Terror is a continuous war with no end in sight (Ackerman 2004, 1033). Thus, the normal situation, without war, does not exist. According to Article 118 of the Geneva Convention, combatants who are detained by the enemy in an armed conflict can be confined until the termination of active conflict (War 1949). However, if armed conflict is seen in terms of War on Terror, then the War on Terror is continuous. Accordingly, the detention of the combatant can be indefinite too. Ackerman also argues in an emergency regime; the state response is based on distinction between friend and enemy under prevention rationale. Thus, the regime does not provide protection to citizens that are available under criminal law, detaining people merely on basis of suspicion (Ackerman 2004, 1058)

The powers of derogation with regard to non-citizens seem morally problematic because non-citizens by virtue of their humanity should be treated in accordance with fundamental of rule of law, though they could be subject to reasonable restrictions. However, using the context of war, these restrictions are often stretched beyond reason. Keeping the moral dimension of non-citizens rights aside, if the issue is examined in terms of greater rights of citizens and lesser rights of non-citizens, then in case of disappearances, the sovereign has blurred the line between citizens and non-citizens. In the backdrop of a war, the result is that the citizen has become akin to a non-citizen enemy, with no resort to the legal guarantees offered by the state. Thus, from the view-point of the sovereign, the result may be that "…citizenship can always be dissolved or denied…" since it is "…a legal construct, an abstraction, a theory" (Barron 2012, 34).

The impunity with which the military is involved in the practice of enforced disappearance owes partly to the narrative that is constructed around the enemy, the security threat. The enemy is demonised as someone who has evil intentions and wants to undermine the integrity and

security of the state through collaboration with enemy states. As discussed in previous sections, the military portrays itself as the defender of the nation, therefore any criticism of military is portrayed as equivalent to undermining the state and its security. Furthermore, the narrative around the enemy is so potent that the establishment of some sort of association with the enemy group is enough to cast suspicion that the person is a potential enemy.

This can be seen through various cases of enforced disappearances. In case of Balochistan, most of the targeted people are Baloch nationalists and their sympathisers. Military has openly and repeatedly blamed India for causing instability in Balochistan through extension of support to Baloch rebels (T. E. Tribune 2010) . To whatever extent that claim is true is not relevant here but the fact that the state absolves itself of everything that it has done to create that crisis and its response to it as well. It does so by creating an enemy out of its citizens, by establishing their link with the enemy states.

In another case, in 2017, Raza Khan, a peace activist, disappeared. He was a low-key member of *Aghaz-i-Dosti* (Initiation of Friendship) organization that worked to build better relations between India and Pakistan. Days before his disappearance, he had shared social media posts that were critical of the military (Hashim, Asad 2017). As has been discussed in previous section, the propagation of the view by military that India is an eternal enemy serves military interests and it keeps a tight-grip over foreign policy with India (add citation). Thus, the act of even innocuous association from Khan's side that aimed at establishing better relations with the 'enemy' state meant that Khan was seen as an enemy agent, whose citizen rights held no weight. Therefore, Schmitt's distinction between friend and enemy was held. In order to ensure internal peace, the state needs to declare internal enemies (Schmitt 2007, 46). Those citizens,

like Khan, who question and do not subscribe to the friend/enemy distinction then face the risk of being declared an enemy. As pointed by Schmitt:

> "If a part of the population declares that it no longer recognizes enemies, then, depending on the circumstance, it joins their side and aids them. Such a declaration does not abolish the reality of the friend-and-enemy distinction." (Schmitt 2007, 51)

In order to ensure security and peace, the sovereign transforms its citizens into enemies. The sovereign then makes the decision, which sends some people on the path of disappearance, while others are meted different treatment.

Instability within the Distinction

In the context of nation-states, Schmitt says that an enemy does not have to be a friend or an enemy forever (Schmitt 2007, 34). Furthermore, only real participants in the conflict can decide whether the enemy presents an existential threat that should be countered (Schmitt 2007, 27). Therefore, the distinction is not stable. Let's consider the case of terrorism in Pakistan. In the Anti-Terrorism Act, the definition of terrorist is not precisely defined. Thus, someone who commits even ordinary criminal acts such as abduction and extortion of money can be labelled as a terrorist (The Anti-Terrorism Act 1997, 6-7). Even though the parameters absurdly defined however the conviction rate when it comes to those who commit actual acts of terrorism is rather limited (Parvez and Rani 2015). One issue is that even though terrorism poses an existential threat but all terrorists are not enemies. The sovereign predominantly makes the decision as to which terrorist will be considered an enemy or a friend. Within that, the sovereign further makes the decision as to who among the enemy-terrorist will suffer enforced disappearances. As a result, members of proscribed organizations such as Lashkar-e-Taiba, who was accused of being involved in 2008 Mumbai attacks, are extended support (Jorgic and Johnson 2018). These terrorists are friends because they target the enemy state. On the other

