

REGULATORY TRANSGRESSION? DRIVERS, AIMS AND EFFECTS OF MONEY
LAUNDERING AND TERRORISM FINANCING REGULATION IN PAKISTAN

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ABSTRACT

The harmonization of money laundering and terrorism financing regulation is a key feature of the contemporary global economy. Since 9/11 particularly, the remarkable growth of this field of regulation has been characterized by both scale and intensity. However, this drive towards regulatory convergence is puzzling: the efficacy of the regulation remains unproven while the content of the regulation poses significant challenges to both criminal justice systems and human rights frameworks. The corollary to these observations: who does the regulation benefit?

With the understanding that all regulation is an expression of some interest/s, this study analyses the trajectory of this global regulation and its products. My aim is to understand who gains what from regulation and how they influence this regulatory evolution. Focusing on Pakistan, my research will examine how anti money laundering (AML) and counter terrorism financing (CTF) regulation and its increasing demands for information affects established power hierarchies in states, between states and among states. At the international and transnational levels, I'm interested in how a universal financial regulation discourse threatens basic rights and freedoms and how this exercise of power affects civil, political and economic rights in a country, its foreign policy as well as geopolitics. At the national level, I'm curious about how such regulatory power with its distinctive objectives interacts or conflicts with or even amplifies the control of established power centres in a polity. The analysis of power relations in the case of Pakistan will be particularly instructive for several reasons. First, the size of its formal economy is rivalled (if not surpassed) by the informal or black economy and the money laundering industry is all the more powerful for processing illicit funds from crime; corruption; and trade- and taxation-related malpractices. Second, Pakistan's military establishment has long supported militancy as a foreign policy tool, both materially and financially, and to date orients its foreign policy accordingly. Finally, the military establishment also relies on intrusive surveillance tools to control civil society.

The opacity of the discourse regarding international financial governance makes a closer scrutiny of its aims a critical imperative. By exploring the links between regulation, power, knowledge and surveillance, I hope to understand the aims of this power and offer a critique of financial regulation as a technique of power and the politics of making and administering AML/ CTF regulation, both across the globe and within states.

DEDICATION

For Rameez, Baba and Margaret

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LIST OF ACRONYMS

AML-CTF	Anti-money laundering and counter terrorism financing
CDD	Customer Due Diligence
CTD	Counter Terrorism Department
CTR	Currency Transaction Report
FATF	Financial Action Task Force on Money Laundering and Terrorism Financing
FBR	Federal Board of Revenue
FIA	Federal Intelligence Agency
FIU	Financial Intelligence Unit
FMU	Financial Monitoring Unit
FSB	Financial Stability Board
FSF	Financial Stability Forum
FSRBs	FATF-style regional bodies
IAIS	International Association of Insurance Supervisors
IB	Intelligence Bureau
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISAF	International Security Assistance Force
ISI	Inter Services Intelligence
IVTS	Informal Value Transfer System
JuD	Jamaatud Dawa
KYC	Know Your Customer
LEAs	Law enforcement agencies
LeT	Lashkar-e-Taiba
MVTS	Money or Value Transfer System
Nacta	National Counter Terrorism Authority
Nadra	National Database and Registration Authority

PMLN Pakistan Muslim League (Nawaz)

PPP Pakistan Peoples Party

ROSCs Reports on the Observance of Standards and Codes

STR Suspicious Transaction Report

TLP Tehreek-e-Labbaik Pakistan

TTP Tehreek-e-Taliban Pakistan

UNSCR United Nations Security Council Resolution

WB World Bank

CHAPTER 1: Introduction

Since its emergence in 1988, anti-money laundering and counter terrorism financing (AML-CTF) regulation has not only been globalised at a rapid pace, it has done so unaltered by the political or economic exigencies of implementing jurisdictions. This study looks to understand why. The project is analytical as it seeks to identify and understand the motivations of the drivers of AML-CTF regulation, both globally and in Pakistan, in the period between 1988 and present day. The study, however, is also theoretical as it examines power – within, between and among states, institutions and classes – as a possible explanation for the existence and the spread of AML-CTF regulation. Based on qualitative research, this study will take a grounded theory approach to the issue of power relations embedded within the framework of global AML-CTF regulations.

1.1 Why AML-CTF regulation?

The question regarding the spread of AML-CTF regulation¹ is especially pertinent in contemporary times for three reasons. First, few would doubt and the Panama and Paradise Papers proved that money laundering is still a thriving industry; investigative reporting in several developed countries (particularly Canada, the US and UK) showed how local economies were imbricated in the laundering enterprise². Clearly, AML-CTF regulations are not impeding

¹ As used here, regulation refers to norms, standards, principles, guidelines and rules (including laws). By AML-CTF regulation are meant, primarily, the 40 voluntary recommendations devised and promoted by the Financial Action Taskforce on Money Laundering and Terrorism Financing. (See Chapter 3 for details.)

² See, for example, Robert Cribb and Marco Chown Oved, “Snow washing: Canada is the world’s newest tax haven”, *Toronto Star* (January 25, 2017); online <http://projects.thestar.com/panama-papers/canada-is-the-worlds-newest-tax-haven/>; Nicholas Shaxson “The finance curse: how the outsized power of the City of London makes Britain poorer”, *Guardian* (October 5, 2018); online https://www.theguardian.com/news/2018/oct/05/the-finance-curse-how-the-outsized-power-of-the-city-of-london-makes-britain-poorer?CMP=share_btn_tw; Lee Sheppard, “Our hypocrisy on tax havens”, *Forbes* (July 22, 2010); online <https://www.forbes.com/2010/07/22/tax-finance-havens-economy-opinions-columnists-lee-sheppard.html#5a550c5b5f49>; John A Cassara, “Delaware, den of thieves?”, *New York Times* (November 1, 2013); online <https://www.nytimes.com/2013/11/02/opinion/delaware-den-of-thieves.html?searchResultPosition=1>; John Christensen, *When will the British government impose public registries on its tax havens?*, (Tax Justice Network, March 4, 2019); online https://www.taxjustice.net/2019/03/04/when-will-the-british-government-impose-public-registries-on-its-tax-havens/?fbclid=IwAR1ZpBGwMVL9UFNIOOSMGirs1pbyErQPQuzO2hpbm9vm9j9d4_7gN0eFTEE & Leslie Wayne, “How Delaware thrives as a corporate tax haven”. *New York Times* (June 30, 2012); online

laundering as much as the authors of such regulation state in their public policy goals, not even in the earliest, most enthusiastic adopters of the regulation, let alone in the recent (and often, reluctant) converts. Meanwhile, as the frequency of terrorism cases reported in the mainstream media in the last 10 years indicates, AML-CTF regulation is not preventing terrorism to any expected degree either. Given that even global regulators – primarily the Financial Action Task Force on Money Laundering and Terrorism Financing (FATF) – are unable to show that the regulation is having the desired effect, the furious pace of the globalisation of this regulation makes little sense.

Second, a concerted policy regarding regulatory convergence or harmonisation – that is, compatible regulation across differently-situated jurisdictions – is puzzling on its own. The critical economic literature about the IMF and the World Bank through the late 1990s and the noughties categorically discredited regulatory harmonisation as a goal: different jurisdictions, it was argued, needed different policies and regulations³. The pushback from the global South was equally sharp and there is now a well-developed body of literature regarding the failure of the Washington Consensus for postcolonial states⁴. Even if one accepts the economic-financial distinction carved out in the literature⁵, there is little to justify why financial regulation is a better candidate for regulatory harmonisation than economic regulation.

<https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?searchResultPosition=1>.

³ While the literature is enormous, for overviews, see generally, Joseph E. Stiglitz, *Globalisation and its discontents* (New York, W.W. Norton & Company Inc, 2002) and Samir Amin, *Capitalism in the age of globalisation: the management of contemporary society* (London, Zed Books, 2014).

⁴ See, for example, Antony Anghie, "Time present and time past: globalisation, International Financial Institutions and the Third World" (2000) 32 NYUJ Intl Law & Pol 243, Sundhya Pahuja, "Global formations: IMF conditionality and the South as legal subject" in Peter Fitzpatrick & Patricia Tuitt, eds, *Critical beings: law, nation and the global subject* (Hantspp, Ashgate Publishing Limited, 2004) at 161-179; Sundhya Pahuja, "Technologies of Empire: IMF conditionality and the reinscription of the North/South Divide" (2000) 13 Leiden J Intl L 749; Leslie Sklair, *Globalisation: capitalism and its alternatives* (Oxford, Oxford University Press, 2001); & Dani Rodrik, *The globalisation paradox: why global markets, states and democracy can't coexist* (Oxford, Oxford University Press, 2011).

⁵ Conceptually, economic regulation is generally understood as the norms, standards, principles and rules (including laws) that govern the macroeconomy, particularly the demand for goods and services, employment, inflation and economic growth. In 1974, Posner called economic regulation "the pattern of government intervention in the market" that referred to taxes and subsidies of all sorts as well as to explicit legislative and administrative controls over rates, entry, and other facets of economic activity (Richard A. Posner, "Theories of Economic Regulation" (1974) 5:2 Bell J Economics at 335-358). Financial regulation, meanwhile, is seen as the norms, standards, principles and rules (including laws) applicable to the financial services industry. These include

Third, there is the issue of *composition*. Despite multiple attempts to quantify the size of the global money laundering ‘problem’, there are still no authoritative estimates regarding the same⁶. The problems of quantification have been compounded by the extended definition of illicit financial flows (IFFs)⁷: the enhanced parameters of corporate criminal liability and the inclusion

banking and securities regulation obviously but after the 2007 global financial crisis, there have been calls to extend the perimeter of financial regulation to include Special Purposes Vehicles, hedge funds etc. (Luisa Zanforlin, Ian Tower, Nier Erend, Michael Moore, Ana Carvajal & Randall Dodd, “The Perimeter of Financial Regulation” (2009) International Monetary Fund, Staff Position Note No. 2009/07; online <https://www.imf.org/en/Publications/IMF-Staff-Position-Notes/Issues/2016/12/31/The-Perimeter-of-Financial-Regulation-22826> at 4-7)

⁶ Most estimates – especially those by economists – rest on numerous unverifiable assumptions. Quirk put forward a “2 to 5 percent of global GDP” estimate while working as an adviser to the IMF’s Monetary and Exchange Affairs Department (Peter Quirk, “Macroeconomic implications of money laundering” (1996) IMF Working Paper 96/99, Institute for International Economics, Washington, DC; online <http://www.elibrary.imf.org/abstract/IMF001/04385-9781451962123/04385-9781451962123/04385-9781451962123.xml?redirect=true>); was subsequently quoted by then IMF managing director (Michel Camdessus (Address by the former managing director of the IMF at the Plenary Meeting of the Financial Action Task Force on Money Laundering, Paris, February 10, 1998); online <http://www.imf.org/external/np/speeches/1998/021098.htm>) and has since been cited in IMF documents. While John Walker has frequently attempted estimates – for AUSTRAC in Australia; independently and for the United Nations Office on Drugs and Crime (see John Walker, *Estimates of the extent of money laundering in and throughout Australia*. (AUSTRAC, Government of Australia, 2004); online <http://www.criminologyresearchcouncil.gov.au/reports/200304-33.pdf>; John Walker and Brigette Unger, “Measuring global money laundering: ‘The Walker Gravity Model’” (2010) 5:2 Rev L & Economics 821–853; and UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes* (2011); online <https://www.unodc.org/unodc/en/frontpage/2011/October/illicit-money-how-much-is-out-there.html>) – he maintains that the only goal is to speculate intelligently. Most authors agree that the problems associated with precise calculations are insurmountable (Walker 2010; UNODC 2011; Peter Reuter and Edwin Truman, *Chasing dirty money: The fight against money laundering* (Washington, DC, Institute for International Economics, 2004); and Petrus C. van Duyn, M. S. Groenhuijsen and A. A. P. Schudelaro, “Balancing financial threats and legal interests in money laundering policy” (2005) 43 Crime, L & Soc Change 117).

⁷ Since the early 1900s, money laundering was understood as a cleaning process whereby ‘dirty’ money acquired through criminal activities (such as the drugs trade) would be sluiced through store front operations or cash businesses to obliterate traces of its criminal acquisition and so, render it immune to seizure by law enforcement agencies. Present definitions, however, refer to these monies as the “proceeds of crime” where crimes include all transnational crimes and, post 9/11, terrorism financing and the financing of weapons of mass destruction. In the last ten years, the term ‘laundered funds’ has been replaced by ‘illicit financial flows’ (IFFs), which focus on the source as well as the intended use of the monies. The new term covers evolving laundering practices such as the running of charities, kidnapping, extortion, membership fees (especially for militant organisations), personal income contributions, the sale of religious books, the organisation of lectures as well as the gems and jewellery black market. More significantly, the term also covers tax abuse and trade-related malpractices. However, there are calls to expand the definition of laundering even further: Beare et al, for example, argue for the inclusion of white-collar crime in the folds of organised crime (Margaret Beare, ed, *Critical reflections on transnational organised crime, money laundering, and corruption*. (Toronto, University of Toronto Press, 2003)); Pogge and Mehta see tax abuse as the most significant contributor to IFFs (Thomas Pogge & Krishen Mehta, eds, *Global tax fairness* (Oxford, Oxford University Press, 2016)); Ruggiero identifies sources including tax evasion, corruption, bribes, capital flight and proceeds of hidden economies (Vincenzo Ruggiero, *Dirty money: On financial delinquency* (Oxford, Oxford University Press, 2017)). The World Economic Forum 2012 report also identifies tax free zones as key enablers of money laundering while Passas focuses on imports and exports that can hide illegal or controlled

of tax abuse make precise estimates regarding volume hard to come by. Even so, the composition of IFFs is still noteworthy: money from crime (drugs, racketeering and terrorism⁸) accounts for only a third of total IFFs; corruption contributes only three percent while two-thirds of the total IFFs stem from cross-border tax-related transactions, about half of which consist of transfer pricing through corporations⁹. Similarly, others see trade mis-invoicing as accounting for 83.4 percent of measurable IFFs on average¹⁰.

