The Extension in Tenure of the Chief of Army Staff
The Jurists Foundation v Federal Government
PLD 2020 SC 1

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Introduction

On 26 November 2019, the Supreme Court of Pakistan ("**SC**") delivered an unprecedented judgment on the legality of the extension and re-appointment of the Chief of Army Staff of the Pakistan Armed Forces ("COAS"). After three days of hearings, the SC gave its verdict in the case *the Jurists Foundation through its Chairman v Federal Government through Secretary Ministry of Defense*.[1] The SC declared that there was a gap in the law when it came to the extension of the duration of tenure of the COAS. The SC then allowed a period of six months to the legislature to formulate a law to address this gap. In response to this verdict, the Parliament passed an amendment to the Pakistan Armed Forces Act 1952 ("Army Act 1952"). This case note analyses the judgment and the subsequent amendment in the Army Act 1952. First, the facts and rulings of the case are stated, then the judgment and the amendment are analysed.

Facts and Rulings

The brief facts of the case are that a petition was submitted to the SC, invoking its original jurisdiction under Article 184(3) of the Constitution, to adjudicate on the legality and validity of the tenure extension of the COAS. While the petitioner later wanted to withdraw the petition, the SC, holding the matter to be a case of public interest litigation ("PIL"), refused to allow the withdrawal. The SC observed that there were many procedural irregularities in the process of granting an extension to the COAS. For instance, the extension to the COAS was granted by the Prime Minister, but the Prime Minister lacked the authority to grant such under the law. Due to this, the government realised that there is no law providing for the extension of the COAS and, therefore, hastily amended the Army Regulations 255 to include the word 'extension' in the provision.

This case surfaced in an environment of great political tension. The issue of the extension of the COAS was at the centre of political debates around the country.[2] Many predicted the grant of extension and others contemplated its possible consequence vis a vis the political stability of the country.[3] It is amidst all this political controversy that the SC decided to take up the matter and yet again get itself involved in politics.

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[1] PLD 2020 SC 1.

[2] Editorial, "'Extraordinary Situations Call for Extraordinary Decisions': Analysts Weigh in on Gen Bajwa's Extension" (*Dawn*, 20 August 2020) <https://www.dawn.com/news/1500429/extraordinary-situations-call-for-extraordinary-decisions-analysts-weigh-in-on-gen-bajwas-extension> accessed 2 January 2021.

[3] Ibid; Madiha Afzal, 'The Curious Case of the Pakistani Army Chief's Extension' (*Brookings*, 4 December 2019) <https://www.brookings.edu/blog/order-from-chaos/2019/12/04/the-curious-case-of-the-pakistani-army-chiefs-extension/> accessed 2 January 2021; Sanaullah Khan and Naveed Siddiqui, 'Army Chief Gen Bajwa's Tenure

Analysis of Judgment

The first issue determined by the SC was that of its jurisdiction to hear the petition. It held that the petition was maintainable under Article 184(3) of the Constitution – which provides the SC with original jurisdiction over matters involving fundamental rights that are of public importance.[4] This is a two-pronged test and both elements need to be satisfied. For the first, matters under Article 184(3) need to involve an issue of fundamental rights. To analyse this, there is no express right in the Constitution that grants the people of Pakistan the right to contest the appointment or extension of the COAS; however, in the past, the SC has been known to interpret the existing rights in the Constitution liberally and expansively in favour of the people. In *Shehla Zia v WAPDA,*[5] the SC found a right to a clean and safe environment to be part of the right to life guaranteed under Article 9 of the Constitution.[6] Much like the *Shehla Zia* case*,* the issue of extension of the COAS was found to be enfolded in the right to life,[7] liberty, and dignity[8] of the people of Pakistan.

