

Civilian Control of the Military in Pakistan: Accountability and Ministerial Responsibility

Introduction:

A public inquiry on ‘Operation Burnham’ was conducted by the Government of New Zealand, and the major focus of the inquiry was to consider the core constitutional principle that arose in this Inquiry i.e., ‘ministerial accountability’ in conjunction with the norm of ‘civilian control of the military’.

As part of partial requirement of my course Laws 541, I have to write a paper, for this purpose a survey will be done to know what has been said in Operation Burnham inquiry¹ in regard to civilian control of the military and then compare it with Pakistan’s situation. In this paper I will basically highlight the difficulties that can arise if there are not appropriate systems and civilian control. I will also try to find out what are the lessons arising out of Pakistan's experience and see what can New Zealand learn from the Pakistani experience.

Operation Burnham Inquiry and Constitutional context

In New Zealand, military power is exercised through a combination of statute law and the royal prerogative. The principal statute is the Defence Act². Section 5 provides that the “Governor-General may,...in the name ...of the Sovereign,...raise and maintain armed forces either in New Zealand or elsewhere for the... purposes...[of] defence of New Zealand...” Maintaining and utilising armed forces and defending the nation were originally within the royal prerogative and that the prerogative remains relevant. However, s 7 makes it plain that ministerial responsibility for the armed forces lies with the Minister of Defence. The Minister will, of course, be answerable to Parliament for the exercise of their responsibilities in relation to the armed forces.

¹ Terrence Arnold and Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham and related matters* (Department of Internal Affairs, July 2020).

² Defence Act 1990.

Section 8 of the Act provides for the position of Chief of Defence Force. That person is in command of New Zealand Defence Force (NZDF) working through the chiefs of the three armed services—Army, Navy and Air Force. Under s 25(1)(a) of the Act, the Chief of Defence Force is the principal military adviser to Minister; Secretary of Defence being the principal civilian adviser. Importantly, s 25(1)(b)(i) provides that the Chief of Defence Force is responsible to the Minister of Defence for carrying out the functions and duties of NZDF including those imposed by the Government's policies. Further, under s 25(2) of the Defence Act the Minister is under a statutory duty to provide the Chief of Defence Force with Terms of Reference that deal with matters such as the obligations and duties of the office and how the Chief of Defence Force is to perform them.

The Burnham Inquiry was significant as it highlighted two mutually reinforcing constitutional principles, which are considered fundamental to the proper functioning of New Zealand's democracy: They are: (i) civilian control of the military; and (ii) ministerial accountability to Parliament.³ The report pointed out that effective operation of these principles depends, essentially, on the provision of accurate information to ministers by New Zealand defence forces⁴. The Inquiry further confirmed that over a number of years, NZDF and ministers (including two Prime Ministers) made public statements that were inaccurate, including in response to parliamentary questions.⁵

What is accountability?

Accountability has a much wider meaning than the limitations of financial accountability. The *Oxford English Dictionary* defines *accountability*: the quality of being accountable; liability to give account of, and answer for, discharge of duties or conduct; responsibility, amenableness. In democratic governance, public accountability is one of the key elements whereby it provides the political representatives as well as voters a mechanism to judge the fairness, effectiveness and efficiency of the governance⁶. In parliamentary democracies, the dominant public

³ Arnold and Palmer *Report of the Government Inquiry into Operation Burnham and related matters* above n 1 at 360.

⁴ At 360.

⁵ At 361.

⁶ Mark Bovens "Public Accountability" in Ewan Ferlie, Laurence Lynn and Christopher Pollitt (ed) *The Oxford Handbook of Public Management* (September 2009) Oxford Handbooks Online <www.oxfordhandbooks.com> at [3–4].

accountability relationship operates based on the doctrine of ‘ministerial responsibility’. In public law, another perspective of accountability what may be termed constitutional or legal, is concerned with creating an equilibrium among the various powers of the state. The courts are allowed to review the actions or decisions of a public or private administrative body (including the executive) to see whether they acted within the powers given to them by the law. The purpose is to investigate and the accountability processes bring to light any unlawful action of the government and control it. Accountability has also a function of improving performance which is considered as ‘learning’ perspective of accountability.⁷

Another accountability model in a representative democracy is achieved through controls on the bureaucracy such as Ombudsmen and Commissioners, who are appointed by the Governor-General (in New Zealand). Their options, however, are critically limited by their terms of reference and funding⁸. The Burnham Inquiry falls in this category of accountability.

In a representative democracy, civilian officials determine the state’s public policy and as a constituent thereof the defence policy is formulated to ensure that the state is adequately protected and that military activities comply with the desires of the electorate. The officers they supervise, however, have access to specialized expertise on defence affairs that is often greater than that of the civilians who oversee them.⁹ The power of the expert arises because of the requirements for technical knowledge to achieve politically defined goals.¹⁰ Therefore, a potential exists for the military bureaucrats controlling the state through promotion of their own policies to the elected representatives and weakening the democratic process¹¹.

In addition, the military activities have secrecy issues linked to them in the interest of furthering national interest. Military would also prefer considerable autonomy from civilian oversight, arguing that excessive civilian interference in military affairs leads to inefficiency and hinders the performance of the forces in combat. This combination of factors makes the military an unusually opaque institution. The elected officials often have little information on which to

⁷ Mark Bovens, Thomas Schillemans and Paul ‘T Hart “Does Public Accountability Work? An Assessment Tool” (2008) 86 Public Administration 225 at 230.

⁸ Peter Walker “Understanding Accountability: Theoretical Models and their Implications for Social Service Organizations” (2002) 36 Social Policy & Administration 62 at 67-68.

⁹ Harold Trinkunas *Ensuring Democratic Civilian Control of the Armed Forces in Asia* (East-West Centre, Occasional Paper No 1, October 1999) at 16.

¹⁰ Peter Walker Understanding Accountability above n 8 at 67.

¹¹ At 67.

base their decisions.¹² Yet, this lack of transparency is an important precursor to proper democratic accountability.

In New Zealand's parliamentary democracy, ministerial accountability is a familiar concept. Those who govern need to be accountable and responsible to those over whom they govern. A basic duty of Parliament is to hold the executive government to account. This accountability requires ministers actively to supervise and monitor the agencies for which they are responsible. Ministers are answerable to Parliament, and through Parliament to the people, for their stewardship. Furthermore, military's operational decisions can have profound reputational, legal and political consequences, both internationally and domestically¹³. The recommendations in the Burnham Inquiry report were relating to issues of public administration and institutional accountability. The Inquiry emphasized the need to put in place systems to control a military, *inter alia* recommending the establishment of an office of the Independent Inspector-General of Defence, with the aim at bringing more transparency and openness about NZDF, thereby building greater public trust and confidence.¹⁴

In the backdrop of Burnham Inquiry, this paper will discuss how the associated concepts of accountability and ministerial responsibility work and whether there is any civilian control of military in Pakistan.

Constitutional, Legal and Administrative Controls

Pakistan is a parliamentary democracy as per the constitution adopted in 1973, therefore, a structure of civilian oversight of military matters exist. The Federal Government has the control and command of the armed forces. The supreme command of the armed forces vests in the President. The President has power to raise and maintain the armed forces of Pakistan and to grant Commissions or warrants for appointment. The President on the advice of the executive government, appoints the heads (Chiefs of Staff) of Army, Air Force and Navy. Article 244 and 245 of the 1973 Constitution restrict military's role in political affairs¹⁵.

¹² Trinkunas above n 9 at 10.

¹³ Arnold and Palmer *Report of the Government Inquiry into Operation Burnham and related matters* above n 1 at 362 and 367.

¹⁴ At 367.

¹⁵ Pakistan military has inherited an apolitical professionalism from the British Indian Army. The professionalism involved strict discipline, hierarchy, loyalty, and obedience to legally constituted authorities. But military elite

These stipulations put the Federal Government to direct Armed forces to come to its aid only when called upon to do so.