To club these three issues into one: why is the globalisation of AML-CTF regulation such a pressing issue, when neither phenomenon seems to respond to regulation; the goal of regulatory harmonisation – as evidenced by the critical literature on economic regulation – is conceptually flawed; and the ‘size’ of the problem is unquantifiable? If the primary ‘wrong-doers’ are mostly rich states and corporations, why must the rest of the world sign up for this regulation?

The primary aim of this study is to understand who gains what from enhanced AML-CTF regulation and how they influence the regulatory trajectory, both globally and in a mid-sized economy such as Pakistan. The key question is: how does AML-CTF regulation affect established hierarchies of power within the state and without? Where does power accrue (and drain) in the AML-CTF regulatory convergence enterprise, both at the global level and the

commodities trade and shield illicit financial transactions via mis-declaration of the quality, quantity, value, origin, destination, and final use of goods. Nikos Passas, (Hearing on “Trading with the enemy: Trade-based money laundering is the growth industry in terror finance” before the House Financial Services Committee Task Force to Investigate Terrorism Financing, 2016); online <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba00-wstate-npassas-20160203.pdf>

⁸ While the phrase “terrorism financing” is commonly used in the literature, the financing of militancy is a more accurate and value-neutral characterisation. For the purposes of clarity, it is useful to distinguish between the two. As Ruggiero correctly contends, the characterisation of militants as violent entrepreneurs or terrorists, not as religious or political actors, is a “disingenuous discourse” designed to propagate the dominant ideology that fails to link the crime with the criminogenic environment that gives rise to it, thereby shifting the blame from institutions to individuals and victims. (The other example he gives is of financial institutions that are routinely portrayed as ‘vulnerable’ to drug money and terrorist finance – not as voluntary service providers reaping huge profits from cocaine cartels, militant organisations and tax evaders.) Ruggiero supra note 7 at 203. While AML-CTF is being talked about, the word ‘terrorism’ will be used although this should not be assumed as endorsement of the term.

⁹ UNCTAD, *Urgent global action needed to tackle tax avoidance* (2014); online http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=838&Sitemap_x0020_Taxonomy=CSO [UNCTAD 2014a]; and UNCTAD, *Trade and development report 2014*; online http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf at 173 [UNCTAD 2014b]

¹⁰ Global Financial Integrity. 2015. *Illicit financial flows from developing countries: 2004–2013*; online http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf at vii, 5

domestic one? And finally, as the title of the study suggests, do the regulators transgress their stated aims and objectives in the design, enforcement and implementation of the regulation?

Hypothesis

This project is intended as a power-based study of the global AML-CTF regime, particularly as it filters down to Pakistan. My working hypothesis is that AML-CTF regulation is the site of power struggles between various global and domestic actors as each attempts to consolidate their power. Unlike a more normative project that would review the performance of the regime in light of its resolution of a particular problem or stated policy objective, this study looks to understand the existence of the regime – including its problems – in terms of the power competition between various domestic and global interests.

In a global context, regulatory power is exercised by powerful regulatory institutions where the will of powerful member states prevails over the weaker ones. At a national level, power is exerted by traditional power centres, sometimes in connivance with global powers and sometimes in opposition to them. Simultaneously, these local powers also collude with and oppose rival power centres within a polity. The working assumption is that AML-CTF regulation is both an instrument in the economic warfare arsenal deployed by ruling elites (economic, military etc) within powerful states against weaker states *and* the means for the acquisition of more power by the various actors involved in the enterprise. First, as in economic warfare, the language of technicalities is deployed in AML-CTF regulation with a view to blinding one to the normative content of regulation. Second, the power to define ‘mere’ technicalities is political, economic and biopower. Finally, the aim of this power is more power: economic, political and biopower.

As understood here, ‘power’ refers to both statist as well as universalizing conceptions¹¹. In the first, it refers to the exercise of absolute, unqualified power within a state by its representatives, whether democratic or otherwise. In the second, it refers to the exercise of power over a state (and by necessary implication, its citizens) by those external to a state (other states/ institutions/

¹¹ Picciotto, Sol, “International law: the legitimation of power in world affairs” in P. Ireland & P. Laleng, eds, *The Critical Lawyers' Handbook 2* (London, Pluto Press, 1997)

non-state actors). Further, power is also considered in both its ideational sense (that is, how it is *represented* in the realm of ideas – the relational, processual and strategic aspects of power) as well as its material sense (that is, how power is materially organised and institutionalised). My study will thus tease out the tensions among the power centres within states, between states and among states to arrive at a fuller understanding of the imperatives of the power located within the AML-CTF architecture. However, to guard against “the fallacy of affirming the consequent”, I shall also be evaluating plausible rival hypotheses¹² available in theoretical literature.

Alternative hypotheses

The primary justification offered by regulators for the AML-CTF harmonization project is that it addresses the twin evils of money laundering and terrorism financing, which are a threat to the health of the global financial system. Besides this, AML-CTF regulation is also pitched as a panacea to criminal activities such as drugs trafficking, organised crime and insider trading. To this mutually beneficial end, it is contended, all jurisdictions voluntarily sign up to implement AML-CTF regulation. As such, the regulators’ purported claims can be seen to be resting on three pillars: efficacy; universal benefit and voluntary submission to jurisdiction. However, both contemporary literature as well as fieldwork discredit such an account.

1.2 Why Pakistan?

Several reasons inform the decision to study Pakistan within the context of the global AML-CTF regime. First, Pakistan typifies the dilemma of a global South country: a mid-sized economy within the lower-income band that is significant enough to merit regulation but not enough to influence regulatory outcomes. Second, few other jurisdictions have had such obvious problems with both money laundering and terrorism financing. But the most pressing reason has to do with its military.

A key feature of the polity is its historic civilian-military imbalance and the fact that the military establishment, as a political and economic actor, exercises a preponderant influence over the state and its domestic and foreign policy. The Deep State – also known as the establishment in Pakistan – is seen as the cooperative federation of powerful unelected pillars of the state

¹² David de Vaus, *Research Design in Social Research* (London, Sage Publications, 2001) at 13.

apparatus, particularly the military, intelligence agencies and parts of the bureaucracy. Collectively, they see themselves as guardians of the country's physical territory but also, as significantly, of what they call its ideological frontiers. These frontiers are determined by the Deep State's version of Pakistan's founding as an ideological Islamic state and the characterization of neighboring India as the eternal enemy. The most powerful component of the Deep State is the main intelligence agency – the Inter Services Intelligence (ISI). The case of Pakistan is particularly instructive for such a study since organised crime theory – as the foundation for AML-CTF regulation – focuses on the state as victim and not as an actor¹³. While the confusion between the roles throws up important questions, this issue acquires an additional layer of complexity in Pakistan: who is the state and can it be independent of the Deep State¹⁴?

Pakistan's foreign policy choices illustrate this dilemma. From the late 1970s, Pakistan's pro-US and, as a corollary to that, pro-Afghan Taliban tilt, embedded money laundering and what is now normatively understood as terrorism financing within the state apparatus¹⁵. The ISI was among the main actors responsible for propagating and facilitating both processes¹⁶. While the ISI's involvement has been downplayed for strategic reasons in the decades since, a complete withdrawal of 'state support' for terrorism financing can neither be presumed nor proven. Further, Pakistan's pro-Saudi Arabia stance from the late 1970s through the 1990s encouraged the setting up conduits for terrorism financing within madrassahs, charities and mosques across

¹³ Susan Karstedt, "Organising Crime: The State as Agent" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014) at 303

¹⁴ See Christine C. Fair, "Why Pakistan Army is here to stay: prospects for civilian governance?", *International Affairs*, Vol. 87, No. 3, (2011) at 571-588; Christophe Jaffrelot, *The Pakistan Paradox: Instability and Resilience* (Oxford, Oxford University Press, 2015) at 197; Zhao Shurong and Saif ur Rahman, "Rethinking Civil-Military relations in a Pakistan: Some Lessons from Turkey" (2017) 6:3 *Journal of Socialomics*; and Jyoti M. Pathania, "Verdict is out and the verdict is 'Uniform-ed Democracy'", *Claws* (August 17, 2018); online <https://www.claws.in/1924/commentary-on-pakistan-elections-2018-verdict-is-out-the-winner-is-%c3%a2%c2%80%c2%9cuniform-ed-democracy%c3%a2%c2%80%c2%9d-dr-jyoti-m-pathania.html>.

¹⁵ See, generally, Ahmed Rashid, *Pakistan on the brink: the future of Pakistan, Afghanistan and the West* (London, Penguin Group, 2012); Ahmed Rashid, *Descent into chaos: Pakistan, Afghanistan and the threat to global security* (London, Penguin Group, 2008) as well as Ayesha Jalal, *Partisans of Allah: jihad in South Asia* (Lahore, Sang-e-Meel Publications, 2008).

¹⁶ See, generally, Shuja Nawaz, *Crossed Swords: Pakistan, Its Army, and the Wars Within* (Karachi, Oxford University Press, 2008) and Aqil Shah, *The Army and Democracy: military politics in Pakistan* (Cambridge, Harvard University Press, 2014).

Pakistan, which are still in active use¹⁷. Both foreign policy choices have had far-reaching consequences: the empowerment of the military at the expense of civilian and democratic institutions and the creation of powerful militant groups and factions.

Ostensibly, aggressive implementation of AML-CTF regulation ought to be the panacea to both problems identified above. Realpolitik, however, suggests otherwise. First, the military establishment has historically courted the religious right in Pakistan, both for political legitimacy and for ideological support in military misadventures in Kashmir and Afghanistan. As such, the establishment does not have the option of either dialling down its relationship with Saudi Arabia or even cracking down on the financing that right-wing parties in Pakistan rely on.

Second, reports from other jurisdictions suggest troubled domestic experiences with global AML-CTF regulation¹⁸ as well as the view in the academic literature that AML-CTF regulation doesn't work in containing either. Indeed, Hasan 2013, Shah and Hasan 2014 and Rehman 2015 outline fund mobilisation strategies deployed by militants in Pakistan that sidestep the formal financial system for the most part. As such, a detailed examination of Pakistan's case seems particularly apt. In a cash-driven economy where the undocumented sector rivals the size of the formal economy¹⁹, the chances of AML-CTF success thus seem questionable²⁰.

Last, but not the least is the fact that AML-CTF regulation enhances the surveillance powers available to states, powers that particularly interest the Deep State. Not only does Pakistan have a poor track record on the enforcement of human rights, particularly the security of person and right to privacy²¹, the state's powers are prone to abuse by state actors, particularly military

¹⁷ See, generally, Azmat Abbas, *Madrassah Mirage: A contemporary history of Islamic schools in Pakistan* (Islamabad, Emel Publications, 2018); Shoaib Hasan, "The Militant Economy", *The News International* (January 28, 2013); online http://e.thenews.com.pk/newsmag/mag/detail_article.asp?id=4482&magId=10

¹⁸ See, for example Sharman & Mistry's 2008 case studies of Barbados, Vanuatu and Mauritius (J. C. Sharman & Percy S. Mistry, *Considering the consequences: The development implications of initiatives on taxation, anti-money laundering and combating the financing of terrorism* (London, Commonwealth Secretariat, 2008)).

¹⁹ M. Ali Kemal & Ahmed Waqar Qasim, "Precise Estimates of the Unrecorded Economy" (2012) Winter Vol. 51, No. 4, Part II Pakistan Development Rev 505

²⁰ See, for example, Margaret E. Beare, "Compliance expectations: banking on the banks" (Paper delivered at Thirty-third International Symposium on Economic Crime, Jesuit College, Cambridge, September 9, 2015) [unpublished]

²¹ See, for example, Human Rights Commission of Pakistan, *Annual Report 2014*; online <http://hrcp-web.org/hrcpweb/annual-report-2014/>.

agencies, against its citizens²². The AML-CTF regime strips away or derogates from many constitutional and procedural safeguards available under existing laws; as such, the potential for abuse by the military establishment is amplified and some of these fears are already being realised. While the global trend towards the judicialization of politics has paved the way for the rise of the judiciary as a strong power centre in the last decade or so, infighting between the military establishment and the judiciary is likely to distract the latter from its task of protecting citizens.

1.3 Research design

Conceptualisation and operationalisation

I will argue that the uniformity of regulation and the lack of sustained, critical dissent in this vital area of global governance suggests a power that is ideological. I will suggest this power is all the more potent because it generates (and operates on) the belief that the existing social, political and economic status quo is natural, inevitable, perpetual and universally beneficial. Further, I will argue that the specificity of the standards themselves suggests a disciplinary power reminiscent of Foucault's "micro-physics of power"²³. My study thus aims to deconstruct the evolution and processes of the AML-CTF discourse with a view to interrogating its dominance.

In the context of AML-CTF regulation, I will argue that power refers to, first, the ability to control the discourse surrounding regulation. This includes the definition of key concepts and the creation of normative and legitimation frameworks²⁴. Second, in this dissertation, power refers to the ability to create and enforce regulations – what Hindess understands as capacity. Power also

²² See Human Rights Watch, *World Report 2014: Pakistan*; online <https://www.hrw.org/world-report/2014/country-chapters/pakistan> and International Commission of Jurists, *Authority without accountability: the search for justice in Pakistan* (2013); online <http://ici.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-PAKISTAN-FINAL-.pdf>.