The SC has defined the term 'public importance' in various judgments in the past. The most recent deliberation on this term was in *Secretary Revenue Division Islamabad v Iftikhar Ahmed Tabassam*,[9] coincidentally authored by Justice Mansoor Ali Shah himself, who authored the majority judgment in this case as well. It was held that for an issue to be of public importance "the matter must go substantially beyond the facts of the case."[10] The case went beyond the facts because the question was not whether the incumbent COAS could hold office, the question was whether any army officer could legally hold office in absence of a regulatory framework. As held in the judgment, the army plays a key role in protecting the security and sovereignty of the country. Because the administration of the army affects the whole country, the public-at-large is concerned with the appointment and extension of the COAS. From this perspective the issue of the extension of the COAS surely become an issue of public importance

The SC held that this case is one of PIL and therefore did not allow the petitioner to withdraw the petition. The Commentators of PIL generally agree that *Benazir Bhutto v Federation of Pakistan*[11] and *Darshin Masih v The State*[12] are the pioneers of PIL in Pakistan. Although these two cases were very far apart from each other according to the subject matter, they have a common ancillary: the suppression of the right to access justice.[13] This set the founding stone of PIL upon which this type of litigation is built. Another important aspect of PIL was held to be litigation for the poor. PIL assumes the inherent inequality between the contesting parties and allows for the relaxation of rules to prevent a misuse of law. Based on this inequality, the requirement of *locus*

Extended for Another 3 Years' *Dawn* (21 November 2019) < https://www.dawn.com/news/1500427> accessed 2 January 2021.

[4] The Constitution of Islamic Republic of Pakistan, Article 184(3).

[5] PLD 1994 SC 693.

[6] Ibid [12-13].

[7] The Constitution of Islamic Republic of Pakistan, Article 9.

[8] The Constitution of Islamic Republic of Pakistan, Article 14.

[9] PLD 2019 SC 563.

[10] Ibid [10].

[11] PLD 1988 SC 416.

[12] PLD 1990 Supreme Court 513.

[13] Maryam S. Khan, 'Genesis and Evolution of Public Interest Litigation in Supreme Court of Pakistan: Towards a Dynamic Theory of Judicialization' 28 Temp. Int'l & Comp. L.J. 285.

standi and other procedural rules are relaxed. Along with these relaxations, the provisions of law are read in liberal manner, particularly the fundamental rights provided in the Constitution.[14] It is this same line of reasoning which assumes inequality between both parties that gives rise to the suo motu jurisdiction of the SC. This jurisdiction was meant to relax the formalities of law. It was meant to be used sparingly, without taking the formalities away entirely. So, filing a petition through means of a letter sent to the Chief Justice of Pakistan, as was done in *Darshin Masih* case, was allowed but the SC itself becoming a party in the case remains a controversial choice. Coming to the merits of the case. Regardless of suo motu, the parties involved in current case of the extension of the tenure of the COAS are by no means of unequal standing. The issue was of political nature and not of social nature. Therefore, there is no social inequality element involved in the case. More so, there is no right to the access of justice being infringed of any party. Rather, the issue of extension was set to remain in the political discourse, and no one was interested in the legality of the matter. The SC taking up the issue was an unexpected move.

Moreover, there has been much criticism of the arbitrary invocation of fundamental rights in this case. This arbitrary use of fundamental rights ties in with the maintainability of the petition under 184(3) and the definition of public importance. For instance, in the *Benazir Bhutto* case*,* the SC held "the case must be such as, gives rise to questions affecting the legal rights or liabilities of the public or the community at large."[15] According to this, the public importance element of the case can only be satisfied if a legal right of a community at large is infringed. In the present case, however, there is no express legal right of the community to grant an extension to the COAS or a right to raise and maintain an army. Thus, a balancing exercise was needed where the rights of people were to be balanced with the authority of the Federal Government. Consequently, it becomes the responsibility of the courts to interpret the Constitution in a restrictive manner, and not to arrive at a conclusion that was not intended by the Constitution. However, the SC refused to do this. Since there is no express right of people to appoint the COAS, the SC relied upon other fundamental rights to adjudicate on the matter. In doing so, the SC did not interpret the Constitution in a restrictive manner. Rather, the SC extended the scope of the existing right to life along with other rights. Historically, cases such as the *Shehla Zia* case or *Suo Motu Action Regarding Non-Payment of Retirement Benefits by The Relevant Departments v Secretary Privatization Commission*[16] where these fundamental rights have been interpreted liberally to create a new right, a justification is given. Usually that these cases fall under PIL. However, the current case does not fall under PIL, which means that there remains no justification to liberally interpret these fundamental rights. Therefore, the SC should have restrained from interpreting the fundamental right to life and dignity so liberally. In this case, the Constitution is read in liberal manner and in way the Constitution did not intend. Perhaps the Constitution did not want the right to life to be used to regulate the office of the COAS.