The legal instrument on service matters in the case of army is Pakistan Army Act 1952, which is adopted from Indian Army Act, 1911. Air force and navy are subject to Pakistan Air Force Act 1953 and Navy Ordinance 1961 respectively.

The civilian government controls the military through ministry of defence where the secretary ministry of defence is the senior most bureaucrat to run the affairs of the ministry. The Secretary Defence is answerable to the Minister of Defence who in turn is responsible to the Cabinet and prime minister on the defence matters.

Since military is hierarchically organized, maximum authority therefore, vests in the service Chiefs. Through defence restructuring implemented after 1973, Bhutto government aimed at reducing the influence of the army chief and bringing the military under greater control of the civilian government. These objectives were to be achieved through strengthening the Ministry of Defence (MoD). Henceforth, the three services were placed under the administrative control of the MoD, headed by a minister answerable to the Cabinet and the parliament.

However, contrary to the theoretical framework enunciated in the constitution and legal instruments, the situation on the ground is different. The Pakistani military has been making coups up to four times in the past since 1958 and ruled the country over three decades out of the country's seventy-four year existence. For the time it was not ruling directly, it has intervened from behind the scene in the working of civilian governments.

Pakistan's military enjoys complete autonomy over its internal promotions, transfers and appointments except prime minister selects the three services Chief¹⁶. The criteria while

also shared the colonial officials' view of politicians as un-trustworthy and in-sincere. Pakistani military leadership also believed in the notion that centralized authority was important to nation-building, because it would ensure political and economic modernization of society on uniform basis. The military dismissed the constitutional government and seized control in October 1958 as it was determined that the parliamentary system would bring more chaos rather solve the national problems.

¹⁶ The appointment of services chiefs is made by the Prime Minister, but it is done in a pro-forma manner. The civilian control has no real input or control in the selection process, as prime minister has to pick one among the list of five candidates submitted by COAS. This compromises their ability to comprehend the organizational culture of the military or predict the nature of civil-military interaction. Prime Minister makes selection of a candidate on the basis who will be more docile and apolitical and indicates a sense of loyalty.

choosing a Chief has fundamentally been to appoint someone who is apolitical and docile, and indicates a sense of loyalty. Professional competency or capability to lead in the operational context, are seldom taken as determining factors¹⁷. The corps commanders play a key role in influencing the decisions of army chief and military policy formulation.

Civilian Control: What does it mean?

The military's monopoly over the means of violence, as well as its hierarchical organisational structure, raises the question of how unarmed civilians can ensure that the military remains firmly subordinate to the legitimate civilian holders of political office¹⁸. The principle of 'civilian control' denotes a hierarchical relationship in which civilians make decisions, while the military is responsible for implementing those decisions that have been delegated to them by the civilian decision makers. As a consequence, the degree of civilian control depends on the extent to which they have the authority to make socially binding decisions, as well as sufficient oversight to ensure that the military fulfils its delegated functions in the manner how the civilians want¹⁹. Accordingly, civilian control may be understood as that of distribution of authority and oversight under which civilians can autonomously decide on all relevant political decision-making matters, and delegate and revoke the delegation of political decision-making and implementation to the military; as well as oversee and direct the making and implementation of those decisions what they have delegated to the military.²⁰

A conceptual framework

The scholarly literature has produced a wide range of arguments to explain the conditions under which civilian control can be established. Huntington²¹ suggests two broad models for "civilian control" or supremacy over the military. The first, the "subjective civilian control" model, is

¹⁷ Saeed Shafqat Pakistan Military: Sustaining Hegemony and Constructing Democracy (2019) 42 Journal of South Asian and Middle Eastern Studies) 20 at 32.

¹⁸ David Kuehn *Institutionalising Civilian Control of the Military in New Democracies: Theory and Evidence from South Korea* (GIGA, Working Paper 282, 2016) at 6.

¹⁹ At 6.

²⁰ At 6.

²¹ The professionalism did not depoliticize the Pakistani military. Instead, it aroused the military's interest in civilian affairs and spurred members of the senior officer corps, led by the commander in chief, Gen Ayub Khan (1951-1959), to voluntarily assume the obligation of properly organizing political society and the state (see at page 6 in Aqil Shah's book: *The Army and Democracy*).

attained by simple and direct maximization of civilian power vis-à-vis the military. It can be achieved through governmental institutions, social classes, or constitutional means.²² However, he argues that with the rise of military professionalism, this form of civilian control has become obsolete. The other form of civilian control is “objective civilian control,” which can be achieved by maximizing military professionalism. In his view, “it is that distribution of political power between military and civilian groups which is most conducive to the emergence of professional attitudes and behaviour among the members of the officer corps”. Huntington’s model of objective civilian control, in the case of Pakistan, does not seem relevant as despite military professionalism military has not shown itself “politically sterile and neutral”²³.

Moris Janowitz, also agrees with the professionalism-equals-civilian control theory propounded by Huntington. However, he considers that officer is subject to civilian control not only because of “self-imposed professional standards,” but also because of a “meaningful integration with civilian values.” In his view state institutions play a secondary role as an extension of society. Janowitz also acknowledges some degree of unavoidable politicization of the military because under the prevalent circumstances the military increasingly had to operate on the concept of a constabulary force²⁴.

Samuel Finer considers that the very nature of “professionalism” as defined by Huntington, in fact may often lead to military collision with civilian authorities, and making the military politicized. In order to inhibit the military’s desire to intervene in politics, in his view, the military requires the firm acceptance of civil supremacy, not just professionalism²⁵.

Eric Nordlinger points out that military usually acts against civilian governments which have evidenced performance failures. In his view, it becomes easier to justify the overthrow of governments who have lost their legitimacy or the public respect. The coup succeeds mainly

²² Abdul Shakoor Khakwani *Civil-Military Relations in Pakistan: The Case of the Recent Military Intervention (October 12, 1999) and Its Implications for Pakistan’s Security Milieu* (University of Illinois, Occasional Paper 1/2003) 2003 at 13.

²³ Khakwani above n 22 at 4.

²⁴ Gerhard Kummel “The Military and its Civilian Environment: Reflections on a Theory of Civil-Military Relations” (2002) 2/02 (SOWI) 63 at 65.

²⁵ Khakwani above n22 at 5.

because “a large population of politicized citizens are not offended by the government’s demise, if not positively delighted with its overthrow.”²⁶

Rebecca Schiff has given the theory of concordance for civil-military relation. According to her, “concordance theory describes a concordance among the military, the political elites, and the citizenry found in a wide range of cultures”²⁷. To her, concordance “explains the institutional and cultural conditions that affect the distinctive relationships among the three partners”²⁸. Furthermore, she explains that “if these partners agree on four indicators – the social composition of the officer corps, the political decision making process, recruitment method and military style - domestic military intervention is less likely to occur”²⁹. Her theory’s applicability in Pakistan came under criticism because it does not explain domestic military intervention.³⁰ Critics have asserted that political interventions of Pakistani army may reflect popular support for the military’s political role rather than disquiet in the country’s civil–military affairs.

David Kuehn admits that divergent interests of politicians and military officers could lead to conflicts about the institutionalisation of civilian control³¹. He argues that the development of civil–military relations can be conceived as a continuing power struggles between civilian and military elites. In this view “the outcome of these power struggles depends on the respective bargaining power of civilians and the military, which is in turn a function of (1) the willingness of civilians to challenge the military’s institutional prerogatives and the military’s willingness to defend them and (2) each party’s ability to bear the costs of a civil-military conflict”.³²

Civil-Military Relations in Pakistan

These different models explain the civilian control of military, but also make evident the complexity of this issue, particularly, as has been observed, for those countries where

²⁶ Hussain Haqqani *Pakistan between Mosque and Military* (Carnegie Endowment for International Peace, 2005) at 117.