²³ Foucault, Michel, *Discipline and Punish: the Birth of the Prison*, translated by Alan Sheridan (New York, Random House, 1995) at 26. [D&P]

²⁴ Louis Althusser, Etienne Balibar, Roger Establet, Pierre Macherey & Jacques Ranciere, *Reading Capital*, translated by Ben Brewster and David Fernbach (London, Verso, 2015) at 22-5, 36

carries embedded in its notions of legitimacy as well as the authority to organise accountability mechanisms as well as punitive or disciplinary measures – power as right²⁵.

In this dissertation, power is the independent variable and sovereignty is the dependent variable (the more power, the more sovereign a state/ institution/ individual), while AML/CTF regulation can be seen as one among several intervening variables. The juxtapositioning of the *imperatives* of power with the *processes of its construction*, I will explain, renders key insights into its aims.

Power and its sources (economic, military, political, ideological and judicial) are key concepts for the purposes of this study, which looks to document their interaction on the plane of AML-CTF regulation through an extensive review of the literature and, more particularly, through a case study of Pakistan. Power is used here in consonance with the insights provided by Mann, which refers to the ability to secure results through political manoeuvring effected by leveraging various sources of power. This power is held by actors (both individuals and states), institutions as well as networks. In the first instance, power refers to the ability of citizens to impact the laws they are governed by: for example, the ability of citizens within the pale of domestic politics to influence the character of AML-CTF regulation as it applies to them. In the second instance, power refers to a state's ability to make and administer the laws operative within its territorial jurisdiction *as well as* its ability to leverage its power on a global level to effect (as well as affect) *global* laws and regulations that it can benefit from. Finally, power also refers to the ability of institutions or networks to secure favourable outcomes in derogation of those sought by others.

Although AML-CTF regulation is pitched as voluntary, I will argue that its enforcement runs counter to such a characterisation. The 'outsourcing' of AML-CTF regulation to organisations such as FATF can, as such, be seen as an erosion of the monopoly of the state over making and administering law. Accordingly, among the indicators to be studied are how AML-CTF regulations impact North-South relations in a postcolonial context. Since power is reflexive at its core, the study shall examine the effect of these imported laws on the development of political institutions, democratic structures and processes in the South, using Pakistan as a case study.

²⁵ Barry Hindess, *Discourses of Power: from Foucault to Hobbes* (Oxford, Blackwell Publishers, 1996) at 1 [Discourses]

This shall be done by examining the impact of the implementation of the AML-CTF regulations on the parliament's relationships with its core constituencies, the people as well as national regulators (central banks etc). Significantly, this examination shall also extend to how AML-CTF regulation impacts relationships within a polity (between the legislature, the judiciary and the powerful military establishment in Pakistan). The analysis of how the various forms of power – political, military etc – work in tandem and in isolation will provide answers to the question of how AML-CTF regulations affect established hierarchies of power.

Methodology, data collection and sampling strategy

Given the complexity of the research questions and the need to develop a nuanced understanding of the phenomena under study, a qualitative research method was selected. The primary instrument of research were interviews, in order to “access the perspective of the person being interviewed ... to find out from them those things we cannot directly observe²⁶”. This was particularly necessary since power, as a concept, does not readily lend itself to observation and even when operationalised, requires further interpretation by its objects and subjects. The dependence on interviews was rendered all the more complete as there is little available literature that examine AML-CTF regulation through the prism of power.

Literature review

To develop a fuller understanding of power as well as the processes of its operationalisation, I drew on popular accounts from the fields of law, political science and sociology. While the selection of theorists may appear – at first blush – to be both Eurocentric as well as gendered, this was necessitated by the parameters of the study. First, in the chapter on power that forms the theoretical framework for this study (Chapter 2), the objective was to develop *a generalised theory of power* by mining the literature for commonalities. Since only the most influential, *general* accounts of power were selected, this resulted in the necessary omission of, for example, theorists from the global South as well as feminist voices. Second, while there was an attempt to

²⁶ Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (Newbury Park, CA, Sage Publications, 1990) at 278.

include women besides Arendt and Sassen, unfortunately, many did not make the cut due to the stringency of the parameters outlined above.

Given the lack of empirical evidence demonstrating the efficacy of AML-CTF in reducing/eliminating money laundering and terrorism financing, I relied on official data and/or published accounts issued by states and regulatory institutions.

By official data are meant quantitative assessments and economic/ financial data regarding efficacy issued by the IMF/ WB/ FATF as well as governments. For example, the IMF, WB and FATF cite a single guesstimate (of dubious provenance) regarding global money laundering; the Pakistani central bank does not even attempt an estimate for money laundered in Pakistan. The Panama and the Paradise papers disclosures are spectacular precisely because they provide a more substantial sense of the numbers involved than was previously possible. (However, since these numbers are drawn from the documents leaked from *one* law firm, they have no bearing on global estimates.) Accordingly, I tested efficacy by juxtaposing regulatory agency ‘non-claims’ (i.e. their lack of quantitative data demonstrating efficacy) with evidence of occurrence in the news media (i.e. unabated money laundering/ terrorism financing as evidenced by Panama/ Paradise-type revelations or terrorism financing operations).

Interviews

A total of 32 interviewees were selected through purposive sampling, networked introductions and the ‘snowball’ method. This was because an understanding of the field required specialist knowledge.

Most of the interviews ranged between 60 and 90 minutes each and were conducted in person in Islamabad, Karachi and Lahore over the summer of 2018. The interviewees were people responsible for the regulation, enforcement and implementation of AML-CTF regulation in Pakistan and included former and serving policymakers and technocrats within the government; law enforcement agencies (LEAs); financial sector regulators; investigators and prosecutors within national agencies; industry participants, especially bankers; lawyers; economists; academics; parliamentarians; rights activists; aid workers as well as journalists in Pakistan.

The interviews helped assess the potential impact of financial regulation on domestic constitutionalism, political institutions as well as democratic processes and procedures in Pakistan. The activists helped answer what these regulations will mean in a country with a patchy human rights record and a long history of excesses and surveillance by both political governments and the Deep State. Finally, the interviews with journalists covering militancy helped acquire a deeper understanding of how terrorism funding operates on the ground and, thereby, how the state (or, more accurately, the Deep State) is complicit in the securing the success or the failure of AML-CTF regulation.

Open-ended, semi-structured interviews were chosen as the most appropriate means of data collection. Since questions of power are rarely examined in conjunction with specifically money laundering and terrorism financing regulations, this format allowed for more considered and reflective responses. Further, since some interviewees were reluctant to challenge – or even voice misgivings – regarding regulations without empirical evidence to support their claims, the open/semi-structured format allowed me to respond to and individualise questions to get an in-depth response while staying within the broad parameters of the subject area²⁷.

To encourage greater disclosure and to ensure the safety of the interviewees where the information provided was either of a sensitive nature or where interviewees were prohibited from talking about the nature of their assignments, each interviewee was given the option of remaining anonymous for part/s or the entirety of their interview.

Finally, the interviews were not recorded and only notes were taken during the same. This was because recorded interviews generally encourage guardedness. Further, in the case of public officials, the absence of recorded interviews allows them to maintain plausible deniability. Finally, taking notes also makes for more active involvement on part of the interviewer²⁸, which was a key requirement.

Documentary Analysis

²⁷ Patton supra note 26 at 283.

²⁸ Simon Halliday & Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge, Cambridge University Press, 2009) at 249.

Since this project also focuses on the possible objectives of money laundering and terrorism financing regulation, research included discourse analysis of money laundering and terrorism financing regulation as contained in policy documents issued by global regulatory agencies such as FATF, the IMF, World Bank, the United National Security Council and the Organisation for Economic Cooperation and Development (OECD).

To focus the scope of the enquiry, the study focused the period between 1988 and present day. Second, the documents were chosen on the basis of their relevance to global AML-CTF harmonization projects. Therein, particular focus was laid on material changes in policies/ operations of the IMF/ World Bank etc (for example, documented instances of when AML-CTF-specific regulations were made part of country conditionality on IMF/ WB loans) and in the standards and codes they endorse/ promote (for example, the inclusion of the regulations in the IMF's surveillance work). Further, material changes in the workings of the global financial market – as reflected by practices of commercial banks; debt clubs; private financial institutions/ individuals and even states – were also examined. The chronological assessment of these changes show the gradual reification of AML/ CTF regulatory discourse.

The research also included analysis of statutes dealing with money laundering and terrorism financing in Pakistan, including the amended version of the Anti-Terrorism Act and the Anti-Money Laundering Act of 2010 as well as relevant portions of statutes such as the Pakistan Penal Code; the Income Tax Ordinance; the Customs Act as well as the Control of Narcotics Substances Act. Policy documents and guidelines issued by the National Counter Terrorism Authority, which is the lead agency in dealing with terrorism financing in Pakistan; the State Bank of Pakistan, which is the banking sector regulator, as well as the securities regulator Securities and Exchange Commission of Pakistan were also examined, in addition to the Constitution of the Islamic Republic of Pakistan. A close reading of these documents enabled a deeper dive for regulatory objectives.

Further, a study of the methodology of regulation contained in such laws and policies as well as the financial architecture described provided significant insights into the rationale and the possible objectives of the regulation. 'Methodology of regulation' here refers to the embedding of FATF regulations across the Pakistani legal universe – in a variety of criminal and civil

statutes, policy documents and guidelines, bilateral and multilateral agreements etc. This ‘regulatory web’, I believe, allows for more stringent enforcement of the FATF 40 recommendations than a single statute would have done. An examination of the precise location of a regulation (for example, whether it is part of the anti-terrorism law or general criminal law) offers greater insights into the intention of the framers as well as its potential for abuse.

Such a reading also allowed me to see first, the substantive changes in the laws over the period under study and to connect such changes to geopolitical events. Further, it also provided insights into how the law regarding money laundering and terrorism affects or purports to affect individuals and institutions (financial as well as, for example, charities). To test the validity of my findings, I further relied on contemporary scholarship for expert assessments regarding efficacy. This triangulation help increase the internal validity of the data or what Rubin and Rubin call “consistency-coherence²⁹”. (That is, any possible inconsistencies in data can be explained or unpacked, as the case may be.)

Researcher positionality

Having worked as a journalist in Pakistan for 18 years has provided me with significant exposure to and insight into Pakistan’s history, politics and business. As such, many of the people I interviewed were drawn from my professional network. Further, since my father was a judge at the Supreme Court of Pakistan and my brother practices law at the Supreme Court, I also had the advantage of being able to capitalise on their professional networks. This allowed me to build on existing relationships of trust and, through the means of networked introductions, further extend that circle. As a former business editor, not only am I deeply familiar with business practices as well as the workings of the financial sector in Pakistan, I have studied many of the applicable laws and regulations, particularly during the course of my Master’s research in financial sector regulation. This familiarity with both ‘technical’, financial sector-specific knowledge and the law worked to my advantage in conversations with most interviewees. Finally, due to my journalistic background, I also have a significant understanding of Pakistan’s militant networks, their operationalisation and the issues within. This includes an understanding of the relationship with

²⁹ Herbert Rubin & Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data* (New York, Sage Publications, 1995) at 87-9.

the state as well as a working knowledge of their financial operations (fund mobilisation etc) on the ground. Since several former colleagues cover militancy in Pakistan for mainstream Pakistani and foreign publications, I also had access to people who were better informed and provided me with supplementary information. Since the majority of interviewees hailed from urban professional backgrounds, I did not face any problems associated with perceptions regarding my gender, class or professional background. In most situations, I was able to trade in on my credibility as a former journalist to gain both access as well as trust. (But see the section on Limitations)

Limitations of the study

The most challenging aspect of this project was the lack of empirical data regarding both the ‘size’ of the problem as well as the efficacy of AML-CTF regulation. Official data regarding money laundering and terrorism financing (both globally as well as in Pakistan) provided only guesstimates of dubious provenance. While there has been every attempt to triangulate the figures cited by some interviewees, the data ought to be used with caution.

The second potential limitation is that in Pakistan’s context, it is hard to locate ‘the state’ within a praetorian state with a subservient legislature and timidly-assertive judiciary. Given the role of the military establishment in promoting ‘state-sponsored’ militancy, Pakistan’s historic civilian-military imbalance as well as military excesses against citizens, the study risks assuming causality where there may only be correlation (direct or indirect) or even a spurious relationship³⁰. While there has been every attempt to guard against this possibility by canvassing the widest range of opinions in both academic scholarship as well as among interviewees, an element of risk remains.

Finally, an additional challenge was that my analysis would be compromised or rendered less objective due to my positionality or being deeply embedded in the context. To guard against this possibility, the research design was built to include an alternative hypothesis, a large cross-

³⁰ de Vaus supra note 12 at 34-5.

section of opinion as well as a stringent data analysis methodology. Wherever possibly, I also cross-checked data against independent sources.

1.4 Project overview

My project begins with a general discussion of power in extant scholarship and, as I have read it, the implications for AML-CTF regulation. As a central concept of the study, the issue of power is taken up from four angles: what is power and who does it speak for; how is power produced, ordered and deployed; what does the interaction of various powers produce and are these results predictable; and finally, what are the aims of power.

The third chapter focuses on power relations embedded in the global AML-CTF architecture by mapping its historical evolution as well as the role of key actors, institutions and events, between 1988 (the first conception of AML regulation by the Basel Committee) and now, especially after 9/11. The wider context is about the geopolitics of making and administering AML-CTF regulation but equally about how the dynamic interaction of powers big and small produces unpredictable regulatory outcomes. The chapter then proceeds to a discussion of contemporary critiques of AML-CTF regulation as well as their deficiencies.