A more appropriate critique of this judgment can be done on the notion that the SC assumed powers that were rightfully of the Parliament and did not adhere to the principles of the separation of powers as enunciated in the Constitution[17] but rather entered the domain of both the legislature

[14] Ibid 14-16.
[15] *Benazir* (n 11) 491.
[16] 2018 SCMR 736, [25].
[17] See The Constitution of Islamic Republic of Pakistan, Article 175. This gives independence to judiciary and is seen to be the article in Constitution that enshrines the principle of separation of powers.

and executive organs by deciding a policy question. Instead, the SC should have exercised a degree of judicial restraint. This criticism has some merit in it and will be analysed now.

The doctrine of 'separation of powers' dictates that policy matters and governance should be entrusted to the Executive, while the courts should exercise judicial restraint in such matters. This view has been repeatedly held in various judgments, very recently in *Dossani Travels Pvt. Ltd. v Messrs Travels Shop.*[18] However, the courts can still question the power of the executive to take policy decisions and decide on the limits of those powers. This is an established principle not only in the jurisprudence on judicial review in Pakistan,[19] but across the globe.[20] Thus, a simple question arises: how does one differentiate between question of policy and a question of law? In *Suo Motu Case No.10 of 2007*,[21] the SC held that administrative matters that are to be dealt with through the machinery of law alone are matters of law and can be taken up by courts, whereas questions involving other factors beyond the exclusive control of the Government become matters of policy.[22]

When the SC investigated the issue of the COAS extension, it concerned itself with only legal questions. No political or policy questions were taken up. It was only concerned with the legality of the decision taken, and whether Executive had the power to take that decision. It is noteworthy that the SC did not question the decision itself. The matter would have been different had the SC undertaken to adjudicate on who the right choice would have been for the position of the COAS. The SC did not concern itself with that issue as that decision lay with the Executive, who is better placed to decide. Regardless, the fact remains that the SC can question whether and with whom the power resides in taking the decision. Interestingly, it should be noted that had the SC questioned the choice of who was appointed as the COAS, that would still not have been violation of principle of the separation of powers. In a very recent and landmark judgment of the United Kingdom's apex court, a somewhat similar question was posed in *R (on application of Miller) v The Prime Minister*.[23] A case was filed challenging the advice rendered by the Prime Minister to the Queen to prorogue the Parliament. To render such advice and to act on it is the prerogative of the Executive. The apex court of the UK held that not only can the origins of the powers of this prerogative – and consequently, the limits imposed on them – be questioned, but the advice rendered under this prerogative can be questioned as well through judicial review. The Court then went on to state the standard on which this advice shall be questioned. For the *Miller* case, the standard was that advice to prorogue the parliament must not frustrate or prevent "without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."[24] The Court devised this standard by exploring principles of judicial review and the principle of parliamentary sovereignty. Therefore, considering the jurisprudence on judicial review, the SC would not be amiss to question the appointment of the COAS on grounds of judicial review and constitutional sovereignty.

[18] PLD 2014 SC 1, [26].
[19] *Suo Motu Case No.10 of 2007* PLD 2008 SC 673, [5-6].
[20] *R (on Application of Miller) v The Prime Minister*, 2019 SCMR 1887, [32-33].
[21] *Suo Motu Case No.10 of 2007* (n19).
[22] Ibid.
[23] *R (on application of Miller)* (n 20).
[24] Ibid [50].

In the present case, the SC did exercise judicial restraint to the extent that it made a declaration that there was a gap in the law regarding the extension of the COAS' tenure which must be addressed. There were bits and pieces of law where, if combined, somewhat of a convoluted argument could have been made to give the COAS an extension for another tenure. All that was needed for this was to grant legal cover to Army Regulations 255, and an institutional practice of extension. However, doing this would also have meant that the SC would have to set the period of the tenure. That could also have been done by looking at the institutional practice and setting the tenure according to that. But this institutional practice is neither consistent throughout the history of Pakistan, nor is completely and resolutely backed by the people of Pakistan. For example, not all the COAS have been granted extensions; even the last COAS was not given extension. Therefore, in this case giving legal cover to this institutional practice and setting the period of tenure would have amounted to exceeding the constitutional powers of the SC. As this would have required defining the terms of tenure, which is not the job of SC. Moreover, the SC did not right away cancel the extension notification, rather it allowed a time period of six months for the Parliament and the Executive to bring about the required changes in the law. So, the SC did not define the terms of tenure and gave time to government to make the law. But here a criticism can be levied on the judgment. That to challenge the extension of the COAS, as mentioned above, there needs to be some law that allows for this challenge. In the *Miller* case there was a law that allowed the PM to render advice to prorogue, only the limits of the law were undefined. In this case there is no law or right that allows for regulation of the office of the COAS to begin with. The SC created a new right by liberally interpreting the existing right to assume jurisdiction. This, as already pointed out, was wrongly done. It was wrongly done because SC can only assume jurisdiction if the matter was of fundamental rights. Since there was no express fundamental right to grant the COAS extension, the SC had to recourse to other fundamental rights and interpret them liberally. To do so the SC first held that the case fell under PIL so that doctrine of PIL would allow it to liberally interpret the right to life and dignity and, therefore, assume jurisdiction under article 184(3). The case does not fall under PIL; therefore, the SC cannot justify the liberal interpretation of existing fundamental rights. The SC employed a circular argument which does not seem to have force.