²⁷ Rebecca Schiff “Civil-military relations reconsidered: a theory of concordance” (1995) (*Armed Forces & Society: An Interdisciplinary Journal*) 1 at 1.

²⁸ At 1.

²⁹ At 1.

³⁰ Zulfikar Ali “Contradiction of Concordance Theory: Failure to Understand Military Intervention in Pakistan” (2014) *Armed Forces & Society* at 1.

³¹ At 1.

³² Kuehn above n 18 at 23.

democracy is weak. It is generally also recognised that basic precondition of a true democratic setup is a healthy civil-military relationship. In all democratic countries, an elected civilian government enjoys full control over the military. However in the case of Pakistan there has always been some imbalance between civilian-military relationship. Since its independence, Pakistan has been governed under various regimes, ranging from direct military rules, political authoritarianism or democratic governments. Out of its seventy years of existence, Pakistan has been ruled by military for 33 years. As a matter of fact, pattern of civil-military relations underwent a complete transformation in Pakistan within a decade or so. There are multiple factors responsible for this military dominance:

i. Incompetent political leadership

Quaid-i- Azam Muhammad Ali Jinnah, the father of the nation, clearly articulated a subordinate role of the military to civilian government.³³ However, Jinnah died just one year after the creation of Pakistan. The first Prime Minister Liaquat A Khan also died in 1951. The incompetent leadership that followed them failed to guide the destiny of the nation. The incompetence of politicians and wrangling for power, instead of cooperation and mutual accommodation led to ceaseless infighting³⁴ that provided the military an opportunity to intervene in politics.

ii. Weak political parties

The Muslim League party that led the independence was not representative of the whole country³⁵. There were no other established political parties. The politicians were divided and engaged in a continuous struggle for power, frequently shifting their loyalties. Due to their infighting the country's economy also suffered badly. As a consequence, political elite could not assert civilian control over the military nor restrict the latter's role in politics. The

³³ (Quaid-i-Azam on his visit to Staff College Quetta on 5 November 1947): "Do not forget that the armed forces are the servants of the people. You do not make national policy; it is we, the civilians, who decide these issues and it is your duty to carry out these tasks with which you are entrusted".

³⁵Consequently, initially several of the ministers in the cabinet were not elected politicians. There were as many as nine members of the Prime Minister's cabinet in 1954 who did not have a seat in the Parliament.

politicians, on the contrary, cultivated military elite to strengthen their own position, co-opted them for policy-making and gave a free hand in civilian matters.³⁶

iii. Weak civilian institutions

At the time of independence, the country inherited civilian institutions established by the British. However, unlike in the case of India, they were weak or absent, as there was neither parliament, civil secretariat, Supreme Court, reserve bank, nor fully organised armed forces. The civilian bureaucracy and higher judiciary was relatively small. Since Muslims in the Indian Army was comparatively large, the military institution inherited was relatively stronger and it assumed greater significance right in the beginning.³⁷ For the first nine years, Pakistan could not adopt its first constitution. The delay in finalising constitution allowed the *viceregal* system under the governor-general nurture authoritarianism. This had profound, long-term consequences for civil-military relations in Pakistan.³⁸

iv. Rising Power of Civil-Military Bureaucracy

Pakistan had poor basic infrastructure at the time of independence. There was a need for competent and determined leadership to build and nurture democratic institutions. The political, social and economic life in the country, constituting mainly a rural society, was dominated by landed aristocracy. The feudal leadership was not capable of dealing with the diverse problems facing the country. It depended heavily on the civil and military bureaucracy³⁹. The result was that bureaucratic elite⁴⁰ became more assertive, in comparison with political elite.⁴¹ When Commander in Chief Ayub Khan was included in the 1954 cabinet as defence minister, this tradition led to the “beginning of army taking over civilian responsibilities and the end of the supremacy of the civilian over military power”.⁴² The first

³⁶ Hasan-Askari Rizvi “Civil-Military Relations and National Stability in South Asia” (1989) 42 Pakistan Horizon 47 at 68.

³⁷ At 68.

³⁸ Sumit Ganguly “A Tale of Two Trajectories: Civil-Military Relations in Pakistan and India” (2016) 39:1 Journal of Strategic Studies 142 at 146.

³⁹ Noorul Haq “Civil Military Relations in Pakistan” (2012) XII *IPRI* 110 at 113.

⁴⁰ Governor General Ghulam Muhammad (October 1951–October 1955) and his successor, Major-General Iskander Mirza (October 1955–March 1956), derived their support from civilian bureaucracy and the army and not from any political party.⁴⁰

⁴¹ Haq above n 39 at 113.

⁴² Hamid Khan “Developing Liberal Jurisprudence in Pakistan” (2020) 17 Policy Perspectives 129 at 131.

military takeover in 1958 was a momentous event as it stifled the emergence of democracy which could ensure a subservient military under civilian control⁴³. Ayub developed deep misgivings about parliamentary democracy, which he thought did not suit Pakistan with its poor rate of literacy. After coming into the cabinet, Ayub could implement his constitutional plan⁴⁴.

v. Security Threats

The military considers itself as the sole saviour of the nation against threats to Pakistan's integrity, sovereignty and statehood. The persistence of external and internal threats transformed Pakistan into a security state which hindered the progress towards democracy. India is perceived as an 'existentialist threat'⁴⁵ to Pakistan and this perception besides 'security considerations' is also driven by the culture of the military elite who are 'ideologically' motivated.⁴⁶ The ideological overtones gave military a pre-eminence in the socially conservative society and the government system.

vi. Ties with United States

The roots of the military tutelage of the civilian government can be attributed to the defence of country's sovereignty in the face of external threat. The political and bureaucratic elite's real-politic world view led them to assign to the military a prominent role in political decision making, especially with regard to the emerging strategic relationship with the United States.⁴⁷ The 1954 Defence Treaty with the US that brought military and economic aid. Pakistan became member of security alliances⁴⁸ created to contain Communism.⁴⁹ The US would trust military

⁴³ T V Paul *The Warrior State : Pakistan in the Contemporary World* (OUP, 2014) at 46.

⁴⁴ Aqil Shah *The Army and Democracy* (Harvard University Press, 2014) at 79.

⁴⁵ The two states fought three major wars (1947–1948; 1965; and 1971) and a minor one (1999) at Kargil sector, besides experiencing a number of serious crises. The 1971 war had the most pronounced impact, ending in a military debacle for Pakistan and the separation of the eastern wing of its territory.

⁴⁶ Shafqat above n17 at 21.

⁴⁷ Paul above n 43 at 46.

⁴⁸ Pakistan joined the Southeast Asia Treaty Organization (SEATO) in September 1954 and the Central Treaty Organization (CENTO) or Baghdad Pact in February 1955.

⁴⁹ See, given the fractious politics of developing countries, also split along communist and capitalist ideological divide, the military was the only credible institution that could guarantee stability and better governance. The armed forces were seen by the US as instruments of domestic stability and as dependable partners for achieving the US security objectives, especially against the potential communist onslaught.

as a dependable ally in its strategic designs. By the second half of 1950s, the three A's- Allah, Army, and America- would emerge as the most powerful rallying forces in determining the destiny of Pakistan.⁵⁰

vii. Civil Dependence on Army

During the early years of country's existence military had to be frequently called in to aid weak civil administration to deal with natural disasters, emergencies and civil function. The army was tasked to escort the movement of refugees' convoys from East Punjab as well as establishing their camps. The "aid to the civil power" operations and its responsibility to streamline the civilian administration led to the politicisation of military early on.⁵¹

Institutionalising Civilian Control

Civilian control only exists when government officials hold ultimate jurisdiction over military activities. In other words, civilian control is maximized when rulers provide informed oversight and final approval for the policies and activities of their armed forces.⁵² Only when civilian control is institutionalized will democracy prevail and norms of civilian supremacy develop within the military.⁵³ Maximizing civilian control in a democracy involves limiting the areas of state policy in which the armed forces hold ultimate jurisdiction. The ability of the armed forces to make decisions on state policy without civilian input or supervision is clearly incompatible with civilian control.⁵⁴

This authority and oversight over decision-making matters are realised through a framework of institutions that include: (a) formal rules that ensure civilians' right to propose and enact legislation in all political matters (including internal security, defence, and military policy), and to decide on matters of war and peace and declare domestic emergency situations, as well as (b) effective organisations such as defence ministries and legislative committees with actual

⁵⁰ Paul, above n 43 at 46.