The fourth and fifth chapters draw off my fieldwork in Pakistan. The fourth slices Pakistan's AML-CTF regime two ways: first, in the context of how its foreign policy, especially in relation to the US and Saudi Arabia, influences both the enforcement and the implementation of regulation in Pakistan; second, in the context of how the domestic sources of power – military, economic, political, ideological and judicial – both affect and are affected by the implementation of *global* regulation. That is, how global AML-CTF regulation amplify and/or erode domestic sources of power.

The fifth chapter sets out the costs of implementation of AML-CTF regulation in Pakistan, given particularly the structure of its economy and its polity. I look at the possible consequences of the democratic deficit in AML-CTF regulation on the North-South power dynamic as well as the possible consequences for democratic processes in Pakistan. These obviously include the right to be governed by a government of one's choice and to hold it accountable for transgressing the

defined limits of such delegated power. However, far more pertinent is how the regulations will affect the balance of powers in contemporary Pakistan.

CHAPTER 2: Re-reading power inside the AML-CTF regime*

The question of power is key to this project. Like transnational economic law³¹, anti-money laundering and counter terrorism financing (AML-CTF) regulation too does not respond to analyses of power that are state-centric and the Foucauldian focus on the relational, processual and strategic aspects of power is a better analytical fit for a domination that arises from “a constellation of interests³²”. Significantly, this constellation refers to both the array of global *and* local ‘drivers’ of AML-CTF regulation *as well as* the variety of ideational *and* material goals pursued by these drivers.

The drive towards (and away from) AML-CTF regulation can be resolved into its constitutive elements that determine and influence the trajectory of regulation as well as its implementation (see Chapter 3 for details). Globally, these elements comprise states who benefit from money laundering vis-à-vis other states that do not; developed states vis-à-vis developing ones; individual states vis-à-vis transnational regulators; and transnational networks and pressure groups vis-à-vis governments. Domestically, these elements comprise the military vis-à-vis the judiciary; state bureaucracies (central banks etc) vis-à-vis economic actors; law enforcement agencies vis-à-vis the people, including domestic politicians; the state vis-à-vis criminal organisations; and even regulators vis-à-vis industry. At the global level, power manifests itself as pressure from various actors/ institutions/ networks (for example, the US/ the Financial Action Task Force on Money Laundering and Terrorism Financing (FATF)/ G7). Within domestic jurisdictions, the drive for and against AML-CTF regulation can be distilled to the various sources of economic, political, ideological, judicial and military power within a polity: for example, an on-shore haven may have an *economic* interest in encouraging the inflow of laundered monies from other jurisdictions but a *political* interest in arresting the flow of terrorism financing.

This array of ‘drivers’ – as well as the opposition between them – confirms the Hobbesian degrees-of-power analysis, *where everyone has some power*. Crucially, the ‘drivers’ are not just ruling elites: the *relational* aspect of power ensures that non-elite groups also have a voice in the

* Particular thanks to Frank Pearce for his insightful critiques of earlier drafts of this chapter.

³¹ See, generally, Schaffer and Zumbansen

³² Rheinstein, Max, ed and trans., *Max Weber on Law in Economy and Society* (Cambridge, Harvard University Press, 1966) at 324. [Weber]

regulation. For example, militant groups in Pakistan (through their influence on military and judicial power) and global movements such as the Tax Justice Network or Global Financial Integrity (as a consequence of their efficacy as pressure groups) also wield a power that does not comport with their size.

The point that deserves greater recognition, however, is that power is both the capacity to *act* and to *resist*. In the context of AML-CTF regulation, the resistances that Foucault and Lukes speak of are visible in, for example, the “hidden transcripts” that are disguised expressions of ideological insubordination – for example, the subversion of the implementation of AML-CTF regulation by the Deep State in Pakistan.

Finally, power within the AML-CTF universe is both ideational and material: the former, in how it is pitched, for example, as a battle against organised crime; the latter in how it operates to the material advantage of laundering havens in developed countries or of ‘exporters’ of compliance products in such countries.

‘Global’ regulation can thus be seen as the product of the interaction of these big and small, domestic and global powers that clash, converge, consolidate, oppose, resist and nullify each other through strategic alliances and ruptures. To understand the *effects* of power within the AML-CTF universe requires an appreciation of the power structures and networks undergirding the global regime. To this end, the present chapter explores, first, the question of power itself; second, how it is produced, ordered and deployed. The final section discusses what happens when differently sized and oriented powers compete and whether these outcomes are predictable.

2.1 Power, defined

Given that power means different things to different people in different contexts, it is necessary to structure the specific contours of any debate regarding its meaning. This section refers to definitions available in the existing literature on power in the disciplines of sociology, politics, law and philosophy. Accordingly, each definition carries the imprint of the evolution of its discipline over time as well as convergences and intersections across disciplines.

The concept of power has received sustained scholarly attention in European thought since (and even before) Hobbes’ *Leviathan* in 1651 but its inherent porousness and fungibility render it resistant to an easy universalisation. There is no singular, universal understanding of what power

is, where it is found, what it does and how it works. There are overlaps and commonalities between various theories but these crop up in unexpected spaces: for example, most see invisibility or the complicity of the subjugated as essential to the exercise of power, not visible displays of power or coercion. Differences in conceptions of power, meanwhile, are invariably rooted in context: power in sexual relations is fundamentally different from the exercise of sovereignty. Power thus expands and contracts according to the lens of the theorist examining it and the situation it is applied to. Even the theories that allow for a more general applicability of the concept of power – especially as it relates to AML-CTF regulation – are almost invariably mired in restrictive contexts or riven by certain fundamental inadequacies. For example, while Foucault’s explications regarding power and resistance are analytically useful in understanding the operation of AML-CTF regulation, he rarely delves into the precise workings of the economy. Accordingly, for a project that focuses on financial regulation, Foucault’s theories necessitate adaptation or tempering with insights from theorists with a stronger economic focus such as Marx, Gramsci, Weber and Poulantzas.

The classical Hobbesian definition sees power as man’s present means to acquire some future apparent good³³. This power may be original (or natural) in that it flows from the eminence of mental or physical faculties, or it may be instrumental (or acquired), that is power – acquired through the eminence of faculties or by fortune – which is the means and instrument to acquire more³⁴. The strength of Hobbes’ analysis lies in the insights he derives from a series of everyday examples of power. He shows, for example, material wealth, knowledge and eloquence as types of power, which possess an essential, inherent transmutability: each can potentially be converted into benefits for the user³⁵. The point about transmutability is significant – Bourdieu later makes a similar point regarding the inter-convertibility of economic, social and linguistic capital (discussed later) – since it shows power as the means to an end and not as an end itself.

The other important point Hobbes makes is regarding ‘honour’, that is, recognition or acknowledgement of power³⁶. While the concept was later investigated as ‘validity’, ‘legitimacy’

³³ C.B. MacPherson, ed, *Thomas Hobbes: Leviathan* (London, Penguin, 1968) at 150. [Leviathan]

³⁴ *Leviathan* supra note 33 at 150

³⁵ *Leviathan* supra note 33 at 139. For Hobbes, even physical appearance qualifies as power since it can secure a future good: the favour of women and strangers.

³⁶ Thomas Hobbes, *Elements of Law, Natural and Politic* (available for download at HeinOnline) at 25. [Elements]

and ‘recognition’ by many theorists ranging from Weber to Bourdieu, Hobbes originally saw honour as the worth of a person as determined by the value others placed on their power or the use thereof – a succinct explanation of the relational aspect of power. Critically, Hobbes is alive to the essential subjectivity of such assessments: he notes that evaluation is dependent on the needs or judgement of the evaluator and is conditioned by their peculiar context³⁷. The value of this insight is indicated by the fact that more than three centuries later, contemporary scholarship is still preoccupied with the subjectivity of norms and discursively constructed legitimacy.

Bourdieu also makes a similar point regarding the acknowledgement of power. The language of authority, he notes, governs *in collaboration* with those it governs and with the aid of the social mechanisms capable of producing this complicity. For a language to be accorded the importance it claims, it needs to be recognised as such³⁸. This is because power and authority come to language from the outside: from the social position of the speaker and his participation in the authority of the institution authorising his utterance (as reflected by his access to the legitimate instruments of expression) but also – in the Hobbesian sense of subjectivity – from the legitimacy of the situation and the legitimacy of the receivers of the said utterance³⁹. Legitimate receivers (or the market for a discourse), argues Bourdieu, shape both the symbolic value of and, by means of their unique interpretation, the real meaning of the discourse⁴⁰.

The insight is key to understanding the pre-eminence of FATF as *the* global authority on both money laundering and terrorism financing. If the organisation is assessed – like other global economic regulators – against criteria such as democratised rule formation or the breadth of its political engagement (as reflected by its membership), FATF’s legitimacy as a regulator is questionable. But, as Chapter 3 shows, the non-representative nature of FATF and its non-democratic processes prove no real impediment. This is because its language of authority, to quote Bourdieu, comes from the *outside*: FATF is pre-eminent because *its power is recognised* by other actors (states such as the US; institutions such as the International Monetary Fund (IMF) and networks such as the G7). These actors *lend* their power and authority to FATF by

³⁷ Leviathan supra note 33 at 151-2

³⁸ Pierre Bourdieu, *Language and Symbolic Power*, ed by John B Thompson, translated by Gino Raymond & Matthew Adamson (Cambridge, Harvard University Press, 1991) at 72. [Symbolic]

³⁹ Symbolic supra note 38 at 111-3

⁴⁰ Symbolic supra note 38 at 38

accepting – and thereby *endorsing* – its jurisdiction over the issues of money laundering and terrorism financing. Further, this market for the FATF discourse on money laundering or terrorism financing – the “legitimate receivers” – shapes both the symbolic value of and, by means of its unique interpretation, the real meaning of the discourse⁴¹. For example, how the Basel Committee on Banking Supervision – as one such ‘receiver’ – interprets the regulations as applicable to the financial services industry ends up being the most authoritative explication of the *global* AML-CTF standards regarding banks⁴². Similarly, the IMF’s endorsement and promotion of FATF standards *enhances* both the symbolic value ascribed to AML-CTF compliance as a normative good but also its *material* value as a guarantee for better terms on a loan or the route to a better assessment of a country’s financial sector in an IMF-World Bank-authored Financial Sector Assessment Programme⁴³.

For Hobbes, however, material gain or the threat of violence are the only guarantee of compliance. People honour the commands of a sovereign, he says, when they value him/her for the help s/he can provide or the harm s/he may inflict⁴⁴: “the terrour of some Power⁴⁵”. The argument holds up well in the AML-CTF context: FATF’s ability to grey- or blacklist countries based on their lack of compliance would probably not have inspired such fear among ‘errant’ jurisdictions if the listing did not affect access to financial capital and services. A FATF ‘call-for-action’ is a call for all its members and partners to cooperate in effecting a financial chokehold on a jurisdiction by eliminating transactions with the said jurisdiction or enhancing scrutiny of the existing ones. The FATF call translates into the jurisdiction’s inability to – for example – seek IMF monies; avail of correspondent services from global banks; raise monies from international capital markets⁴⁶.

The most sophisticated excursion of Hobbes’ thought, however, lies in his description of the interaction of powers (what Gramsci and Foucault subsequently develop as, respectively, alliances and network of power relations; discussed below). “[T]he power of one man resisteth

⁴¹ Symbolic supra note 38 at 38

⁴² For a more detailed discussion, see Chapter 3.

⁴³ The programme is part of the IMF/ World Bank’s surveillance operations, which aims to analyse the quality of the financial sector in a jurisdiction. See Chapter 3 for a more detailed discussion of how such assessments inform both lending by the IMF as well as by the international capital markets.

⁴⁴ Leviathan supra note 33 at 152

⁴⁵ Leviathan supra note 33 at 223, 225

⁴⁶ See Chapter 3 for detailed discussion.

and hindereth the effects of the power of another: power simply is no more, but the excess of the power of one above that of another. For equal powers opposed, destroy one another; and such their opposition is called contention.⁴⁷” For Hobbes, power is not the zero-sum game some Marxists (including Marx himself) allude to; the exercise of power cannot be reduced to a binary of the powerful against the powerless in an orderly, circumscribed field. Instead, Hobbes favours a degrees-of-power analysis, suggesting a field with competing forces of varying magnitude: interacting, consolidating, opposing and nullifying each other. Simply, no one is completely deprived of power in Hobbes’ world; some have more, others less. The exercise of power in the context of AML-CTF regulation can then be seen as the clashing and/or convergence of big and smaller powers – ruling elites and non-elite groups – both at the global and the local level.

Although Hobbes does not state so explicitly, the resistance and hindrance he speaks of emerge as inherent to the exercise of power and not as a consciously organised, revolutionary opposition. Foucault articulates it thus: “where there is power, there is resistance”, in fact, “a plurality of resistances”, since there is “no single locus of great Refusal”. But Foucault cautions against viewing these points of resistance as “only a reaction or rebound, forming with respect to the basic domination an underside that is in the end always passive, doomed to perpetual defeat”. Instead, he sees resistance as inscribed in power as an “irreducible opposite” and scattered over the power network: capable of creating new alliances, cleavages, regroupings and even revolutions⁴⁸.

Poulantzas takes strong exception to this resistances argument, contending that the existence of power precludes the presence or even the emergence of resistance⁴⁹. But this reading ignores the relational, reciprocal aspect of power Poulantzas dilates on himself: where power is a field of struggle between competing interests, the exercise of power by one runs directly counter to the exercise of power (or, effectively, resistance) by another⁵⁰. The very application of power itself suggests the prior presence of a smaller force or resistance.