So, what can be said is this; that the SC did exercise judicial restraint by declaring that there is a gap in law, by not setting the terms of tenure, and by allowing the government time to address the gap. But, since it wrongly interpreted the fundamental rights and assumed jurisdiction, therefore, it overstepped its boundaries and any subsequent judgment relying on that liberal interpretation of fundamental rights invalidates the reasoning and the decision. In other words, this liberal interpretation of fundamental right was where judicial restraint should have been exercised.

Despite the reasoning of the judgment, the judgment clearly had a political undertone. The rules of interpretation were not strictly followed; rather, at various points, it seemed that the judgment was swaying from the established rules of interpretation. The approach that the SC intended to take was briefly outlined in the start of the judgment.[25] The SC intended to take restrictive or textual approach to only see what the constitution says in this regard and whether the existing law can stand the test of judicial review. However, when interpreting Article 243[26], the

[25] *The Jurists* (n 1) [14].
[26] The Constitution of Pakistan 1973, Article 243**:**

SC took a spirited approach and disregarded the literal[27] textual interpretation of the said Article. When the Attorney General pointed out the difference between the text of Articles 243(3) and 243(4), the SC chose to ignore the literal interpretation and held that in spirit, the term 'subject to law' applies to both clauses. When it was argued that section 176A of the Army Act 1952 allows for the retirement of the COAS and then the reappointment of the COAS, this spirited approach was not rendered in favour of extension. The SC at that moment chose to take a literal interpretation and held that retirement is a matter to be dealt by rules as prescribed under section 176[28] of the

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Command of Armed Forces
(1) The Federal Government shall have control and command of the Armed Forces.
(2) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.
(3) The President shall subject to law, have power—
(a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and
(b) to grant Commissions in such Forces.
(4) The President shall, on advice of the Prime Minister, appoint—
(a) the Chairman, Joint Chiefs of Staff Committee;
(b) the Chief of the Army Staff;
(c) the Chief of the Naval Staff; and
(d) the Chief of the Air Staff,
and shall also determine their salaries and allowances.

[27] Pakistan Army Act 1952, s 176A:
176A. Power to make regulations**.**
The Federal Government may make regulations for the governance, command, discipline, recruitment, terms and conditions of service, rank, precedence, and administration of the Pakistan Army and generally for all or any of the purposes of this Act, other than those in respect of which rules have been made under section 176.

[28] Pakistan Army Act, 1952, s.176:
176. Power to make rules.
(1) The Federal Government may make rules for the purpose of carrying into effect the provisions of this Act.
(2) Without prejudice to the generality of the power conferred by subsection
(1), such rules may
provide for___
(a) the retirement, release, discharge, removal or dismissal from the service of persons subject to this Act;
(b) the specification of punishments which may be awarded as field punishments under sections 23 and 61;
(c) the assembly and procedure of Courts of inquiry the recording of summaries of evidence and the abstracts of evidence and the administration of oaths and affirmations by such Courts;
(d) the convening and constitution of Courts martial and the court of Appeals;
(e) the adjournment, dissolution and sittings of Courts martial and the Court of Appeals;
(f) the procedure to be observed in trials by Courts martial and the Court of Appeals, and the qualification of legal practitioners who appear thereat;
(g) the confirmation, revision and annulment of, and petitions against, the findings and sentences of Courts martial;
(h) the carrying into effect of sentences of Court martial and the Court of Appeals;
(i) the forms and orders to be made under the provisions of this Act relating to Courts martial and the Court of Appeals and sentences of stoning to death, death, amputation of hand, foot or both, imprisonment for life, imprisonment, detention or whipping ;
(j) the constitution of authorities to decide for what persons, to what amounts and in what manner provision should be made for dependants under section 71 and the due carrying out of such decisions;
(k) the relative rank of, and powers of command to be exercised by, officers, junior commissioned officers, warrant officers, petty officers and non-commissioned officers of the Pakistan Army, Navy and Air Force, when acting together;
(l) deductions on account of public and regimental debts from the pay and allowances of persons subject to this Act; and
(m) any matter in this Act directed to be prescribed.