hand, the military has conducted various operations against Tehrik-e-Taliban Pakistan (TTP), also known as Pakistani Taliban, which targets Pakistani state. Furthermore, most of the members that were involved in the formation of the terrorist-enemy TTP were once a part of Afghan Taliban, and had crossed Pakistan to support them in Afghan Jihad (Gall 2009). They were initially categorized as friends by the military but later when they started attacking the Pakistani state, they ended up in the category of enemy. An instability exists within these categories as a result of sovereign decision. Thus, it is possible that, for the citizens, it can create a sort of duality; whereby they have to negotiate their version of personal threat from enemy with the sovereign's version, which may not always be the same. This can lead to conflict and lack of trust in the sovereign.

Demonization of Public Enemies

To draw support for this endeavour of declaring someone an enemy, other distinctions that exist independent of the distinction of enemy are employed (Schmitt 2007, 27). Pakistani military engages in visual politics in which terrorists are demonised and portrayed as "public enemy" (Schmitt 2007, 28). The Inter-Services Public Relations, media wing of military, produces videos and photos in which the military is depicted as the saviour of the state and guardian of the belief whereas terrorists are demonised as evil. In such content, the focal point is military's efforts against Taliban but no distinction is made between good and bad Taliban (S. B. Khan 2017, 160). Thus, enforced disappearances occur in the backdrop of such narrative that is pro-military. In some cases, appeals are made to other issues. In one case, the military agencies picked up five social media bloggers who were critical of military. The military denied its involvement in their disappearance but one of the bloggers who was later released blamed the intelligence agencies (B. News 2017). Meanwhile, when the bloggers were in detention, a social media campaign ensued that tried to portray them as blasphemers. Such pro-military social

media campaigns have become a norm in Pakistan. They try to overhype national security and foreign policy issues and often target internal enemies who are presented as hand in glove with external enemies. It is difficult to locate the source of such content because it is generated out of "social media accounts and websites set up under obscure identities" (Farooq 2016). It is widely speculated that the military is involved in such campaigns. Even if it is not, the content only helps strengthen its narrative. As in the case of bloggers, the charges of blasphemy can tarnish the public image of the alleged person in Pakistan. Furthermore, the use of such an issue is important because blasphemy is considered a crime in Pakistan and it is punishable by death (Pakistan Penal Code 1860). Later, the Court cleared the bloggers of charges of blasphemy (AFP 2017). However, Pakistan has witnessed cases in which even if the Court absolved the alleged blasphemer of charges, he was eventually killed by people, often mobs, outside of Court (Hashim, Asad 2014). In such a situation, the creation of the image of blasphemers around bloggers can be seen as a creative, and dangerous, exercise in the formation of a Schmittian public enemy.

Chapter 5: Implications - The Case of Pashtun Tahaffuz Movement

Pakistan's state of exception(s) has reconfigured the balance between liberty and security in the favour of the latter. Consequently, there were voices of discontent and dissent but they could not mount an effective challenge due to various factors among which one big factor was repression on part of the state (News, The 2014). In spite of that, Pashtun Tahaffuz Movement, Pashtun Protection Movement, (PTM) has sprung up and managed to gain a huge following among people belonging to Pashtun ethnicity. Most of the Pashtuns live along the border with Afghanistan, and they have experienced violence either at the hands of the militants or the military. Therefore, PTM is not merely an anti-war movement but it is also highly critical of military. One of the demands of the movement is an end to practice of enforced disappearances, and the production of disappeared people before the Courts (Shams 2018). The section attempts to explaining PTM through theoretical understanding of different theorists and goes on to critically analyse the merits and limitations to explain the phenomenon of state of exception in Pakistan. These normative considerations are anchored in liberal thought, mainly employed through Waldron, which Schmitt might characterize as hypocritical or illusory (Bielefeldt 1998, 24). However, it is worth engaging in this exercise because liberal tradition does include political and ethical substance, that might provide with critical insight into various aspects of PTM, including the possible reasons for its existence in the first place.