⁴⁷ Elements supra note 36 at 26

⁴⁸ Michel Foucault, *History of Sexuality: Vol 1: an introduction*, translated by Robert Hurley (New York, Pantheon Books, 1978) at 95-6 [HoS]

⁴⁹ Nicos Poulantzas, *State, Power, Socialism*, translated by Patrick Camiller (London, NLB, 1978) at 149

⁵⁰ Poulantzas supra note 49 at 147

Lukes appears to corroborate such a reading as well as Foucault's original assertion when he challenges the notion of power being analogous to domination. Quoting extensively from James Scott's *Domination and the Art of Resistance: Hidden Transcripts*, Lukes contends that the 'victims' of domination are actually tactical and strategic survivors who dissemble in order to survive. Since they have everything to lose by openly resisting the dominant forces, their resistance is concealed in "hidden transcripts" of their lives away from public scrutiny and in open yet disguised expressions of ideological insubordination. With Scott, Lukes also believes that these resistances are eclipsed out of "official" or public transcripts – which are created and infused with the power of the dominant forces – and replaced with narratives that seem to verify the purported hegemony of dominant values⁵¹.

That said, as Agamben correctly identifies, the originality of Foucault's contribution towards an understanding of power lies in that he veers away from the traditional juridico-institutional models of power: definitions of sovereignty and the theory of state⁵². Instead of locating power within state sovereignty, law or domination, Foucault focuses on the operation of power in ways that are, concurrently, relational, processual and strategic. Power, to him, is: "the multiplicity of force relations immanent in the sphere in which they operate and which constitute their organisation; [] the process which, through ceaseless struggles and confrontations, transforms, strengthens or reverses them; [] the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and [] the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies⁵³". (This can be seen, for example, in the Pakistani military establishment's unarticulated opposition to the implementation of AML-CTF regulation. While the "official transcripts" or the Pakistani state's communications with FATF suggest a complete capitulation, the "hidden transcripts" or the actual conduct of the state show an opposition that is both active and undefeated. Moreover, the military establishment also *deploys* AML-CTF regulation to help achieve its own ends by, for example, using the regulation to discredit its

⁵¹ Steven Lukes, *Power: a radical view* (Basingstoke, Palgrave Macmillan, 2005) at 124-7

⁵² Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford, Stanford University Press, 1998) at 5

⁵³ HoS supra note 48 at 92-3

political foes, thereby creating new fissures and alliances within the polity (see Chapter 4 for a detailed discussion).)

More specifically, Foucault refers to power as a certain type of relation between individuals where one can, more or less entirely, determine another's conduct⁵⁴. However, he is quick to include the caveat that such a determination of conduct is never exhaustive (in the sense of total control) or coercive (that is, the subject is never coerced into compliance)⁵⁵. (While Foucault does not dilate on precisely why a power-driven determination of conduct is non-exhaustive, the presumption seems a concession to the vagaries of human behaviour.) There are two significant diremptions worth exploring here: the break with Marx's base-superstructure argument and the emphasis on the absence of coercion in the exercise of power. Foucault's failure to adequately theorise economic relations within power is a conceptual weakness in his overall framework but the problematisation of coercion and consent is a far-reaching key feature of his thought.

As Hindess contends, modern Western political thought features two competing conceptions of power. The first is the idea of power as a generalised capacity to act (he calls this power-as-capacity); the second is power as a capacity to act but accompanied by the *right* to act, which is *predicated on the consent of the subjugated* (power-as-right)⁵⁶. To contextualise Foucault's contribution, it is worthwhile to look at other influential explications of the power-coercion nexus. Hobbes, for example, seems to adhere to the power-as-capacity thesis and propounds the principle of *coactus tamem voluit* (although coerced, it was his will)⁵⁷. Hobbes maintains that the simultaneous existence of liberty and fear are possible because even a man driven to an action by fear is at liberty to omit to do so⁵⁸. That this 'liberty' does not correspond to general standards of free will and doesn't represent 'real' choice does not interest Hobbes. Weber, meanwhile, insists that an act – physical or psychological – qualifies as coercion proper only if it is backed by an order and is applied by “a staff of people holding themselves specially ready for that purpose”⁵⁹.

⁵⁴ “The Subject and Power” in James D. Faubion, ed, *Essential Works of Foucault 1954-1984: Vol 3: Power* (London, Penguin, 2000) at 337. [Power]

⁵⁵ “The Subject and Power” in Power supra note 54 at 337

⁵⁶ Discourses supra note 25 at 1

⁵⁷ Hindess, however, maintains Hobbes' thought represents a confusion between power-as-capacity and power-as-right. Discourses supra note 25 at 14

⁵⁸ Leviathan supra note 33 at 262-3

⁵⁹ Weber supra note 32 at 6.

The significance of this definition acquires greater clarity when juxtaposed with what Weber defines as domination, that is, the possibility of imposing one's will on another. While he does not define 'power' directly, he categorises domination as a special case of power⁶⁰. This domination arises from either "a constellation of interests", especially a position of monopoly, or from authority (that is, the power to command which imposes a corresponding duty to obey)⁶¹. But while domination appears strikingly similar to an authoritarian power of command in that the will of the person exercising power influences the conduct of the 'ruled' through empathy, inspiration, persuasion or some combination of the three⁶², its distinguishing features are its validity (that is, its appearance as exemplary or obligatory) and, as a consequence, its legitimacy. For Weber, obedience/ conformity with the will of the ruler qualifies as domination only when the command is accepted as a valid norm: "as if the ruled had made the content of the command the maxim of their conduct *for its very own sake* [emphasis added]⁶³".

This point bears repetition: the command is obeyed not because it is one or because the subject is coerced but because the validity of the norm is accepted. Power can thus be seen as operative in not the issuance of a command per se but in the actions, ideas or representations that validate the norm and encourage obedience – power-as-right. While Weber remains acutely aware of the possibility of this domination translating to a strict or oppressive discipline or even a "despotic hegemony" with coercive apparatuses, he still points out that it is a consequence of a contract made between formally equal parties through voluntary acceptance of the terms⁶⁴.

With his "normalising judgement" concept, Foucault takes up and expands on the political act involved in the creation and propagation of this aspect of the Weberian norm. Power, insists Foucault, does not act upon a person; it is a mode of action that acts upon the *action* of a person⁶⁵. The subject is thus necessarily complicit – actively or passively – in his own subjugation by the norms he accepts and orients his behaviour towards; by the disciplines and

⁶⁰ Weber supra note 32 at 323.

⁶¹ Weber supra note 32 at 324

⁶² Weber supra note 32 at 328

⁶³ Weber supra note 32 at 328. Validity, here, means the appearance of the order to some actors as exemplary or obligatory and thus binding. These two factors condition the 'legitimacy' of the order. p 3

⁶⁴ Weber supra note 32 at 326-7. The impact of domination on Weber's (un)freedom of contract thesis would have made for riveting reading but unfortunately, Weber deals mostly with the rights of third parties to a contract and the reflexivity between special and general law.

⁶⁵ "The Subject and Power" in Power supra note 54 at 340

power relations he internalises⁶⁶; but, above all, by his acceptance of the ‘truth’ of his identity as articulated and imposed on him by power⁶⁷. The complicity of the subject is thus critical to the working of power. Unlike coercion, power can only be exercised over free subjects since power and freedom are a permanent provocation to each other⁶⁸. Since power exists only in its *exercise*, it is not a renunciation of freedom, a transfer of rights or a delegation of power to one or a few. Accordingly, the exercise of power cannot be predicated on consent; ‘consent’ can only form the *basis* of a power relation but a power relation is not the manifestation of a consensus⁶⁹. This line of reasoning comes through more clearly when he describes the technique of individualising correction in prisons. The function of ‘discourse’, argues Foucault, is to allow for a “universal recoding” that enables both the convict and all other potential offenders to see that the punishment is not only ‘natural’ but in their own interest⁷⁰.

Bourdieu further develops this notion of power-as-right or the complicity essential to the exercise of power as “symbolic power”. All symbolic domination, he contends, presupposes a complicity on part of the ruled that is neither passive submission to external constraint nor the exercise of free will. Instead, it is the systematised inculcation of dispositions in line with the rules of a particular market⁷¹, be it the official sector or international capital markets. The efficacy of this symbolic power, as Thompson reads Bourdieu, thus depends on the inculcation of certain forms of cognition or belief so that even those who gain the least from the exercise participate in their subjection for the most part since they have been deprived, as Bourdieu puts it, of a sense of deprivation⁷². By acknowledging the legitimacy of power or of the hierarchical relations of power they are embedded in, the subjugated fail to recognise hierarchy as an

⁶⁶ D&P supra note 23 at 202-3. Here, Foucault is talking about Bentham’s Panopticon and how the prospect of permanent visibility leads to an internalization of discipline by prisoners and their self-surveillance.

⁶⁷ “The Subject and Power” in Power supra note 54 at 331

⁶⁸ So, for example, slavery is not a power relation for Foucault. “The Subject and Power” in Power supra note 54 at 340-2

⁶⁹ “The Subject and Power” in Power supra note 54 at 340

⁷⁰ D&P supra note 23 at 108-9

⁷¹ Symbolic supra note 38 at 50-1, 54, 82-3. Bourdieu is talking specifically about the domination exercised by an “official language”, whereby speakers subconsciously adjust their manner of speaking – without any consciously experienced constraint – to correspond to the rules of the official language in order to capitalize on their linguistic capital. He uses the speech patterns of those deprived of economic and cultural capital to show how their attempts to emulate upper-class speech (or conversely, even deliberately flout such rules) is born of their internalising a system of evaluation stacked against them: what expresses itself as linguistic habitus is for Bourdieu really class habitus.

⁷² Symbolic supra note 38 at 123-4

arbitrary social construct designed to serve the interests of some groups more than others⁷³. (Interestingly, while many of the Pakistani interlocutors correctly read US pressure behind FATF’s greylisting of Pakistan⁷⁴, too many fail to recognise the extent of money laundering in many developed countries or even the irony of Saudi Arabia – as a self-confessed financier of terrorism – being a FATF member (see Chapters 3 and 4 for detailed expositions).)

Both Foucault and Bourdieu are on the same conceptual plane. The function of discourses in the Foucauldian sense is to “impose frameworks which structure what can be experienced or the meaning that experience can encompass, and thereby influence what can be said, thought and done⁷⁵.” And, as a corollary, what *cannot* be. The implicit ‘consent’ of the convict to his correction secured by recoding can thus be seen as qualitatively different from the Gramscian notion of consent as a foundation for power or hegemony⁷⁶. In Foucault’s example, power is exercised through the administrative apparatus to alter the *mindset* of the convict by the means of “representations” that *communicate to him* his interests, advantages and disadvantages as well as his pleasures and displeasures⁷⁷. (This shows up, strikingly, in calls by several Pakistanis to implement AML-CTF regulations “for our own sake”, “in our own interest⁷⁸”. That is, *without having meaningfully interrogated the quality or the efficacy of the regulation*, several are convinced of the *inherent salubrity* of the regulation.)

Unlike Gramsci’s subordinate class which has its own set of internal demands, Foucault’s convict *receives* a conception of who they are *from the outside*. Much like Pavlov’s dog, the convict learns to associate the idea of crime with the idea of punishment and view it as “a retribution that the guilty man makes to each of his fellow citizens, for the crime that has

⁷³ Thompson in Symbolic supra note 38 at 23

⁷⁴ Interview 10, senior journo; Interview 12, senior bureaucrat; Interview 15, senior parliamentarian

⁷⁵ Allan Hunt & Gary Wickham, *Foucault and law: towards a sociology of law as governance* (London, Pluto Press, 1994) at 8.

⁷⁶ The difference between the Foucauldian and Gramscian consent is of the mode of acquisition of said consent. Gramsci’s hegemonic class looks to position itself as a universal, pan-national representative by co-opting the subordinate classes as allies, by accepting their popular-democratic demands and transforming their outlook (or “ideology” or “common sense”) by an ideological struggle on an intellectual and moral plane. The aim of this struggle is to forge “a common conception of the world” that can undergird a common will. However, the consent of the subordinate classes is voluntary and secured by the means of concessions as well as this ‘new’ common ideology, which is established after an ideological struggle and not by fiat. Quintin Hoare & Geoffrey Nowell Smith, eds & trans, *Selections from the Prison Notebooks of Antonio Gramsci (1929-1935)* (London, Lawrence and Wishart, 1971) at 74, 77-78, 57-61. [SPN]

⁷⁷ D&P supra note 23 at 125-7

⁷⁸ Interview 15; senior parliamentarian

wronged them all⁷⁹”. (One such example are the FATF-mandated action plans that every ‘errant’ jurisdiction agrees to file after invasive country reviews by monitors such as the FATF-style regional bodies (FSRBs)) The convict’s ‘consent’ to the punishment or, more precisely, their belief in punishment as a duty they owe, is the result of the manipulation of their mind and not any manifestation of their will. This malleability of consent is the reason Foucault refuses to see an *exercise* of power in a renunciation of freedom, a transfer of rights or a delegation of power. Using his studies on prisons, hospitals and human sexuality⁸⁰, Foucault shows how consent is actively manufactured and conduct determined by using disciplinary tactics and “technologies of power”.

In the AML-CTF context, this consent or complicity of the subjugated is reflected in the fact that most jurisdictions submit ‘voluntarily’ to FATF jurisdiction in that they *choose* to comply – power-as-right. The *validity* of the norm – to desire to crack down on money laundering or terrorism financing – is accepted; the subject becomes complicit in their own subjugation by the norms they have accepted and oriented their behaviour towards⁸¹. This orientation reflects in either the internalisation of certain disciplines/ power relations/ rules of a particular market⁸² (for example, the *submission* to AML-CTF rules for either their own sake or for the sake of the capital markets) or the acceptance of the truth of the subject’s identity as articulated and imposed upon it by power⁸³ (for example, by ‘delinquent’ jurisdictions ‘accepting’ the greylisting or blacklisting classification that FATF imposes on them instead of challenging or ignoring it). In line with Foucault’s reading of the function of discourses in manufacturing consent⁸⁴, the power of the AML-CTF discourse seems to obviate resistance or defiance since countries see the regulation as in their own interest: every greylisted country and even Iran – despite its blacklisting – is struggling to achieve AML-CTF compliance⁸⁵. Critically, however, acceptance of the norm *should not be conflated* with normative endorsement. That is, not all the jurisdictions

⁷⁹ D&P supra note 23 at 109-110

⁸⁰ Various, D&P supra note 23, HoS supra note 48, *Madness and Civilisation*.