Army Act 1952. Consequently, it held that such regulations under section 176A cannot deal with the subject of retirement. Throughout the judgment there is a switch from the literal to purposive interpretation of the law. There was no strict adherence to one consistent approach; rather, paths were being constructed to get around obstacles that provided hindrance in the desired reasoning of the SC.

Putting Judgment in Political Context

It would be worthwhile to understand the politics behind the extension of the COAS to understand why the SC might have fallen short of its reasoning and why it had to interpret the fundamental rights liberally. Before that it would be pertinent to discuss the history of relationship of army and judiciary in Pakistan. It is no secret that both institutions have very close ties with each other. Probably the first manifestation of this closeness was back in 1958 when the judiciary upheld the first martial law. In what is criticised to be greatly misunderstood interpretation of Kelsen's *grundnorm*, the apex court of Pakistan held martial law to be a concurrent right of military to impose anytime it desires.[29] This started a long tradition of army imposing marital laws and apex courts upholding those martial laws. Judiciary legitimised General Zia ul-Haq's martial law by justifying it on basis of the doctrine of necessity.[30] In 1988 when a democratically elected government was sent home by General Zia ul-Haq, it was the SC that held the dissolution invalid but refused to reinstate the National Assembly stating that elections were conducted on non-party basis which is not democratic enough, so it is better if new elections are conducted.[31] Such was never the mandate of the SC to decide whether the elections or laws regulating elections were democratic enough. The SC simply refused to reinstate a democratic government, primarily due to overarching strength that General Zia ul-Haq held at that time in history. The fourth martial law imposed by General Parvez Musharraf was also validated by the judiciary.[32]

The judiciary in Pakistan was never independent even after formally gaining independence on paper. The judiciary was said to be most independent post 2009 after Lawyers' Movement. But as the history goes, one of the key players and mediator between the government and judiciary at that time was the serving COAS of the time General Kayani.[33] After its show of power, it was said that the judiciary is truly independent without any political influences and for a while it showed just that. The judiciary went on a rampage of judicial activism criticising and questioning government at every turn. The judiciary even concluded the high treason case on General Parvez Musharraf and found him guilty of high treason offence.[34] What this entailed was a daylight refusal of the army to accept this judicial decision. The Director General of Inter Services Public Relations immediately held press conference refusing to accept the verdict.[35] The government, same as the

(3) All rules made under this Act shall be published in the Official Gazette and, on such publication shall have effect as if enacted in this Act.

[29] *State v Dosso* PLD 1958 SC 533.

[30] *Begum Nusrat Bhutto v The Chief of the Army Staff* PLD 1977 SC 657

[31] *Federation of Pakistan v Muhammad Saifullah Khan* PLD 1989 SC 166.

[32] *Syed Zafar Ali Shah v General Pervez Musharraf, Chief Executive of Pakistan* PLD 2000 SC 869.

[33] Editorial, '2009: Army's Role in Long March Conclusion' *Dawn* (Islamabad, 5 June 2011) <https://www.dawn.com/news/634414/2009-armys-role-in-long-march-conclusion> accessed 2 Jan 2021.

[34] *The Federal Government of Islamic Republic of Pakistan v General (R) Pervez Musharraf* 2019 LHC 208, [65].

[35] Editorial, 'ISPR Blasts Detailed Verdict in Musharraf Treason Case, Deems it 'Against Humanity, Religion'' *Dawn* (Islamabad, 19 December 2019) <https://www.dawn.com/news/1523189> accessed 2 Jan 2021.

one that granted the COAS Bajwa extension, immediately challenged the verdict in the Lahore High Court which post-haste declared the composition of the special bench to try General Parvez Musharraf as invalid.[36] Although the Musharraf case verdict came after COAS extension case verdict, the point goes to show the relation between the two institutions.