⁵¹ Shah above n 44 at 68.

⁵² Trinkunas above n 9 at 3.

⁵³ Trinkunas above n 9 at 4.

⁵⁴ Trinkunas above n 9 at 10.

decision-making power and with civilians in command, without undue influence from the military personnel⁵⁵.

The oversight institutions enable civilians to monitor and direct the implementation of decisions delegated to the military, and to punish misbehaviour. They include (a) regulations on ministerial oversight, legislative scrutiny, and the auditing of defence policy, military policy, and budgets, as well as on the judicial accountability of the military, and (b) civilian-led agencies such as ministries, legislative committees, auditing chambers, and courts that are mandated and able to oversee and direct the military's operations and to punish military shirking.⁵⁶

Military regimes in Pakistan

Since independence, Military generals has ruled directly for thirty three years under Ayub Khan (1958–1969) under Yahya Khan (1969-71) under Ziaul Haq (1977–1988) and under Pervez Musharraf (1999–2008). For the rest of years, military has wielded decisive political influence behind the scenes, thus practically making civilian control non-existent⁵⁷.

In October 1958, President Mirza abrogated the 1956 Constitution, and by proclamation dismissed the central and provincial governments and legislatures, abolished political parties and promulgated martial law. C-in-C of Army was appointed chief martial law administrator. Three weeks later, Ayub Khan took the presidency and had Mirza exiled. On coming to power he introduced measures to 'cleanse' the system of 'corrupt politicians'.⁵⁸ He introduced a system termed as Basic Democracy. The 1962 constitution adopted by military regime stipulated presidential form of government.

After protests against authoritarianism, Ayub resigned in March 1969 and handed over powers to General Yahya Khan. He abrogated the 1962 constitution. General election was announced on adult franchise in 1970. However, after elections the military had reservations to transfer

⁵⁵ Kuehn above n 18 at 7.

⁵⁶ At 7.

⁵⁷ Shah above n 44 at 18.

⁵⁸ Smruti Pattanaik "Pakistan's 'Sustainable Democracy': Army as the Political Architect" (2004) IDSA 272 at 273.

political power to civilians. After a war with India in December 1971, Pakistani army had to surrender at Dhaka. The fall of Dhaka demoralised the army and it forced Yahya to quit.

In 1977, Gen Ziaul Haq seized power through a military coup. The military government controlled political activities in the country. A ban was imposed on student and labour unions. The media and press was kept under tight control. A general election was held in 1985 on party-less system. The parliament rubber stamped all the constitutional and legal changes made by military order. In August 1988, Zia, was killed in a plane crash. Upon his death military decided to quit and run the show from behind the scene.

In 1999 October, Pervez Musharraf seized the power of civilian government under Prime Minister Sharif, and brought Pakistan's fourth military regime. In his reign Musharraf took upon himself to rid the country from corruption. National Accountability Bureau⁵⁹ was formed which was used mainly to witch hunt the politicians. The leaders of two main political parties, Peoples Party and Muslim League (Nawaz), were kept out of politics. In 2007, Musharraf got himself re-elected as President while still retaining the post of Army Chief. Supreme Court was against this unconstitutional stance. Musharraf declared a national emergency, suspended the judiciary, and abrogated the constitution. Under pressure from senior army leadership, Musharraf had to resign as Chief of Army and from the army. After installation of civilian government in February 2008, he was forced to quit as President, in August 2008.

The phase of guided democracy (1988-1999)

The democratic transition after the military regime of Zia was not successful mainly because of the continuing military interventions. Consequently, no civilian government could complete its tenure⁶⁰. Benazir Bhutto's government was dismissed in 1990 by the President on charges

⁵⁹ See, National Accountability Bureau has no mandate to investigate corruption in the armed forces, as they had their own internal accountability mechanisms. In April 2016 on corruption charges six army officers including two serving general officers were sacked. In August 2015 two former generals were punished on financial irregularities.

⁶⁰ The 8th Constitutional amendment introduced provisions for indirect control of army on politics. Four elected governments were dismissed by the country's presidents on charges of corruption, inefficiency and failing to meet the security challenges. This resulted in the strengthening of the civil-military bureaucracy. Art 58 (2)(b) was got inserted as a precondition to lift the marital law. This enabled the military to boot out elected governments through Presidential decree, if they questioned its authority or were unworthy of its trust. Article

of corruption and inefficiency. The 1990-93 Sharif government and 1993-96 PPP government under Bhutto were also dismissed on similar charges of corruption and mismanagement⁶¹. The elected governments were subject to military institutional authority and control in key areas of state policy in foreign and defence affairs⁶². The civilian leaders under constant threat of coups and removal from power could do little to consolidate democracy⁶³. However, incompetent politicians were also responsible for becoming a tool at the hands of military. The opposition parties used extra-constitutional means to dissolve the government and win in early elections rather than wait for the government's term to expire. This situation suited the military as fractious political nature of politics could not raise any serious challenge to deprive the army of its unbridled power⁶⁴.

Militarisation of Civilian institutions

Military has been desirous of an institutional role in the country's political governance. This relates to military's perception of civilian politicians and institutions that lack the capability to lead and to anticipate threats, hence the country warrants an institutionalized arrangement such as a National Security Council (NSC) for defence policy management⁶⁵. The military considers that an institutionalised mechanism can guarantee harmonious and sustainable civil- military relationship. In 1980s, for the first time a National Security Council was formed through an act of Parliament. This idea though was not liked by elected governments, as Prime Minister Sharif sacked the army chief in 1998 for his proposal of forming NSC to provide a legalized role for armed forces in governance of the country.⁶⁶

58(2b) enabled the President to dissolve the National and Provincial Assemblies in 1988, 1990, 1993, and 1996 and suspend parliamentary government.

⁶¹ Shah above n 44 at 211.

⁶² Shah above n 44 at 207.

⁶³ Shah above n 44 at 213.

⁶⁴ Christine Fair "Why the Pakistan army is here to stay: prospects for civilian governance" (2011) 87 RIIA 571 at 576-577.

⁶⁵ Shah above n 44 at 23.

⁶⁶ Stephen Cohen in his book, *The Future of Pakistan*, says that any arrangement to "bring the army in to keep it out" such as through National Security Council (NSC) is not democratic. But it carries weight in the sense that civil-military integration on important national issues would prevent the military from going it alone. He considers that army cannot be pushed out of power, its withdrawal from politics must be staged, in a sense that demonstrable civilian competence should replace it gradually as it withdraws from each sector of society. Civilian capacity cannot be built up overnight, and a NSC arrangement would not only solve the serious problem of policy

Later, the Musharraf regime formed NSC in 2004, as part of the military efforts to establish itself as an entity parallel and equal to political establishment.⁶⁷ After return of democracy in 2008, again NSC was abolished. However, in 2013, Sharif government legalized de-facto military dominance over national security affairs by reconstituting Defence Committee of Cabinet (DCC) into Cabinet committee of National Security (CCNS)⁶⁸. During Sharif government (2013-18), the military was given unusual concessions to intrude into civilian's domain of governance under National Action Plan (NAP) for combating terrorism. The twenty-first constitutional amendment, also introduced by Sharif government, constitutes a power transfer to the military, especially the fact that civilians can be subjected to military jurisdiction.⁶⁹

Due to pervading military influence, both the elected and military governments have militarized the civilian administration in Pakistan. Appointment of serving and retired military officers at various civilian posts is a norm. These appointments are besides the fixed military quota in civil administration, introduced during Zia's regime to keep the military tutelage on the civilians.