⁸¹ Weber supra note 32 at 328; Discourses supra note 25 at 1; Power supra note 54 at 331; D&P supra note 23 at 202-3

⁸² Symbolic supra note 38 at 50-1, 54, 82-3

⁸³ Power supra note 54 at 331

⁸⁴ D&P supra note 23 at 108-9

⁸⁵ <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/public-statement-june-2019.html>

that comply believe AML-CTF regulations are a normative good; many comply for more pragmatic reasons such as ease of trade and/ or financial transactions with other jurisdictions⁸⁶.

Barring Hobbes, all the major theorists seem to veer towards an understanding of power-as-right. However, despite this and other specific differences in the positions assumed by Hobbes, Weber, Gramsci and Foucault, there is a striking similarity common to all: violence. It is loud and explicit in its exercise in Hobbes and Foucault (coercion, fear, imposition, discipline); quieter and more tractable in Weber and Gramsci (empathy, persuasion, co-option, concession). One inference would be that there is no getting around the structural violence involved in orienting an action, even when mediated by consent.

However, there is a gentler, third way too: Bourdieu's habitus. Objects of knowledge, he says, are constructed by a system of structured, structuring dispositions – the habitus – which is constituted in practice and is always oriented towards practical functions. The world and its exigencies – how things are to be said or done – impose themselves in thought and deed “without ever unfolding as a spectacle⁸⁷”. That is, individuals are ‘conditioned’ on a subconscious level to act and react according to certain principles that are never articulated as formal ‘rules’. As Thompson explains in the introduction to *Language and Symbolic Power*, habitus is a set of dispositions that inclines agents to act/ react in certain ways and generates (in interaction with the context of the individual) practices, perceptions and attitudes that are regular without being consciously coordinated or governed by any rule. Inculcated by mundane processes of training and learning and reflective of the social conditions it was acquired in, the greatest utility of a habitus lies in the fact that, first, it becomes ingrained in a body such that it endures for the life of the individual in a pre-conscious way so that it doesn't readily change with conscious reflection and modification, and second, that the conduct produced is capable of being transposed to fields other than the one of their acquisition⁸⁸.

The potential advantages of the use of habitus as a technique of power seem incomparable. First, ‘training and learning processes’ seemingly bleed power of visible violence as well as its normative core, thereby pre-empting and forestalling any resistance. Second, the durability of the

⁸⁶ See Chapter 5 for a more detailed discussion of how AML-CTF compliance affects trade and business.

⁸⁷ Pierre Bourdieu, *The Logic of Practice*, translated by Richard Nice (Cambridge, Polity Press, 1990) at 52. [Logic]

⁸⁸ Thompson in Symbolic supra note 38 at 12-3.

habitus as well as its own resistance to modification makes it a more secure guarantor of the desired behaviour. Finally, its mobility to other contexts is a convincing argument in favour of its cost-effectiveness as a technique of power. That said, even habitus is not immune to the charge of violence in just the fact of its inculcation.

The AML-CTF regime offers several examples of such structured, structuring dispositions designed to inculcate certain attitudes. Through *seemingly* mundane processes of training and learning – for example, the filing of Suspicious Transaction Reports; a country’s regular submission to FATF, International Monetary Fund (IMF) and World Bank (WB) scrutiny; the filing of copious compliance reports – the habitus is engrained such that it *endures*. Critically, habitus here is not the *filing* of reports per se; it is *habituated* compliance with certain principles *that are never articulated as formal ‘rules’*: submission to scrutiny, accountability and a general willingness to change everything deemed offensive or objectionable by the regulators (for example, domestic legislation; the monitoring of financial or economic systems; regulations and rules). To rephrase, the filing of Suspicious Transaction Reports by a banker is significant because *it represents a series of duties*: to report, to submit to scrutiny and to be held accountable for failure to comply. Moreover, the conduct is easily transposed to other fields: for example, habituated compliance with FATF-mandated *banking* regulations was easily extended to more invasive surveillance by including realtors, lawyers, jewellers and casinos in the reporting effort against launderers/ terrorism financiers.

Such a reading of power, of course, conflicts with traditional state-centric analysis, which relies on the concept of the delegation of sovereignty, whether by God or the people. Hobbes, for example, sees the state’s power (whether acquired through natural force or war or through a covenant of political representation⁸⁹) as the fusing of the power of many into one person, natural or civil, who can use their collective power as s/he wills⁹⁰. Since FATF boasts only 39 members despite claiming global authority, the idea of delegated sovereignty does not really apply here.

⁸⁹ Leviathan supra note 33 at 228

⁹⁰ Leviathan supra note 33 at 150. Although the process he describes is clearly the delegation of authority, Hobbes insists this exercise of collective power is not delegation. He claims that the subjects do not *give* the sovereign the right to punish; they *choose* not to exercise their own right to do so, thereby strengthening the sovereign’s right. Leviathan at 354.

The above survey is not exhaustive by any means but one omission stands out nonetheless: Marx. As one of the earliest and most influential theorists of power, Marx exemplifies power's ability to expand and contract in accordance with the lens of the theorist and illustrates the consequent profits and pitfalls at either extreme. With historical materialism⁹¹, Marx positioned the economy as central to every human enterprise and located class struggles at the heart of all conflict in society. An extraordinarily powerful analytic tool, it expanded the epistemic frontiers of the knowable world; once seen, the dominant role of the economy in influencing social, political and intellectual life processes could not be unseen. For Marx, however, this insight led to the conclusion that political power was "the organised power of one class for oppressing another⁹²"; the bourgeoisie, agents of power; and the state, its instrument for class domination. Compounded by his polemical style, this econo-centric focus to the derogation of all other frameworks proved detrimental to the vigour of Marx's original insight and rendered his theory more susceptible to attack by several generations of scholars.

Weber and Gramsci, for example, make powerful cases for understanding power as, and in, a dialectical relationship with politics, culture and religion. Significantly, neither contests the significance or even the primacy of the economy in power relations; they just dispute its exclusivity as the source of all power. Hindess and Hirst, comparatively, take a more aggressive line and challenge the very concept of mode of production as a social totality, "a form capable of historical existence as a society⁹³". In an influential critique of both Marx and the Althusser-Balibar duo (authors of the equally influential *Reading Capital*), Hindess and Hirst advocate a broader conception of class relations than as economic class relations alone. Further, as Bourdieu argues, treating the political field as an epiphenomenon of economic and social forces ignores the symbolic effectiveness of representation and the proper political power of the government. To Bourdieu, the political field is the site of competition for the right to speak in the name of all. "The world is multi-dimensional," he argues, "and allows for the valuation of different kinds of capital⁹⁴." Economic capital is obviously valuable but so are cultural, linguistic and symbolic

⁹¹ Terrell Carver, ed & trans., *Marx: Later Political Writings* (Cambridge, Cambridge University Press, 1996) at 159-60. [Later Marx] As Marx articulates his vision of the political economy, material economic circumstances provide the base onto which the ideological superstructure (law, politics, religion etc) of a society is grafted.

⁹² Later Marx supra note 91 at 20

⁹³ Barry Hindess & Paul Hirst, *Mode of Production and Social Formation: an auto-critique of Pre-Capitalist Modes of Production* (London, The Macmillan Press, 1977) at 2.

⁹⁴ Symbolic supra note 38 at 7-8.

(that is, accumulated prestige or honour) capital, especially since the forms of capital are convertible among themselves⁹⁵.

As Poulantzas rightly observes, the economic process is class struggle and thus, manifests relations of power, not just economic power⁹⁶. But contrary to Marx's assertion that politics and ideology are built upon the foundation of the economy, Poulantzas holds that political and ideological relations are already present in the actual constitution of the relations of production. This, he says, is *why* they play an essential role in the reproduction of the latter; this is also why the process of production and exploitation involves the reproduction of the relations of politico-ideological domination and subordination⁹⁷. Balibar, in comparison, phrases this slightly differently: reproduction replaces and transforms things but it retains social relations indefinitely. Thus Balibar believes production is not the production of things but of social relations⁹⁸. The difference is twofold: first, while Poulantzas finds ideological and political relations within the relations of production, Balibar locates them within the process of reproduction. Second, Balibar thinks the *aim* of production is to produce social relations whereas Poulantzas assumes a more instrumentalist approach and sees social relations as the founding activity for the process of production. However, both shun a completely materialist view and agree that social relations are inextricably tied to both production and reproduction.

Poulantzas' virtue lies in that he is able to synthesise the materialist with the political. Unlike the powerful-powerless, oppressor-oppressed binaries Marx trades in for the most part, power to Poulantzas is no zero-sum game with a definite, measurable amount of power. Instead, he sees it as the capacity of one *or several* classes to realise their specific interests in derogation of the capacity and interests of the other classes. Poulantzas' conception of power is thus best understood as a relational field. The power of a class, he argues, is a manifestation of its objective position in economic, political and ideological relations, where the place of each class is designated and limited by the place of the other classes. The political power of a class to realise its political interests thus depends on its class position relative to others but also on the

⁹⁵ Symbolic supra note 38 at 3

⁹⁶ Poulantzas supra note 49 at 36

⁹⁷ Poulantzas supra note 49 at 26

⁹⁸ Althusser et al supra note 24 at 436-7

position and strategy it displays vis-a-vis the others⁹⁹. Finally, Poulantzas echoes Gramsci when he argues that even though state power is the power of certain dominant classes in relation to the dominated classes, the state is only a site and centre of exercise of power and not a player with power of its own¹⁰⁰.

The materialist strain – as expounded by Marx and Poulantzas, particularly – is also visible in AML-CTF regulation. That is, there is a palpable difference between how the AML-CTF regime is *represented* in the realm of ideas and how it is *materially organised*. On the plane of ideas, the regime is pitched as both apolitical and salubrious for the overall health of society, democracy and even the global economy. Materially, however, the regime operates to the distinct advantage of *some* groups: laundering havens in developed countries¹⁰¹; their governments' desire for confiscated assets¹⁰² or tax evasion dollars¹⁰³; as well as the exporters of AML-CTF compliance products from such countries¹⁰⁴. The capacity of these groups or ruling elites to realise their interests in derogation of those of others is obviously conditioned by their objective position in economic, political and ideological relations relative to others: as a *G7 and FATF* member, for example, the US is a credible force. However, this capacity also depends on the position and strategy displayed vis-a-vis others: for example, an alliance with other on-shore havens such as the UK and Canada, allows the US to collectively leverage their positions for the greatest gains.

Above all, the difference between representation and material organisation is visible in the way the offence of money laundering is treated in AML-CTF regulation: despite its positioning as the foremost global body to deal with *money laundering in general*, FATF retains an inordinate focus on organised crime and refuses to include tax issues¹⁰⁵ or trade-related malpractices under

⁹⁹ Poulantzas supra note 49 at 147

¹⁰⁰ Poulantzas supra note 49 at 148

¹⁰¹ See, for example, Eleni Tsingou, "Global financial governance and the developing anti-money laundering regime: What lessons for international political economy?" (2010) 47:6 *International Politics* 617–637; Peter Alldridge, "Money laundering and globalization" (2008) 35:4 *JL & Soc'y*; Donato Masciandaro, ed, *Global financial crime: Terrorism, money laundering and offshore centres* (London, Routledge, 2004).

¹⁰² Michael Kilchling, "Finance-Oriented Strategies of Organised Crime Control" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014).

¹⁰³ Michael Levi, "Money Laundering" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014).

¹⁰⁴ Margaret E. Beare & Michael Woodiwiss, "U.S. Organised Crime Control Policies Exported Abroad" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014)

¹⁰⁵ For example, the FATF website states: "FATF *does not address at all* issues related to low tax jurisdiction or tax competition. The FATF mandate focuses *only* on the fight against laundering of *proceeds of crimes* and the financing of terrorism [emphasis added]." <https://www.fatf-gafi.org/fag/generalquestions/#d.en.3119>

its remit¹⁰⁶. That FATF – and by necessary implication, the governing body of its members – refuses to expand its definition of laundering despite calls from academics, tax justice organisations as well as global networks and institutions (such as the OECD) is bewildering on its own. However, this decision becomes even more suspect when juxtaposed with the fact that, first, several influential FATF members are net beneficiaries of the AML-CTF regime, and second, tax and trade issues account for a much larger proportion of illicit financial flows as compared to organised crime¹⁰⁷. More simply: key FATF member governments as well as global and domestic capital have a continuing interest in the continuation of money laundering. This state-corporate nexus is positioned at the heart of global money laundering regulation since state policy – as the precursor to a member government’s position and politicking at FATF – is conditioned by both reasons of state (for example, the need for more tax revenues) as well as capital¹⁰⁸. Defining money laundering to exclude tax and trade issues allows for – to quote Bourdieu – the profit of saying while denying it by the way it is said. That is, the repressed elements (here, the state-corporate nexus) are concealed by integrating them into a network of relations (here, FATF) which modify their value without modifying their substance¹⁰⁹: the resulting AML-CTF regulations thus ‘impede’ laundering and terrorism financing without subverting the objectives of the state-corporate nexus.

As the above shows, there is no last word on power¹¹⁰. Yet many of these disparate definitions and explications collectively describe the power structures and operations undergirding the global AML-CTF regime. Knowing what power is, one can then proceed to the question of its exercise.