Unjust Basis of Targeting

Affiliation

As Waldron points out the reconfiguration of balance between liberty and security often leads to a skewed distribution among population, thus some people on the basis of their identity are targeted more than others (Waldron 2010, 38-9). This can be seen in the case of Pashtuns, who

are often targeted by military because a lot of Taliban are Pashtuns as well (Shams 2018). Furthermore, since the colonial times, a stereotype about people belonging to Pashtun tribe was propagated that they were "ungovernable", "unruly" and "fanatics" (Manchanda 2018, 175-177). Later, during Cold War, they were "lionised as holy warriors" against the Soviet threat (Manchanda 2018, 181). But, with the change in context after 9/11, such constructions of Pashtuns ended up feeding into their image as a security threat. Thus, in contemporary Pakistan, Pashtuns are assumed to be terrorists because of their ethnicity. As Waldron argues, this constitutes an extreme form of injustice (Waldron 2010, 38-9) because the reason of suspicion is not some form of objective criteria but a person's identity. Pashtun undergo and recognize this discrimination; therefore, the leaders of PTM are very vocal about how they are being stereotyped as militants because of their ethnicity (Zahra-Malik 2018). Even the name of the movement points towards the group's need for protection from unfair treatment.

According to Ackerman, during emergency, security services might disproportionately target people belonging to certain groups such as on the basis of ethnicities. If members of certain groups suffer detention more than others than it might be due to the fact that members of these groups have greater association with terrorist ideology. After the end of emergency, the court can deal with such abuses by providing punitive damages but also by tackling structural discrimination so that it does not reflect in future emergencies (Ackerman 2004, 1076). Ackerman's solution is based upon the premise that the court would have enough powers to actually tackle such challenges. Even if the courts possessess such power, it does not directly follow that it would necessarily be able to recognize these patterns of discrimination and effectively tackle it. Also, this account is morally and practically undesirable. The people who are made to suffer as a result of such measures will be provided delayed justice, if at all.

Lack of neutral authority

Justice requires officials to take a neutral view point, so that no one is put under greater suspicion than others due to their identity or affiliation (Waldron 2010, 38-9). Nonetheless, neutral position cannot be assured when the military is accused of being a biased entity, that is engaged in a "double game": it fights some Taliban while it protects others (Shams 2018). Furthermore, Pashtun bodies are seen as disposable in such geopolitical struggles, sometimes as fighters and sometimes as militants. The statement by Manzoor Pashteen, the face of PTM, makes this discrepancy in military policy against Pashtuns visible when he observes:

> "When it suits them to bomb us, they'll bomb us; when it suits them to send us rations, they'll send us rations; when it suits them to set our people to kill others, they will train them and facilitate them" (M. I. Khan 2018)

For Schmitt, the claim of neutrality points to liberalism's lack of substance in the sense of lack of clear political and ethical stand-point (Bielefeldt 1998, 24). Neutrality can be problematic if it is impartial towards all ethical and moral problems, but neutrality in the sense of non-discrimination that respects the dignity of all humans as morally autonomous subjects is desirable (Bielefeldt 1998, 29-31). Perhaps, PTM might not existed if neutrality in the latter sense was not trampled upon in the first place since a large of their grievance stems from official biasness against them.

Increase in State Power

Moreover, if the state accumulates additional powers, then a decrease in liberty with an increase in security might be followed by an increase in power of the state (Waldron 2010, 40). Thus, in the context of Pakistan, where the state is seen as partial, this increase in power of state manifests itself in destructive ways for Pashtuns. This includes the demolition of their homes

for alleged links with terrorists, and the disappearances of Pashtuns (Shams 2018). The state can abuse these increased powers. This becomes especially important in context of the Ambiguous State of Exception, whereby the additional powers are used can easily be used against "enemies of the state" rather than "enemies of the people" (Waldron 2010, 40). A case for increased state power becomes difficult to support, even in the existence of threat from terrorism, especially when the context is brought into light – lack of neutral authority and unjust basis of targeting.

Creation of a Regime of Terror

For grievances against the military, the rallies of PTM serve as a platform for relatives and friends of disappeared people. In these rallies, scores of people showed up with posters that had photos and related details of disappeared people.

It is no surprise that the military does not want those visuals and voices to be disseminated and heard widely so they become a part of national discourse, in a way that differs from its own narrative on the issue. For that reason, the news coverage of the rallies and other events related to the movement were absent from electronic and print media. The media black-out had come about due to directions from military officials and also as a result of self-censorship (Ahmad 2018). Presented with such a situation, PTM has resorted to social media in order to spread its message as well to provide live coverage of its rallies. For its partial treatment, Pashteen has called out the media for being "hypocritical" (Rehman and Malik 2018). On the other hand, self-censorship and the acceptance of directives related to censorship among media is mainly the result of a fear that the media does not want to be seen by military as crossing red lines. Those who do so, end up bearing immense cost. Recently, Pakistan's most watched news channel, Geo News, was forced on military directives to go off-air in eighty percent of the country because it had managed to *again* displease the military because of its critical coverage