Role of Superior Judiciary

The Superior judiciary has typically condoned the military interventions. By bestowing the legitimacy the judiciary can be held responsible for perpetuating the military tutelage and undermining the prospects of democratic institutionalization⁷⁰. Supreme Court validated Ayub Khan's coup on the grounds that a victorious revolution or a successful coup d'état is an internationally recognized legal method of changing a constitution⁷¹. The Supreme Court again took recourse to the doctrine of necessity in the case of Yahya's martial law. Similarly,

coordination but would also socialize civilians in decisions that had previously been the exclusive responsibility of the armed forces.

⁶⁷ Ayesha Siddiqi *Military, Inc.: Inside Pakistan's Military Economy* (OUP, Karachi, 2007) at 23-24.

⁶⁸ See, in Defence Committee of Cabinet, the services chiefs were only invited when needed while in CCNS, they were made a permanent part of the cabinet, putting its democratic credentials in question where uniformed men were made permanent part of cabinet committee Rethinking

⁶⁹ Siegfried O. Wolf *China-Pakistan Economic Corridor, Civil-Military Relations and Democracy in Pakistan* (SADF, Working Paper, 2014) at 14.

⁷⁰ Shah above n 44 at 216.

⁷¹ *State vs. Dosso case was brought to the Supreme Court as an appeal in which it had called in question the validity and legitimacy of the imposition of martial law itself. The court's decision was referred to Kelsen-inspired doctrine of 'revolutionary legality' based on theory of legal positivism.*

Supreme Court upheld the subversion of the constitution by dictator Zia ul-Haq. The Court resorted to ‘doctrine of necessity’ and the principle embodied in the maxim *salus populi est suprema lex* to justify the illegal and unconstitutional military takeover. Supreme Court⁷² not only validated⁷³ the Musharraf’s coup launched against the civilian government of Prime Minister Sharif, but also entrusted the military government with authority to initiate constitutional changes that will enable the military to achieve the goals set by itself.

The judiciary’s legal sanction is not entirely altruistic, but linked to its own instinct of survival; superior judges had to often take a fresh oath under martial law order.⁷⁴ How superior courts work under martial law regime, the case of Bhutto’s trial is quite illustrative. The High Court sentenced him to death on made up charges. On appeal Supreme Court approved the verdict. Nasim-Hasan Shah J, who was the part of Supreme Court bench, later admitted that Bhutto death was illegal and unjustified but the court was under intense pressure.

In 2011, a judicial inquiry was ordered by Supreme Court into the ‘memogate’ scandal. Allegedly, the controversial unsigned memo was sent by Pakistani political leadership asking for the US help in curbing the powers of the military. The civilian leadership denied any involvement in the document. The question is whether the Court’s inquiry order was issued, in the interest of national security interests, or just to put the pressure on civilian government to appease the military!

On the whole, the judiciary has aligned itself with the military on national security issues. But on a few occasions, particularly on the insistence of public and media, judges have, of late, questioned the military’s human rights violations in the context of counter terrorism operations.⁷⁵ Senior officers, including the chiefs of the intelligence agencies (ISI and MI) and inspector general of Frontier Corps, evade such judicial instructions on national security excuse.⁷⁶

⁷² On assuming power, the military co-opted the judiciary which functioned as a watchdog with the fresh oath administered under the Provisional Constitutional Order (PCO) to the judges of higher Courts.

⁷³ *Zafar Ali Shah vs General Pervez Musharraf* [2000] SCMR 1137

⁷⁴ For instance, Zia promulgated his own Provisional Constitution Order (PCO) requiring judges to take a fresh oath of office. Refusal (by four Supreme Court judges) resulted in their retirement. Similarly, an executive order issued by General Musharraf on 31 December 1999 decreed that superior court judges take a fresh oath under his PCO. Six justices of the Supreme Court and nine judges of the High Courts who refused to take the new oath were promptly retired.

⁷⁵ Shah above n 44 at 231.

⁷⁶ Shah above n 44 at 232.

Situation after 2008

After 2008, the military has broadly conformed to democratic norms. It has restricted its role merely “to arbitrate political conflict, exercise oversight of the government, preserve its corporate autonomy, and skirt the rule of law”⁷⁷ An elected government feels a constant threat of military intervention. This was illustrated during protests of opposition party in 2014, when military takeover seemed imminent. The army chief advised the government through public statements not to use force on protestors.

Since Imran Khan took office of the Prime Minister of Pakistan in August 2018, apparently there has been an improvement in the ties between the civilian government and the country’s armed forces⁷⁸. However, media reports that Prime minister Imran Khan ⁷⁹ has “run a government of unparalleled subservience to the generals”. To his good luck, army Chief Bajwa says he has no desire to run the country. The present civil-military relationship is not viewed a ‘marriage of love’, but rather one of convenience. This assessment is based on military’s past experience with other political parties that if it fails to work cooperatively with Khan the only alternative is for a military rule.⁸⁰

In 2019, Prime Minister Khan granted Gen Bajwa a full three-year extension as COAS⁸¹ and also made him a member of the government’s National Development Council⁸². The military

⁷⁷ Shah above no 44 at 221-222.

⁷⁸ The National Assembly Standing Committee on Interior has approved a bill to make amendments to the Pakistan Penal Code and Code of Criminal Procedure 1898 to take action against those who intentionally ridicule armed forces. The bill says anyone who shall be guilty of said offence could face up to two years imprisonment or fine that may extend to PKR 500,000 or both.

⁷⁹ The Economist "If you can't beat them, obey them; Pakistan's armed forces" (10 April 2021) <www.economist.com>

⁸⁰ David Smith “Civil-Military Relations in Pakistan: Positive Evolution or More of the Same? (4 February 2020) <www.stimson.org>

⁸¹ Ayesha Siddiqi in an article “Pakistan’s hybrid ‘civilian–military’ government weakens democracy (21 January 2020) has stated: “The court ruled that Parliament needs to formulate legal changes in the Army Act for the process. The opposition parties initially were against extension but they were manipulated by the military to support amendment in law. It shows that Pakistan’s political parties have weakened to the point where they must negotiate timidly for short-term personal benefits rather than long-term political dividends”. <www.eastasiaforum.org>

⁸² The terms of reference of the NDC, outlined in the notification, state “that the council shall set policies and strategies for development and “formulate and tailor policies to achieve accelerated economic growth. The council shall also be responsible for approving long-term planning in relation to national and regional

which already wielded considerable power in the matters of security and foreign policy is now being asked to play a greater role in economic matters.

Military has acquired wide prerogatives in the area of national security, with powers to exercise policy on military personnel, professional trainings, budgets, procurement of arms and equipment, deployments, strategic weapons controls, and intelligence gathering.⁸³ It is increasingly encroaching now on the civilian sphere, with many generals now heading administrative and executive institutions.⁸⁴

It is unfortunate, however that political parties are pitted against each other and show little respect for the parliament, rule of law and democratic processes⁸⁵. Nor have they been able to cement the superiority of civilian governments over the role the military plays in the country's policy-making.⁸⁶ No party takes interest in initiating a consultative process within the parliament or ensuring the sanctity of parliament as the key forum for deliberating and resolving national issues.⁸⁷

What military thinks and does?

The Pakistani military assumes that politicians, political culture and the civilian institutions lack the ability to address the needs of the country. The degenerating political process encourages the military to adopt political role and create military-hegemonic political system. Moreover, the military is convinced that it the only patriot institution in the country. True or

connectivity. Furthermore, it shall set out guidelines for regional cooperation". National Economic Council (NEC) formed under Art 156 of the 1973 Constitution has broadly similar tasks.