The issue of the COAS extension has been controversial from the beginning. It has been criticised the time this extension was granted.[37] In the early August of 2019 there was confusion over whether this extension would be granted. Opposition was critical of this grant, which was also not supported by other quarters of the country for instance the Pakistan Bar Council.[38] They all opposed the extension and wanted that army be made less reliant on individuals who are stronger than the institution. Even the hasty way amendment was passed was criticised.[39] But the understanding was that the extension would be granted mainly because the government in power is alleged to be a proxy for the establishment.[40] And this was what happened when in late August of 2019 the COAS was granted extension, three months before the expiry of his tenure. This ultimately called into question the legitimacy of the government. The government had lost its legitimacy, and many were questioning the role of army in politics and saw this yet another sign of the involvement of armed forces in politics. So perhaps the route that was sought to gain legitimacy was through a trusted friend that army found yet again in the judiciary. This would also explain why the Chief Justice of Pakistan Asif Saeed Khosa who showed great restraint on his part from judicial activism had to break restraint only days before his retirement.[41] CJ Khosa's policy was clear to get the house in order[42] after the period of rampant judicial activism of his predecessors, the CJ Chaudhry and the CJ Nisar, and the criticism it garnered. CJ Khosa did not take any case under PIL during his tenure, except towards the end when he took this case even when the original petitioner wanted to withdraw his petition.

Analysis of the Amendment in the Army Act 1952

To address the concerns raised in the judgment, the Parliament passed a law[43] amending the Army Act 1952. The sole purpose of the amendment seems to be is to give legitimacy to the post of the COAS and the Chairman Joint Chief of Staff Committee ("CJCSC"). This is probably the reason amendment suffer from infirmity. The amendment did address the issue of the COAS' extension,

[36] *General (R) Pervez Musharraf v Federation of Pakistan* PLD 2020 Lahore 285, [21].
[37] Editorial, 'Pakistan's Top Court Grants Extension to Army Chief's Tenure' *Al Jazeera* (28 Nov 2019) < https://www.aljazeera.com/news/2019/11/28/pakistans-top-court-grants-extension-to-army-chiefs-tenure> accessed 2 Jan 2021.
[38] Editorial, 'PBC opposes move to extend army chief's tenure' *Dawn* (Islamabad, 7 January 2020) < https://www.dawn.com/news/1526707> accessed 2 Jan 2021; I.A. Rehman, 'A debatable solution' *Dawn* (9 Jan 2020) < https://www.dawn.com/news/1527166> accessed 2 Jan 2021.
[39] Baqir Sajjad Syed, 'NA to debate services chiefs tenure bills today' *Dawn* (7 Jan 2020) < https://www.dawn.com/news/1526754/na-to-debate-services-chiefs-tenure-bills-today> accessed 2 Jan 2021.
[40] Zahid Hussain, 'The Rise of the Opposition?' *Dawn* (4 Oct 2020) <https://www.dawn.com/news/1583018> accessed 2 Jan 2021; Ayjaz Wani, 'Military Further Tightens Grip Over Imran Administration' *ORF* (23 June 2020) < https://www.orfonline.org/research/military-further-tightens-grip-over-imran-administration-68329/> accessed 2 Jan 2021.
[41] He was due to retire on 20 December 2019 and the judgment was delivered on 28 November 2019.
[42] Arifa Noor, 'The Petition That Nearly Wasn't' (*Dawn* 3 Dec 2019) < https://www.dawn.com/news/print/1520175> accessed 2 Jan 2021.
[43] Pakistan Army (Amendment) Act 2020.

but it overlooks a key issue and also gives rise to another. Firstly, Regulation 255 is still not given any legal cover. The issue of retirement of the subjects of the Army Act 1952 is dealt with under section 176, which allows for the rules to be formed to address the retirement age of officers. However, the retirement age of officers is given under the Regulations 255 which is given validity under section 176A of the Army Act 1952. Section 176A, after the amendment, only allows for the retirement age of the COAS and CJCSC, but still, it does not govern the matter of retirement in general. This being the case the retirement ages of all the officer from "Major and below" to the rank of "Lieutenant General" remain unfounded in law and subject to institutional practice. The judgment of the SC asked government to solve this legal lacuna but as it seems the only concern taken up by the legislature was to provide for the retirement age and extension of the COAS and CJCSC.