(Masood 2018). Earlier, Geo's broadcast journalist, Hamid Mir, one of the most prominent journalists in Pakistan, was shot 6 times in an assassination attempt but he survived. This attack occurred right after he had angered the military for providing coverage to a long march that was held by a group of Balochs, who demanded the recovery and production of disappeared people in Court. Right after the attack, Mir's brother, a journalist himself, blamed the military's agency, ISI, for attack (M. Chaudhary 2014). This brought the channel under immense fire and it was accused of running a campaign "…against a state institution tasked to work for the defence, sovereignty and integrity of Pakistan" (News, BBC 2014). Attacked by the military on various fronts after this attack, Geo tried to appease the military eventually through issuance of an apology (News, BBC 2014). Media, therefore, is itself besieged, facing threats not merely from non-state actors such as Taliban but also from state actors. Such a situation contributes to an environment of fear, in which force is used without reference to law. Thus, people live under constant terror because they do not know when and which action of theirs's might make them a target (Waldron 2010, 62). As the case of self-censorship demonstrates, in the face of arbitrary power, some segments deliberately mould their behaviour to that of 'friends', because anyone outside of that category can become a target.

Thus, in this context, there have been attempts aimed at sabotaging PTM. Students and academics in two private universities, LUMS and Habib University, had organized talks on Pashtun rights. But, they were forced to cancel these events after they received calls from members of security agencies (Bukhari and Sayeed 2018). Furthermore, students who were sympathetic to the demands of PTM received threatening phone calls that asked them to cease their activity. Also, members of PTM, who themselves protest against enforced disappearances, have started getting disappeared (Sayeed 2018). These tactics are employed in order to generate fear among people. Furthermore, social interactions suffer as a consequence of fear making it

hard for "citizens to discuss, criticize, and evaluate" issues of importance among themselves (Waldron 2010, 63). The presence of fear also problematizes the idea of security that the military claims to provide to the population (Waldron 2010, 125).

State Enemy Becomes the Public Enemy

Meanwhile, there have been concerted efforts to delegitimise and discredit PTM in the eyes of public. Part of the ploy involves the creation of the narrative that portrays the movement as anti-Pakistan, working in cahoots with foreign enemies. Chief of the Army Staff resorted to this gambit when he addressed the nation to not forget the sacrifices of "real heroes", the armed forces, versus those engaged in "anti state agenda in the garb of engineered protests" with the aim to reverse achievements made in counterterrorism operations (Syed 2018). As argued by Waldron, the "enemies of the state" might not be "enemies of the people" (Waldron 2010, 40). This reference by the Chief, nevertheless, reflects that an attempt was being made to merge these categories. Even more specifically, PTM has grievances predominantly against one institution of the state, military. Booked for being guilty of sedition and terrorism (Reporter 2018), accused of getting funds by and having links with enemy states (Zehra 2018), the citizens have been transformed into security threats. Battar Sattar, a prominent lawyer, contributes columns regularly for a newspaper. However, when he wrote on PTM, the newspaper did not publish the article because of censorship. So, he released the copy of the article himself, in which he raises the question:

> "Why is our state so insecure that it must deny agency to citizens raising critical voices by 'otherising' and placing them in enemy?" (Sattar 2018)

The tactic is an attempt to discredit and fizzle out the movement. It though poses the question that if the political rights that people have against government are sacrificed in the sense that they damage a people's dignity (Dworkin 2006, 36), then for how long can the political unity in the Schmittian sense be maintained through coercion. Especially, if this political unity as the "pacified unity" takes the form of friend-enemy relationship, then how effectively can the sovereign guard against external threats (Böckenförde 1998, 39).

Conclusion

Therefore, as the research propounds, there indeed exists a Schmittian sovereign power in Pakistan. The military as the sovereign decides on the State of Exception. This State of Exception has continued even under a democratic regime, when the constitutional powers are not dispelled. The presence of this Ambiguous State of Exception along with the practice of enforced disappearances problematizes the situation of Pakistan, beyond its explanation in the classical political theoretical framework. Within the context of War on Terror, the recent developments in Pakistan pose the question whether there is a perpetual state of emergency in the country, and how the prolonged presence of legal grey holes will continue to have repercussions on rule of law and for democracy as well.

The high-handed reaction of the military against a popular movement like PTM makes one wonder whether it is a sign of the weakening power of the "sovereign". Or, whether this Schmittian enemy would eventually be overcome by the sovereign in the Pakistan's state of exception.

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