⁸³ Shah above n 47 at 18.

⁸⁴ Economist "If you can't beat them, obey them- Pakistan's generals are ever more involved in running the country" (10 April 2021) in this article has written: "[c]urrent and former military men have gradually taken on more and more jobs that are central to the health of the economy. They run the civil aviation authority, the national institute of health, various state-owned firms including the national airline, and the government agencies in charge of power, water, telecoms and housing. To crown the army's hold on the economy, a retired general, Asim Bajwa, heads the agency that supervises the China- Pakistan Economic Corridor, helping funnel some \$60bn of Chinese investment into infrastructure". In another article titled "Pakistan: Why is the military taking over civilian posts?" S. Khan (05 February 2021) has stated: "Prime Minister Khan justifies the military appointments, saying they are being done on merit. There is a widespread perception in the country that politicians and civilian bureaucracy are incompetent and corrupt, whereas the military is efficient and well-organized." <www.dw.org>

⁸⁵ Shafqat above n 17 at 34.

⁸⁶ Shafqat above n 17 at 35.

⁸⁷ Shafqat above n 17 at 43.

wrong, military also gives an impression that only it has the capability to defend the country both internally and externally.⁸⁸ This belief is based on their organizational characteristics, institutional strength, and resources.

Throughout Pakistan's history, the military has claimed that its intervention was necessary to counter the threats to national security posed by the corruption and mismanagement of civilian politicians.⁸⁹In the past, it has been observed that military is sometimes invited by the politicians to intervene when power struggle among them becomes inconclusive.⁹⁰After the decades of rule, the Pakistani military has self-assumed the guardian role in the country. The military's media wing, Inter-Services Public Relations (ISPR), constructs and maintains a glorified public image of the armed forces. The stated primary goal of the military's media policy is to harness its role as an "element of national power" to "mould public opinion and develop a consensus . . . on national security".⁹¹

The military greatly influences the foreign policy in the broader framework of security and controls the nuclear weapons programme of the country. Nonetheless, with an increasing awareness and freedom of media in the last decade or so, one witnesses greater demand from the public to cut down Military's role to its legitimate position in the constitution⁹².

However, Pakistani military intervention in politics is not widely debated in the country, partly because of the reason of military enjoying a status of "sacred cow" at home and any objective criticism directed towards military establishment is taken synonymous with un-patriotism or traitor.⁹³ Because the army can potentially destabilize elected governments, most civilian leaders are cautious of confronting the military by challenging its preferred policies at home or abroad⁹⁴

⁸⁸ Ashfaq Rehman, Shughla Ashfaq and Taj Khan "Kargil Operation and its Effects on the Civil-Military Relations in Pakistan" (2018) 2 LASSIJ 10 at 11.

⁸⁹ Shah above n 44 at 214.

⁹⁰ Rehman, Ashfaq and Khan above n 88 at 11.

⁹¹ Shah above n 44 at 226-27.

⁹² Shurong and Rahman "Rethinking Civil-Military Relations in a Pakistan: Some Lessons from Turkey" (2017) J Socialomics at 1.

⁹³ At 2.

⁹⁴ Fair above n 64 at 576-77.

Accountability of Armed Forces

The 1973 constitution stipulates that any person who abrogates the Constitution by use of force shall be guilty of high treason⁹⁵. However, military generals have never been held accountable for violating the constitution and coup against a representative government.⁹⁶

At a time when 1971 debacle occurred the military was ruling the roost. The Hamoodur Rahman Inquiry was commissioned by the civilian government but its report was shelved. The Kargil operation in 1999 allegedly launched without any approval of the civilian government but no accountability was held for those responsible for the international embarrassment caused to Pakistan besides resulting in huge loss of lives⁹⁷. In 2011, parliament called for an independent enquiry - the Abbottabad Commission⁹⁸- to establish whether the failures of the armed forces were due to incompetence or colluding with al-Qaeda⁹⁹. Upon submission, the report was immediately classified by the Pakistani government.

In a democracy, military cannot be above the rule of law. However, the military in Pakistan operates outside the purview of the civilian legal system¹⁰⁰. It considers itself above the law

⁹⁵ It has happened thrice so far, in 1977, 1999 and 2007, that the Constitution 1973 was abrogated or suspended by the military by use of force, in illegal and unconstitutional manner. In 1977 Gen Zia abrogated the constitution when he overthrew Bhutto's government, while Musharraf has done twice, in 1999 by staging a coup and in 2007 while promulgating emergency.

⁹⁶ In 2013, Sharif government in response to a Supreme Court injunction initiated treason charges against Musharraf on abrogation of constitution. The civilian government could have set a positive precedent to help deter military interventions in the future but this opportunity was lost. The civilian government could not sustain military pressure and allowed him to proceed abroad to obviate the trial. Musharraf openly admits of military help in his release.

⁹⁷ Before the elections of 2013 Sharif was committed to holding a public inquiry. But after coming to power, Sharif government did not take any action, as it is obvious that Army does not want any inquiry.

⁹⁸ The Abbottabad Commission was set up to ascertain facts and circumstances surrounding the US decision to launch a secret operation with the objective of capturing al-Qaeda leader Osama bin Laden in Abbottabad on May 2, 2011. The commission was constituted by the Supreme Court of Pakistan on the request of the Government of Pakistan on 21 June 2011, and it chaired by Javed Iqbal J and four non-judicial members. The Commission's final report was submitted to Prime Minister Raja Ashraf in January 2013 but was marked as "classified" by the Government.

⁹⁹ See, "through all this, the Pakistani army's putative civilian boss, Defence Minister Chaudhry Ahmed Mukhtar, remained clueless. He later told a government inquiry commission that he found out about the incident when his daughter called him from New York the next day. This would be unimaginable in a democratic state. In Pakistan, it is business as usual". (Quoted from Aqil Shah's book: *The Army and Democracy*).

¹⁰⁰ For instance, General Kayani initially stalled the efforts of the UN Commission of Inquiry into the assassination of Benazir Bhutto by blocking access to senior military officers because of their alleged involvement in the Musharraf regime's cover-up of her murder. The commission's final report claims that the then director general of MI ordered local police officials to hose down the crime scene within two hours of the suicide attack that killed Bhutto, and that this resulted in the loss of crucial forensic evidence. Instead of investigating the allegations, the military rejected the report as a "bid to malign the national institution" and persuaded the

and views its internal accountability system as more efficient to the civilian one.¹⁰¹ Military refuses to subject its members to civilian prosecution for corruption.¹⁰² The military gets this behaviour sanctioned through manipulation of media and public opinion¹⁰³.

The military resistance to civilian control, and with the official tag of secrecy attached to national security, the standing committees on defence¹⁰⁴ exercise no more than token oversight of the military budget and focus instead on non-sensitive defence issues, such as civil aviation, defence housing, and military lands¹⁰⁵.

Civil military relationships of Pakistan military, according to Ayesha, falls into the ‘parent-guardian military domination’ category. She explains that in parent-guardian category, military uses constitutional and legal mechanisms for institutionalising its political power (and its presence as a permanent arbitrator).¹⁰⁶ Such changes are brought about through the help of civilian partners that are dependent on the military for their survival¹⁰⁷. We have observed recently that how military has further expanded its legal powers over civilians, ostensibly to counter terrorism and militancy.¹⁰⁸

When the military needs equipment, it would invoke the sensitivity of the war effort to defy or bypass civilian authorities. In sum, formal structures could not secure civilian supremacy in their own right because the civilian opportunity for controlling the soldiers was restricted by the imperatives of “imminent” war and a “state of continuous tension and antagonism” with an economically and militarily stronger India.¹⁰⁹

foreign ministry to lodge a protest with the United Nations and seek a reopening of the inquiry. [Quoted from Aqil Shah’s book: *The Army and Democracy at 233*].

¹⁰¹ Shah above n 44 at 232-3.