2.2 Originary power

¹⁰⁶ See, for example, Pogge and Mehta (supra note 7); Nikos Passas, “Financial intermediaries – Anti-money laundering allies in cash-based societies?” (2015) U4 Chr. Michelsen Institute 10; online <http://www.u4.no/publications/financial-intermediaries-anti-money-laundering-allies-in-cash-based-societies/>; and Nikos Passas, “Fighting terror with error: The counter-productive regulation of informal value transfers” (2006) 45:4-5 Crime L & Soc Change 315-336.

¹⁰⁷ See Global Financial Integrity report (supra note 10) and the two UNCTAD 2014 reports (supra note 9).

¹⁰⁸ Regarding other issues, there are, obviously, also other factors affecting state policy.

¹⁰⁹ Symbolic supra note 38 at 142-3

¹¹⁰ Poulantzas comes closest to a Goldilocks mean: narrow enough to be analytically rigorous but broad enough to avoid succumbing to charges of essentialism.

Every definition of power and its mode of exercise are grounded in a particular historical, economic, sociological and legal context. Any systematic investigation of power thus needs to begin with an understanding of how power is produced, ordered and deployed. This historiography is essential to understanding the social formation where power operates and how the exercise of power affects the world we inhabit. The present section takes up two themes that will be critical to helping locate power within the global AML-CTF regulatory architecture in Chapter 3. First, which strategies are used to construct a power framework? Second, which techniques enable the exercise of power?

2.2.1. Constructive practices

In the context used here, ‘constructive practices’ refer to the broad strategies of effecting, maintaining and perpetuating domination. These are distinct from the instruments of power (discussed later) and refer to the practices that rationalise and institutionalise power. Simply put, constructive practices refer to the ‘big ideas’ that pave the way for the deployment of specific techniques of power.

For Marx, this big idea is universality or the common interest. In “The German Ideology”, he argues that each newly dominant class needs to – if only to achieve its interests – conquer political power in order to represent its interests as “universal interests”¹¹¹. As Poulantzas correctly notes, ideology is never neutral and is invariably class ideology. Hence the ruling ideology is an essential power of the ruling class, even when it is deployed by the state to legitimise violence and help achieve a consensus among the politically dominated class¹¹².

The representation of universality, Marx finds, allows for ideas that support domination to be presented as “the only reasonable ones, the only ones universally valid”¹¹³. This is critical because the newly dominant class is embroiled in a class struggle and universality allows it to present its dominance as the dominance of certain *ideas*, and not of the class¹¹⁴. This is because, as Marx contends, historiography accepts each epoch’s “illusions” about itself; doesn’t separate dominant ideas from these dominant individuals; or recognise dominant ideas as *self*-expressions

¹¹¹ O’ Malley, Joseph & Richard A. Davis, eds & trans., *Marx: Early Political Writings* (Cambridge, Cambridge University Press, 1994) [Early Marx] at 132. Bourdieu makes the same point as well. Symbolic supra note 38 at 167

¹¹² Poulantzas supra note 49 at 28

¹¹³ Early Marx supra note 111 at 145-7

¹¹⁴ Early Marx supra note 111 at 132, 145-7

of a dominant class. Instead, historiography sees these ideas as a “self-determining concept”¹¹⁵. Since the revolutionising class stands in opposition to another *class*, he argues, it is invested in *presenting* itself – from the very beginning – as not a class but as the representative of the whole of society. This sleight of hand is what gives the appearance of the entire body of society being opposed to one dominating class¹¹⁶.

The idea of universality also features extensively in Gramsci, who describes it as the “cultural-social unity” undergirding hegemony. A common conception of the world, he argues, is what forges “a multiplicity of dispersed wills, with heterogeneous aims” into a single aim. This unity is achieved through relationships of hegemony – on ideological and commonsensical planes – that are necessarily educative in character¹¹⁷. According to Gramsci, collective political consciousness – of the sort exemplified by the spread of the AML-CTF regime – proceeds in three stages: first, at the economic-corporate level, that is, professional solidarity among the members of a group (for example, the convergence between various pro-AML-CTF lobbies such as the financial services industry in tax havens and compliance product exporters); second, consciousness of the economic interests common to all the members of a social group (for example, the G7 consensus to set up FATF); and finally, hegemony, that is, consciousness of fact that one’s own corporate interests must transcend the limits of one’s economic class and become the interests of subordinate groups as well (for example, the arrogation of the mantle of global regulator by FATF)¹¹⁸.

Interestingly, the germ of the idea of education as the bedrock for power is found in Hobbes too. Among the duties of public ministers as representatives of the sovereign authority is a duty “to teach the people their duty to the Sovereign Power, and instruct them in the knowledge of what is just, and unjust, thereby to render them more apt to live in godliness, and in peace among

¹¹⁵ Early Marx supra note 111 at 148

¹¹⁶ Early Marx supra note 111 at 146

¹¹⁷ SPN supra note 76 at 349-50. As discussed earlier, structural to Gramsci’s version of hegemony is the idea of concessions made to political ends. Unlike Marx’s dominant class which resorts to subterfuge, however, Gramsci’s dominant class is more ‘ethically’ minded in that it makes “sacrifices of an economic-corporate kind” for the sake of the dominated groups. SPN supra note 76 at 161.

¹¹⁸ SPN supra note 76 at 181-2

themselves, and resist the publique enemy”. The sovereign authority, meanwhile, acquires his power to teach and instruct people from God¹¹⁹.

The major difference between the three is of intent. Marx advocates from a position that sees power as essentially repressive and designed to deliver bourgeois aims. Gramsci, meanwhile, is battling for the revolutionary class that needs to educate and ally with subordinate groups to strengthen itself. Hobbes, on the other hand, proceeds on the understanding of the normative good: duty, justice, godliness and peace. While there is a suspicion of power inherent in Marx, Gramsci is more value-neutral and Hobbes seems convinced of its capacity for good as well.

The AML-CTF regime adroitly commandeers this representation of universality. FATF inevitably pitches money laundering as a *global* social and political problem that threatens the viability of world economies; the global financial system; “the social fabric” as well as “the democratic institutions of society¹²⁰” through the untrammelled growth of organised crime. There are similarly shrill evocations regarding terrorism financing. The dominance of FATF is thus presented as the dominance of ideas, the ideology regarding money laundering and terrorism financing, and not as the dominance of ruling elites; the repeated advertence to the *global* nature of the problem helps mobilise a political consensus that pre-empts serious challenge since these ideas are presented as “the only reasonable ones, the only ones universally valid¹²¹”.

Implicit in both Marx and Gramsci is the need for power to be legitimated and recognised by the subordinate group’s assumption of the dominant group’s ideology. Weber takes up the issue in his discussions on the legitimacy of domination and contends the “empirical structure of domination” stems from a power’s need to justify itself. He develops Marx’s idea regarding the illusions of the dominant class into the idea of a myth developed by “every highly privileged group [...] of its natural, especially its blood, superiority”. But the merit in Weber’s construction lies in that he sees the construction of the myth as a conscious bid to acquire legitimacy – not an illusion the dominant class believes about itself – and recognises that the underprivileged groups buy into the myth¹²². Such a myth can be seen in FATF’s justification for its assumption of the role of global problem-solver: among the arguments advanced for the G7’s leadership in the

¹¹⁹ Leviathan supra note 33 at 291

¹²⁰ <https://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223>

¹²¹ Early Marx supra note 111 at 145-7

¹²² Weber supra note 32 at 335-7

devise of financial regulation (including money laundering) was said to be the fact that as homes to the most developed financial markets, these jurisdictions were the first to experience the problems and the first to come up with solutions to the same¹²³. Together, the purported dominance of ‘ideas’ and the legitimating myth end up subsuming the non-democratic, non-representative character of FATF and thereby forestalling political challenges to its dominance.

However, Weber fails to mine adequately the processes of constructing the myth as a self-legitimation device. Instead, he concludes weakly that domination is legitimated by a system of consciously made rational rules; personal authority based on tradition and personal authority based on charisma. While he does issue the caveat that these are idealtypes and the real world features combinations, permutations and modification of the same, the flight of his theory is irredeemably arrested by his failure to interrogate the construction of the myth.

Fortunately, Bourdieu works further on this concept. The reality of the social world, he argues, is constructed by the imposition of “a more or less authorised way of seeing the social world¹²⁴”. Accordingly, political action aims to produce and impose representations of the social world that will authorise collective actions to transform the social world in accordance with the interests of those making the representations¹²⁵. These representations are based on rites of institution: the consecration or legitimation of certain arbitrary boundaries that express and impose a particular identity on an individual¹²⁶. The recognition of a particular social order as legitimate is thus achieved by “the misrecognition of the arbitrariness of its foundation”¹²⁷. Bourdieu fruitfully applies this in his own work on the myth of competence, whereby dominant groups seek theoretical justification for their privilege¹²⁸, and the Weberian germ and the Foucauldian influence are both clear. Bourdieu’s contention regarding the interests of those making the representations is borne out by AML-CTF scholars who argue that FATF calls the problem into being, proceeds to define this “public enemy” (as Hobbes would call it) for the world and then

¹²³ A similar logic is used to justify regulation regarding financial crises.

¹²⁴ Symbolic supra note 38 at 106

¹²⁵ Symbolic supra note 38 at 127

¹²⁶ Symbolic supra note 38 at 118, 121

¹²⁷ Symbolic supra note 38 at 127

¹²⁸ Pierre Bourdieu, *Acts of Resistance: Against the Tyranny of the Market*, translated by Richard Nice (New York, The New Press, 1998) at 42-3 [AOR]

pronounces ‘solutions’ to the problem that privilege some more than others¹²⁹. Not only do these representations legitimate arbitrary boundaries (for example, the criteria classifying a country as “high-risk” or “other monitored jurisdiction”), the misrecognition of this arbitrariness further legitimates *a particular social order*¹³⁰ (for example, the ‘hierarchy’ between compliant and non-compliant states or the decision to focus on money laundering by organised crime and not by corporations).

That said, Bourdieu fails to match Foucault, both in terms of scale and in terms of creative arc. For Foucault, the big idea is power-knowledge. While Bourdieu remains locked in his linguistic deliberations, Foucault’s original is intended for universal applicability. As he describes his power-knowledge bind: “We should admit rather that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations¹³¹.” Knowledge is seen as being produced within a field of power relations; this necessarily renders sites of production of knowledge complicit in power relations¹³² since by its nature, knowledge is perspectival, partial and oblique¹³³.

The idea finds resonance in the work of some Marxist scholars too. Althusser, for example, speaks of the need to see knowledge as “a production”; Balibar describes historical knowledge as the result of a labour of knowledge¹³⁴. Both the subject (the knower) and the object of study, argues Althusser, predate knowledge. As such, both already *define* a certain fundamental field. The real object, he says, comprises an essential and an inessential part; knowledge is the *process* that operates on this real object to eliminate the inessential and leave the subject with the essential part. Significantly, the role of the process of abstraction (from the realm of objects to that of ideas) is to purge the inessential real (that is, the extracted part) *as well as every trace of*

¹²⁹ See, for example, Rainer Hulsse, “Creating demand for global governance: The making of a money-laundering problem” (2007) 21:2 *Global Society* 155-178 and Petrus C. van Duyne, “Transnational organised crime, laundering and the congregation of the gullible” (Valedictory address delivered at Tilburg University, 2011); online <http://www.petrusvanduyne.nl/wp-content/uploads/2017/08/Afscheidsrede-Valedictory.pdf>.

¹³⁰ Symbolic supra note 38 at 127

¹³¹ D&P supra note 23 at 27

¹³² Hunt & Wickham supra note 75 at 13.

¹³³ Power supra note 54 at 14

¹³⁴ Althusser et al supra note 24 at 361

*its operation*¹³⁵. Althusser's explication of the process of obliteration is also worth noting: the invisible, he says, becomes so *because* it is "repressed from the field of the visible". It goes unperceived because the *function* of the field "is not to see them, to forbid any sighting of them". As such, he finds a relation of necessity between the visible and the invisible: the invisible does not exist *outside* the visible but is "the *inner darkness of exclusion*, inside the visible itself [emphasis in original]"¹³⁶. More simply: decisions regarding what to exclude determine what will be rendered invisible. As such, the decision to exclude is as significant an exercise of power as the decision to include since what gets left out defines a field of knowledge as surely as what is included.

Bourdieu is equally fascinated by the concealment idea. As he uses the notions of myth and disinterestedness, they become "veils" for concealing particular interests¹³⁷. Foucault, on the other hand, sees in power-knowledge a passionate 'will to knowledge' that is both a support and an instrument of power¹³⁸. He dismisses what he calls the myth regarding the neutrality of knowledge and insists that political power is always present in knowledge, is woven together with knowledge¹³⁹. As Foucault builds on this elsewhere, he argues that knowledge arises from conflict, combat and the outcome of combat. And between knowledge and things knowledge must know is thus a relation of violence, domination, power and force¹⁴⁰. Foucault's conception of power-knowledge can then be seen as an inherent structural violence that goes much beyond the obfusatory tactics of a smaller, less aggressive power as conceived by Bourdieu or Althusser.

This is also why Foucault disagrees with Marxists who, he says, argue that relations of force, economic conditions and social relations are imposed on knowledge. As Foucault sees them, political and economic conditions are "not a veil or obstacle for the subject of knowledge but the means by which subjects of knowledge are formed and hence are truth relations¹⁴¹". The

¹³⁵ Althusser et al supra note 24 at 36

¹³⁶ Althusser et al supra note 24 at 24-5

¹³⁷ AoR supra note 128 at 42-3 and Logic supra note 87 at 120

¹³⁸ Hunt & Wickham supra note 75 at 13. See D&P supra note 23, HoS supra note 48.