Secondly, the amendment holds that the COAS shall be appointed from the existing Generals of the army.[44] Furthermore, it sets the maximum age of retirement for the COAS at sixty-four years and does the same for the CJCSC.[45] In doing so, the maximum retirement age of other Generals of the Pakistan army is still not decided. This raises a potential issue of the right to equality[46] of the other Generals being infringed upon. As held in many previous judgments of the SC, the right to equality does not means equal treatment to everyone but similar treatment to those in similar circumstances.[47] The simple test to validate discrimination is done on the basis of "reasonable classification."[48] To explain this criterion of reasonable classification, the courts have held that reasonable classification needs to be on intelligible differentia, this means that the discrimination done must be reasonable and appealing to an intelligent mind.[49] The classification needs to be reasonable and should be one where all those similarly situated must be grouped in the same class.[50] In past the courts have held different classifications to be reasonable like classification based on age group, or class difference on ability to be valid.[51] However, after the amendment what has happened is that the Regulation 255 is still without legal cover. This means that the retirement of the officers in General rank is subject to institutional practice, which has the retirement age at sixty years. But the COAS and CJCSC being in rank of Generals will be allowed to hold office until the age of sixty-four. This is clear infringement on the right of equality among Generals. They are all on the same rank as the General and there is no reasonable classification being done to group the COAS and CJCSC in a separate group and all the other Generals in a separate group. The amendment discriminates between the Generals giving priority to those that hold the office of the COAS and CJCSC. Merely holding the office cannot be a rational for reasonable classification.

It can however be argued that this inequality is not discriminatory. The office of the COAS and CJCSC is responsible for much bigger decisions in the army. They have earned a place at the top of the hierachy of the army. Therefore, this inequality is not necessarily discriminatory, but is

[44] Ibid s 8A.
[45] Ibid s 8C & 8F.
[46] The Constitution of Islamic Republic of Pakistan, Article 25.
[47] *Government of Balochistan v Aziz Ullah Memon* PLD 1993 SC 341, [5].
[48] *Shehzad Riaz v Federation of Pakistan* 2006 YLR 229 SHC, [5]; *Elahi Cotton Mills Ltd. v Federation of Pakistan* PLD 1997 SC 582, [20].
[49] *Elahi Cotton Mills Ltd. v Federation of Pakistan* PLD 1997 SC 582, [46].
[50] Ibid [21].
[51] *Shehzad Riaz v The Federation of Pakistan* 2006 YLR 229, [5].

an 'earned' inequality which one might argue is necessary for the maintenance of the armed forces as an institution. But during the course of proceedings CJ Khosa observed that for any threat to security of Pakistan the armed forces as an institution should meet the threat and the role of individual should be minimal.[52] By this amendment the reliance on few individuals in the army has increased greatly. This increases the power of the office holder which is in itself a concern. Additionally, the other Generals can argue that they are equally competent and qualified to hold the office even during the times of peace and emergency. And the emphasis should be on maintaining the strength of the institution as whole. Reportedly the amendment affected the right of twenty Lt. Generals who could have held the office in future.[53] It is difficult to justify ignoring such a large number of Lt. Generals in favour of just two, even if the reason is to be the duties of office of the COAS and CJCSC. This amendment presupposes that those officers are incapable of handling the workings of the army in times of emergency.[54] Furthermore, this longer period of incumbency will cause resentment within ranks of the army against the office holders. Overall it would weaken the army as an institution and would increase reliance on a few individuals. Nevertheless, this might not be an issue likely to be raised anytime soon. This is because at a given time only one or two Generals exist in Pakistan Army, and they hold the office at the same time. So practically, there might not be a General in the army whose rights are being infringed. Regardless of practicality, the issue remains in the law.

Thirdly, the amendment came out in a very hasty manner without due considerations given to it. There was no public debate on such a serious matter which resulted in its poor drafting. It can hardly be said that the apparent intent of the SC's judgment was upheld in the amendment since 'people' barely got to discuss and decide the matter of the extension of the COAS. In this regard some valuable amendments were proposed by the Pakistan People Party members but those were all rejected. These were that the Prime Minister must explain the grounds for extension to the parliamentary committee on national security and the Prime Minister cannot recommend reappointment of the COAS.[55] However, these suggestions were dropped. The amendment did mention some grounds for the extension but no grounds for tenure. It also allows for the reappoint of a General for three years period, provided they have not exceeded the age limit of sixty-four years age. Considering the dropping of these suggestions and poor drafting of the amendment the possibility of the reappointment of the COAS who has already served, in place of serving COAS, is still there. Perhaps if 'people' really had a say in it then these issues could have been avoided.