¹⁰² Shah above n 44 at 232-33

¹⁰³ Shah above n 44 at 226-27

¹⁰⁴ Siddiqi above n 67 at 152.

¹⁰⁵ Similarly in Pakistan, one of the leading military-business conglomerates is the Fauji Foundation. In an inquiry in 2005, the elected parliament was snubbed by the Ministry of Defence (MoD) for inquiring into a controversial business transaction by the Fauji Foundation.

¹⁰⁶ Siddiqi above n 67 at 41.

¹⁰⁷ Siddiqi above n 67 at 61.

¹⁰⁸ Shah above n 44 at 232-33 [For instance, during the ‘Emergency’ in 2007, Musharraf amended the Pakistan Army Act 1952 to empower the military to try civilians in military courts for offenses considered prejudicial to the security and defence of Pakistan.]

¹⁰⁹ Shah above n 44 at 61.

The elected government in November 2013 initiated treason charges against Musharraf (who returned to Pakistan to contest the 2013 elections) in response to a Supreme Court injunction. He was to be prosecuted for his crimes against the constitution (on imposing emergency in November 2007). However, he was set free to go abroad, overtly on medical grounds (but covertly under military pressure). Had it not been done so, this could have set a precedent to help deter military interventions in the future.

Inquiry Commissions

The Pakistan military has never had to accept responsibility for its past actions.¹¹⁰ Hamoodur Rahman Commission authorized by government that inquired and submitted report on events that took place in 1971. It submitted two reports to the Pakistan government, one original in 1972 and one supplementary in 1974. The reports were not published or disclosed by the authority and

Another thing that the government could do to achieve that goal is to establish a Commission to conduct an inquiry into the Kargil war (as Sharif government had pledged), publish its findings, and bring the culprits to justice¹¹¹. Sharif government failed in its pledges. There are no indications, however, that the present civilian government can contemplate such an action.

The Challenges of Civilian Control Over Intelligence Agencies in Pakistan

The political role of the military intelligence agencies has always been controversial¹¹². The agencies have acquired huge capabilities, resources and operational independence initially during the cold war era and then during the recent war on terror¹¹³. Despite the constitutional and statutory limits on intelligence agencies, civilian governments have failed to curb the political interference of intelligence agencies. This is evident in media manipulation, subversion of the political system, and systematic use of political violence against ethnic and

¹¹⁰ Shah above n 44 at 278.

¹¹¹ At 278.

¹¹² Fredric Grare "The Challenges of Civilian Control Over Intelligence Agencies in Pakistan" (18 December 2015) < carnegieendowment.org>

¹¹³ Shurong and Rahman above n 92 at 3.

secessionist movements. Reforming the intelligence agencies would require legislative changes, constitutional and legal accountability, and deepening of Pakistan's democracy¹¹⁴.

The Inter Service Intelligence (ISI) is a federal agency under Prime minister, without any federal body to monitor, regulate and control the agency. In July 2008, Prime Minister Gillani decided to place the ISI under the operational, financial, and administrative control of the Ministry of Interior, both to rationalize the country's intelligence structure and to create civilian oversight over the ISI¹¹⁵. The high command perceived the ISI's formal subordination to the ministry as a damaging political encroachment on core institutions of the country. Hence it virtually forced the government to backtrack within hours of the official notification, clearly indicating the limits it can impose on the exercise of civilian democratic authority¹¹⁶.

Right to Freedom Act

The right to access to information was enshrined in the Constitution through a constitutional amendment in 2010 by inserting Article 19-A which states: "Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law." The provincial governments have enacted laws in order to allow citizens to exercise their right to access to public data. A bill on *Right of Access to Information Act 2017* is currently lying in the Parliament of Pakistan. Pakistan still has retained the colonial *Official Secrets Act 1923* which imposes restrictions on the disclosure of classified information. Cabinet Division has a declassification Committee which reconsiders the classifications. A number of other laws also poorly reflect on a culture of openness. These statutes include the Security of Pakistan Act 1952, the Maintenance of Public Order Act 1960, the Defence of Pakistan Rules and the Penal Code. The law on Evidence stipulates that no government official can be compelled to give information "when he considers that the public interest would suffer by disclosure"

¹¹⁴ Grare "The Challenges of Civilian Control Over Intelligence Agencies in Pakistan" above n 112.

¹¹⁵ An order issued by the PPP government (2008-13) placing ISI under interior ministry was retracted overnight without giving any justification which reflects how fiercely military guards itself from the oversight of elected government in Pakistan.

¹¹⁶ Shah above n 44 at 224.

Institutionalizing Civilian Control of the Armed Forces

In Pakistan, the general practice has been that the prime minister would keep the defence portfolio. However, when a defence minister is appointed, he acts redundantly, as military prefers direct access to the chief executive which enables it to assert autonomy from any ministerial supervision¹¹⁷. Consequently, defence ministers have not wielded the political, administrative, or institutional authority to perform the key functions of a minister of defence, such as direct defence policy, define military missions, oversee budgets, and regulate personnel policy¹¹⁸.

Even, the working of ministry of defence is such that does not allow any ministerial input. As a matter of fact, the military considers the ministry of defence as its administrative arm, whereas, according to rules of the business of the Government, the military is an attached/subordinate department of the MoD.¹¹⁹

As noted above, institutionalising of civilian control is acquired through adoption of rules, legislative action, or court decisions that define new military jurisdictional boundaries.¹²⁰ Legislatures can take an active role through their defence committees, by conducting hearings and investigations of military activities. Monitoring can be done through external agencies, such as an independent press or defence policy think tanks.¹²¹

The strengthening of civilian secretariat charged with overseeing defence policy is crucial. This secretariat can do inspections, audits, and research to help civilian bosses take informed civilian decisions on defence policy issues.¹²²

Reformation of civil-military relation is linked to the broader process of democratization in the country. Only when that process moves forward does controlling the military become

¹¹⁷ Shah above no 44 at 266.

¹¹⁸ The Abbottabad Inquiry commission, set up to investigate the US forces' raid on Osama bin Laden's safe haven in Pakistan, has stated that, constitutionally the defence policy is the responsibility of civilian government, but in reality the defence policy is considered the responsibility of the military. The Abbottabad Commission report has observed that the civilian government did not show any interest, whatsoever, in exerting control over country's defence policy. It further remarked that the minister of defence did not object to being "an irrelevance". The said report was not made public by the government, but it got leaked in media.

¹¹⁹ Shah above n 44 at 266.

¹²⁰ Trinkunas above n 9 at 17.

¹²¹ Trinkunas above n 9 at 17.

¹²² Trinkunas above n 9 at 17.

possible.¹²³ The success of democracy is intrinsically linked to changing the military's tutelary beliefs¹²⁴. This means that military will have to change its behaviour and thinking as to the ultimate custodian¹²⁵ of national security, their relative superiority to civilians, and presumptions of impunity¹²⁶.

Countries with stronger democratic institutions and having the confidence of their citizens are more likely to establish civilian authority. An independent press and a vibrant civil society can provide additional resources to monitor the military and beware the government about problems in civil-military relations¹²⁷.

What lessons New Zealand can learn from Pakistani experience?

As we have discussed above, New Zealand has a consolidated democracy, and civilian government has control of its armed forces. The Burnham Inquiry is also an evidence of the strong accountability mechanism of the armed forces which operates in New Zealand. Pakistan has a professional military (around 650 thousand strong), but it shows praetorian tendency. The civilian governments constantly feel threatened of the military interventions. Since democratic institutions are still not very strong, as such Pakistani civilian military relations always remains tense. Military is not accountable to the civilian actors.

Andrew Cottey has rightly suggested¹²⁸ that in the case of countries with weak democracy despite the formalisation of the first generation reforms, there is a need for second generation reforms for the purpose of civilian governance of defence and security sector. The institutional and legal reforms to bring military under the control of civil executives constitute the first generation reforms while the second generation reforms are the practical manifestation by a state's capacity building. Truly, "the first-generation reforms de-legitimise the military

¹²³ Shah above n 44 at 264.