The SC also directed the authorities to make the publication of Army Regulations (Rules) public and remove the stamp of restrictive document. But this directive is ignored so far and is yet to be complied with.

Conclusion

[52] Haseeb Bhatti, 'Gen Bajwa's Extension Hangs in Balance as CJP Suspends Govt's Notification Until Tomorrow' (*Dawn* 27 Nov 2019) < https://www.dawn.com/news/1518960> accessed 2 Jan 2021.
[53] Dipanjan Roy Chaudhury, 'Imran Khan's extension to Pakistan Army Chief Bajwa to Affect 20 Generals' *The Economic Times* (15 January 2020) < https://economictimes.indiatimes.com/news/defence/imran-khans-extension-to-army-chief-gen-q-a-bajwa-to-affect-20-generals/articleshow/73237690.cms?from=mdr> accessed 2 January 2021.
[54] I.A. Rehman, 'A debatable solution' (*Dawn* 9 Jan 2020) < https://www.dawn.com/news/1527166> accessed 2 Jan 2021.
[55] Ibid.

To conclude, this was the first judgment in the history of Pakistan in which the office of the COAS is called into question in any context. It opened the gates of accountability of those who sit on the higher echelons of power, at least on paper it sets a precedent. It tried to uphold the legal maxim that no one is above the law. In history of Pakistan almost all the high authority figures have been brought under the rule of law, with cases ranging from disqualification of the Prime Minister on issue of contempt of court to the removal of sitting Chief Justice of the Supreme Court. However, this is the first time that a sitting COAS and the validity of his holding the office has been called into question. Although the speculation remains that this all might be a ruse to hide the real motive behind the verdict, nevertheless, it did set a precedent to be used later.

The problem remains with the arbitrary use of the SC jurisdiction under Article 184(3). The problem arises when the SC, seemingly, at will and whim uses the fundamental rights to increase its jurisdiction. The right to life tends to be the favourite child of the SC. In doing so, the SC is giving itself untethered and unchecked powers. This in turn creates a tautology: while performing its duties under the doctrine of separation of powers, the SC is inadvertently crossing the very limitations set upon it through the doctrine itself. Furthermore, given the socio-political backdrop of Pakistan, the SC, among other institutions, is believed to be the 'saviour of the people'. The SC does not tend to shy away from this role and, during the phases of great political activism by its previous Chief Justices, this role was taken up with great vigour. Whether this judgment falls into the ambit of political activism is a tough question to answer. On one hand, the SC did seemingly overstep its boundaries by interpreting the Constitution too liberally, but on the other hand, it did exercise judicial restraint by allowing the Parliament six months to address the gap in the law. It depends on every person's moral compass or professional inclination to decide whether the SC overstepped its jurisdiction.

The tone of the judgment seemed to be concerning regarding the unchecked power that the high executives of Pakistan hold, and the judgment was perhaps an attempt by the SC to give power back to the people of Pakistan or perhaps just a veiled attempt to legitimise the extension of the COAS. The political undertone of the judgment was very clear in the ending paragraph of the majority opinion and the concurring judgment of the CJ Khosa. In hindsight, however, this judgment seems to be a pre-mature attempt to test "democratic maturity"[56] of the people of Pakistan.

The amendment that comes in response to this judgment suffers from many infirmities and only caters to one gap in the law. Other gaps in the law, such as legitimising Regulation 255, remain which need to be addressed. And even while doing so the amendment raised another issue of fundamental right of equality and equality in service. This is a serious oversight by the government, given that during the proceedings similar omissions and oversights were done by the government and those were sternly addressed by the SC. It is not comforting to see despite all that happened the priority of the government was still to secure extension of the COAS, and all the other issues raised by the judgment were overlooked. For instance, the Army Regulations (Rules) have still not been made public. It is worth noticing that for the best interest of the country there should be mutual respect between the SC and the Executive. The SC in this case did show that by exercising some level of judicial restraint, it would behove the government to respond in kind, by making Army Regulation (Rules) public.

[56] *The Jurists* (n 1) [55].