¹²⁴ Shah above n 44 at 276.

¹²⁵ Shah above n 44 at 277.

¹²⁶ The PML-N government in November 2013 initiated treason charges against Gen Musharraf in response to a Supreme Court injunction. The civilian government could have set a positive precedent to help deter military interventions in the future but this opportunity also gone a begging as Musharraf was let go, in fact, on the pressure of Army Chief, as admitted by Musharraf.

¹²⁷ Trinkunas above n 9 at 24.

¹²⁸ Shurong and Rahman above n 92 at 2. [Andrew Cottey "The Second Generation Problematic: Rethinking Democracy and Civil-Military Relations" (Sept. 2002)]

intervention in politics and state affairs while the second generation measures ensure its implementation”.

So important thing is maintaining the strength of civilian institutions. But we have to understand that maintaining the strength of civilian institutions is not a matter of law or other institutions. It is the actors in the system who believe in democracy and adhere to its norms. Pakistan has the legal and constitutional framework, and a democratic government, but what it lacks is that people do not adhere to and believe its values and norms. A good example is that of Supreme Court judges, who instead of resorting to the “doctrine of necessity”, and validating the martial laws, could have said, that a martial law regime is unconstitutional and illegal, no matter what. But for their own sake, they bargained off the democratic norms values, which must adhere to and protect the rule of law.

Summary

Pakistan inherited the British legacy of civilian supremacy over the military at the time of independence. However, security concerns and inability of the political elite to deal effectively with the issues national stability led the military take a position of pre-eminence. Since the first martial law in 1958, the military either directly ruled the country under the cover of martial law or orchestrated a political system which protected the corporate interest of the military and ensured the continuation of policies in key sectors of state.

The military has now taken the role of the most powerful political actor in Pakistan. This shift of the military from subordination to the civilian bosses, and aloofness from active politics to a dominant role in politics was caused by the gradual decay and degeneration of the civil institutions and processes.¹²⁹ The army sees itself and is seen by many Pakistanis as the guarantor of state. Civilian institutions are unable to constrain the army not only because of their own weaknesses but also because they accept this narrative.¹³⁰ Throughout Pakistan’s history, the military has claimed that its intervention was necessary to counter the threats to national security posed by the corruption and mismanagement of civilian politicians. Politicians

¹²⁹ Rizvi above n 36 at 55

¹³⁰ Fair above n 64 at 574.

must also share the blame for giving short shrift to democratic and parliamentary norms, engaging in confrontational politics and abusing public office for personal gain¹³¹.

During various rounds, the military has expanded its grip over ever larger economic interests; cultivated and co-opted bureaucratic, industrial and political elites; weakened the capacity of political actors; diminished opposition to the concept of military intervention by accumulating ever greater numbers of stakeholders; and secured strategic partnerships with the United States, which have been very lucrative for the army. The successive military governments leave the political system in such a state of desperate affairs that it is not in a position to consolidate the democratic institutions during the transition periods.¹³² When civilians have reversed course on the army's preferred policies, the army has ousted them¹³³ and resumed its jurisdiction.¹³⁴ Also, when military is not involved in direct rule, it interferes in domestic politics through its informal means more than the formal one.

What prospects exist for change?

Pakistan is a parliamentary democracy as enshrined in the 1973 constitution, therefore, a structure of civilian oversight of military matters exists. No major structural (first generation) reforms are needed does not require major structural reforms. The elected government in Pakistan needs to strengthen state institutions¹³⁵. Regulatory institutions do exist on paper in Pakistan. However, because of repeated military interventions and a deep-seated tradition of

¹³¹ Shah above n 44 at 213-14.

¹³² Fair above n 64 at 574.

¹³³ The army's decision to disregard the results of Pakistan's general elections brought the country to the 1971 civil war in which India ultimately intervened to separate East Pakistan. In 1988, Prime Minister Junejo signed the Geneva Accords to end hostilities in Afghanistan in opposition to Zia who sacked his government. In 1998, Prime Minister Sharif embarked on a major diplomatic overture to normalize relations with India. While Musharraf did not take over the government at that time, he simply undermined the peace initiative by planning what would become the spring 1999 Kargil War. When Sharif tried to rid himself of Musharraf in October 1999, Musharraf seized power. Either through cooptation or coercion, the preferences produced by the army's strategic culture dominate even during periods of civilian governance. [Quoted from Christine Fair's book *Fighting to the End: The Pakistan Army's Way of War* at 23.]

¹³⁴ "The permanent role of an arbitrator is meant to secure the state from any internal or external threats posed by outside enemies or domestic actors who might weaken the state through their indiscretion" [Quoted from Ayesha Siddiq's book *Military, Inc.: Inside Pakistan's Military Economy* (OUP, Karachi, 2007) at 41.]

¹³⁵ The Pakistan People's Party government did a good job by putting Pakistan on the course of parliamentary form of democracy again by restoring the constitution to its original form (by introducing the 18th amendment in the 1973 Constitution in 2010).

military tutelage of civilian government, these institutions have never had a real chance to develop.

As Pakistan has never experienced “civilian supremacy”, it means that elected civilians not able to exercise control over country’s defence forces. This creates a paradox that the civilian control is a *sine qua non* for democracy. Civilian control is important for the elected administrations, as in its absence anomalies are created in the electoral regime, political liberties, political participation and horizontal accountability.¹³⁶

The parliament of Pakistan, and its standing committees on defence, are required to play an active role in security policy making and scrutinizing the defence expenditures for effective civilian oversight of military¹³⁷. Though it seems a far cry, the elevation of apolitical, law abiding and professional military bureaucrats to the higher ranks is important for military’s commitment to democratic norms and the rule of law. The prime minister or Defence Committee of Cabinet (DCC) must have a vetting power in the promotion of three star generals in armed forces for a sustainable democracy in Pakistan. Among other measures, civil administration should be de-militarized to reduce the tutelary influence over civil institutions.

A parliamentary committee under prime minister should be set up as a legal body to monitor, control and regulate the operations of ISI. The induction of civil officers in ISI should be increased giving them opportunities for promotions to senior positions.¹³⁸

In Pakistan civil society institutions have historically been weak, also one of the ill-effects of militarisation. However, the ways in which civil society organizations and formations are evolving is a good omen, although they still have a limited base in the society¹³⁹. Human rights organizations and civil society organizations (CSOs) are now demanding greater adherence to democratic and lawful practices. In last two decades, media has emerged a key player, courtesy digital revolution. Pakistan's private media appear vibrant and diverse. However, it still lacks maturity and understanding of national security issues. The private media is not either free from biases, as owners/ companies have vested interests, with strong ties to the military and intelligence agencies¹⁴⁰. Arguably, Pakistan's civilian institutions are unlikely to exercise

¹³⁶ Siegfried O.Wolf above n 69 at 10.

¹³⁷ Shurong and Rahman above n 92 at 2.

¹³⁸ Shurong and Rahman above n 92 at 3.

¹³⁹ Fair above n 64 at 577.

¹⁴⁰ Fair above n 64 at 585.

genuine control over the military in the near future, but they carry the hope and optimism. However, the role of non-governmental civilian organisations (NGOs) is significant, having brought awareness, especially among people in the far-fetched areas regarding their rights and obligations.¹⁴¹

Unarguably, good governance is a prerequisite for a sustainable representative government. The elected governments in Pakistan needs to prove through performance that democracy is the only best choice. The present government needs to aim at creating viable institutional arrangements facilitating national stability and a democratic polity, thereby ensuring civilian control of military and its accountability.

¹⁴¹ Sikander Abbasi "Turbulent History of Pakistan's Civil Military Relations" (2020) 6 Journal of Politics and International Studies 65 at 72.