¹³⁹ Power supra note 54 at 32

¹⁴⁰ Power supra note 54 at 8-9

¹⁴¹ Power supra note 54 at 15

relations of production that characterise capitalism, he says, cannot exist without power relations and forms of knowledge¹⁴².

Power relations in the AML-CTF regime can be seen to *produce* knowledge through both discourse creation and data extraction. First, by generating and globalising discourses that define money laundering and terrorism financing, the AML-CTF regime determines how to think about the phenomena but also maps the *frontiers* of this knowledge. Take, for example, the FATF definition of money laundering as the disguising of the illegal origins of the “proceeds of crime”. On the face of it, the definition establishes an abiding link between criminal activities and illicit funds. However, *less obviously so*, the definition *also* determines what constitutes ‘crime’ (and what doesn’t) *as well as* who is a criminal (and who isn’t). And so, when FATF cites drugs trafficking, insider trading and “prostitution rings” as examples of criminal activities, it shears tax- and trade-related crimes from the ambit of laundering criminality¹⁴³. This act of defining (or the creation of discourse) is thus an *act of political power* in that it generates a particular kind of “perspectival, partial and oblique” knowledge, where the decision to exclude – as Althusser argues – is as important as the decision to include. Implicit and embedded in the *positive* definition of crime as organised crime is a coextensive *negative* definition of crime that excludes corporate crime. Critically, by restricting the parameters of the debate to criminals and organised crime networks as well as terrorist and terrorist networks, the AML-CTF regime implicitly *refuses to recognise and hold accountable* corporations and state actors who commit *the same offences*. The well-documented cases of money laundering by the US Central Intelligence Agency and of terrorism financing by Saudi Arabia are but two such examples (See Chapter 3 for a detailed discussion).

Second, power relations in the AML-CTF regime also produce knowledge by extracting knowledge and data about the jurisdictions subject to the regime. As discussed in Chapter 3, under the terms specified by FATF, every jurisdiction is expected to set up a Financial Intelligence Unit (FIU) that collects and analyses Suspicious Transaction Reports and other information relevant to money laundering, associated predicate offences and the financing of terrorism, and for the dissemination of the results of this analysis to the Egmont Group of

¹⁴²Power supra note 54 at 87

¹⁴³ <https://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223>

Financial Intelligence Units¹⁴⁴. A significant chunk of responsibility for surveillance and monitoring also falls onto the IMF and the World Bank. Foucault's contention that knowledge is acquired through relations of violence, dominance, power and force is a point Black corroborates when she argues that the "giving of account" is a relationship that stems from a fundamental power imbalance between two parties, which is further exacerbated by this accountability dialectic¹⁴⁵.

While Foucault does not offer any examples of how capitalism is shored up by the power-knowledge bind, Weber's contractual 'unfreedom' thesis both corroborates and demonstrates this claim. Challenging the idea of contractual freedom, Weber contends that differential levels of power between contracting parties allow for an increase in constraint and lesser individual freedom. This, he says, is because the legal agreements the law chooses to enforce or not are decisively influenced by diverse interest groups which vary in accordance with differences in economic structure. In an increasingly expanding market, he reasons, the most important group is of those who have market interests. The 'unfree' contract thus allows property ownership to be used cleverly and without restraint "as a means for the achievement of power over others". While such a contract is perceived as less coercive, it is actually more coercive because it advantages those who are economically able to make use of the empowerments¹⁴⁶.

Significantly, coercive contracts are the norm within the AML-CTF regime. Theoretically, sovereign states that 'voluntarily' sign up for AML-CTF regulation should be able to opt out of the regime at any time. However, as Weber argues, the law (or regulation, in this case) favours the group that has "market interests" and thus, more power. Since many of the G7 countries are home to the largest financial institutions or global centres of finance, they represent the most important interest group. As backers of the AML-CTF regime, the G7 are naturally invested in the promotion of AML-CTF compliance; as 'owners' of the international capital markets, the G7 also have the capability to exercise their ownership rights to achieve greater power over others. A FATF determination of low AML-CTF compliance, for example, brings an inordinate amount

¹⁴⁴ <https://egmontgroup.org/en/content/financial-intelligence-units-fius>

¹⁴⁵ Julia Black, "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes" (2008) 2 *Regulation and Governance* at 152

¹⁴⁶ Weber *supra* note 32 at 188-9

of pressure on the non-compliant state¹⁴⁷ since it increases the cost of raising funds from the international capital markets by increasing the country's debt risk premia and diminishing its sovereign credit ratings¹⁴⁸. As such, the 'voluntary' aspect of the contract is reduced to a fiction.

One final point: secrecy. Seminal to the construction of a power edifice is secrecy. Weber speaks of it when he says that every continuing domination features secret rule at some point¹⁴⁹; Thompson speaks of it when he says that the invisibility of symbolic power contributes to its legitimacy¹⁵⁰. As Foucault and Lukes repeatedly indicate, power is at its most effective when it is least visible¹⁵¹. As Foucault speaks of the art of punishing, the most potent power sets up a 'natural sequence' so that punishment does not appear as the arbitrary effect of a human power: "punishment must proceed from the crime; the law must appear to be a necessity of things, and power must act while concealing itself beneath the gentle force of nature"¹⁵².

Like other global 'standard-setters', the AML-CTF regime also exemplifies this secrecy requirement¹⁵³. FATF, too, was set up by a mandate provided by a total of 16 members drawn from the G7, the EC and eight other countries. Although its membership has increased to 39, this number is still low considering the body is supposed to be a *global* regulator and the members extend their own mandate for global regulation¹⁵⁴. Further, the global South is underrepresented among the members and the OECD contingent is said to dominate. This membership profile is

¹⁴⁷ Robert P. Delonis, "International financial standards and codes: mandatory regulation without representation" (2004) 36 NYUJ Intl L & Pol 563 at 595-6. In a similar vein, Braithwaite & Drahos recount the example of how the US and UK coerced countries into complying with capital adequacy standards in 1987 by linking compliance with entry to their markets and threatening "inefficient financial regulatory systems" with the "spectre" of loss of business. John Braithwaite & Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000) at 132.

¹⁴⁸ Delonis supra note 147 at 610-1

¹⁴⁹ Weber supra note 32 at 334

¹⁵⁰ Symbolic supra note 38 at 23

¹⁵¹ HoS supra note 48 at 3; Lukes supra note 51 at 64

¹⁵² D&P supra note 23 at 104-106

¹⁵³ The Basel Committee on Banking Supervision, for example, tried to involve non-member countries in various aspects of the standard setting process but the involvement has remained limited to consultation and "the actual decision making remains controlled by the G10 countries". The coterie is infamous for their "obscure" or "secretive" decision making and over-reliance on "personal contacts"¹⁵³. Giulia Bertezolo, "The European Union facing the global arena: standard-setting bodies and financial regulation" (2007) Eur L Rev 257 at *264 (he is referring to the Basel Committee, IOSCO and the IAIS); Kern Alexander, Rahul Dhumale, & John Eatwell, *Global governance of financial systems: the legal and economic regulation of systemic risk* (Oxford, Oxford University Press, 2005) at 37.

¹⁵⁴ The last mandate was set to expire in 2020 but in April 2019, FATF ministers chose to confer "an open-ended mandate" on themselves. <http://www.fatf-gafi.org/publications/fatfgeneral/documents/fatf-mandate.html>

unlikely to change since FATF also keeps a tight control over membership: the key to being “considered” for a membership in a process spanning three years is the ambiguously-worded requirement that the applicant be “strategically important¹⁵⁵”. Meanwhile, the invisibility requirement is satisfied by the disaggregated AML-CTF governance structure: with multiple regulators responsible for the devise, implementation and enforcement of regulation, the prominence or visibility of each recedes (see Chapter 3 for details).

2.2.2 Instrumental power

In the sense it is used here, ‘instrumental power’ refers to the *specific* techniques and means deployed in the exercise of power. However, three significant caveats: first, contrary to utilitarian connotations of the phrase, instrumental power is not just an assortment of tools or simply the means to an end. Instead, as Poulantzas says, all power exists in apparatuses, which help constitute power. Instrumental power is thus a set of discursively constructed practices pregnant with particular histories of conflict and violence – that is, these practices are functional in that they contribute to the furtherance of a goal but they are also *political* in their aims, their construction and deployment.

This leads to the second caveat: while a bare reading of ‘instrumental power’ would suggest a dilation of the power-as-capacity thesis only, a deeper mine reveals an intimate relationship with power-as-right. The ‘big ideas’ or constructive practices discussed above *rationalise* the exercise of power; instrumental practices construct and reproduce both institutions of power and relations of power. Constructive practices justify the exercise of power by X; instrumental practices show how X exercises this power and how the exercise constructs legitimacy for both the power and X, as the holder of this power.

Finally, while instrumental power seems similar to Foucault’s disciplinary power, it is intended for a more general application. Foucault’s concern were the apparatuses of power – prisons, hospitals etc – and the inculcation of discipline. While disciplinary tactics (discussed as

¹⁵⁵ The membership policy also sets out a series of quantitative, qualitative and “additional” considerations such as GDP; population; impact on the financial system; “level of commitment to AML/CTF efforts” and “participation in other relevant organisations”. <https://www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html>

‘dressage’ below) are a key instrumental power, the significance of, for example, crises, scientific rationality and norms as *instruments* of power cannot be underestimated.

At their most potent, instrumental powers perform four functions: they reveal the workings of power; construct and reproduce institutions of power; construct and reproduce power relations; and confer legitimacy on the power and its holder (category A). A notch below are those powers that are primarily techniques of power but mould power relations and institutions (category B). At the most granular are those powers that show how power works and say something about power relations (category C). The common thread between these techniques of power is the seeming invisibility of power; the absence of overt, explicit violence (although, as discussed below, symbolic violence does exist); and the notion of neutrality. But the most interesting aspect of instrumental power is the fact that everyone seems to agree on how power is operationalised. As a survey of the literature shows, each theorist offers minor modifications but the core techniques described exhibit remarkable resilience and traction.

2.2.2.1. Category A

Thinking power

As demonstrated above, universality is a key constructive practice for most scholars of power. But this claim to universality is shored up by the instrumental practice of ‘group think’, where those subject to power share the beliefs and the worldview of the holders of power. The pervasiveness of these beliefs or worldview creates or reinforces existing power relations; enables the creation of institutions that embody this power but also legitimates the exercise of power as well as the holders of power.

Hobbes understands the need to foster group think: he speaks of the duty of public ministers to educate the people in their duty to the sovereign; in differentiating between what is just and unjust; and identifying the public enemy¹⁵⁶. While the ‘instructions’ capture the need for inculcating a homogenous worldview, the fact that the sovereign is in the position to issue such orders is implicit recognition and legitimation of his divine right to do so¹⁵⁷. The ministers are

¹⁵⁶ Leviathan supra note 33 at 291

¹⁵⁷ Hobbes maintains that the sovereign acquires his right to teach and instruct the people from God. Leviathan supra note 33 at 291

thus institutional repositories of sovereign power. Further, the evocation of ‘duty’ (on part of the ministers as well as the people) reinforces the relations of power between the sovereign on the one hand and the ministers and the people on the other.

For Marx, a shared worldview emerges from “ruling ideas” or “dominant thoughts”, which dominate because the class that is the dominant material power of society is also its dominant intellectual power. Since this class is the producer and regulator of ideas, its ideas prevail over the ideas of those who lack the means of material production – even though the dominant class initially persuades itself that these ideas dominate independently of the conditions of their production and the producers of these thoughts¹⁵⁸. These ideas thus carry the imprint of existing power relations and set up institutions (the law, for example), which perpetuate those power hierarchies. Thus, to Marx, the eventual shift towards abstract ideas and universality – the claim that these ideas represent the interests of society as a whole and not just the dominant class – signals the dominant class’s attempt to obliterate the bourgeois origins of these ideas and to secure greater legitimacy for the same¹⁵⁹.

Like Marx, Gramsci is also an advocate for a “common conception of the world” and insists on the epistemological significance of hegemony¹⁶⁰. He sees “intellectual and moral leadership” as one of the two manifestations of a social group’s supremacy¹⁶¹. This leadership is exercised by one or more strata of intellectuals, who give the social group its cohesiveness and an awareness of their economic, political and social *raison d’être*¹⁶². Unlike Marx, however, Gramsci does not reduce the battle over ideas – what he calls ideology and common sense – to a violent, class-based struggle. Instead, Gramsci’s organic intellectuals serve a more beneficial, pastoral function: they foster a “collective national-popular will” by guiding people ideologically and preserving their link to the leading group¹⁶³. Further, Gramsci refuses to set territorial boundaries

¹⁵⁸ Early Marx supra note 111 at 145-6

¹⁵⁹ Early Marx supra note 111 at 146

¹⁶⁰ SPN supra note 76 at 349, 365-6

¹⁶¹ SPN supra note 76 at 57-8. The other manifestation is “dominance”.

¹⁶² SPN supra note 76 at 5

¹⁶³ SPN supra note 76 at 421. Editor Quentin Hoare’s footnote on the same page defines national-popular as a “historic bloc” between national and popular aspirations where the intellectuals play a mediating role.

on hegemonic relationships and insists that they are equally applicable in national, international and global contexts¹⁶⁴.

In the AML-CTF universe, at one level, ruling ideas emerge as normative ideals such as the belief that money laundering inevitably damages the workings of the global economy, particularly by entrenching organised crime at the heart of the economy and allowing it to flourish, and that both phenomena destroy the fabric of society. At another level, these ideas allow the ruling elites to propagate *their* conception of ‘the public enemy’ (here, organised crime launderers and ‘terrorists’) and to instil a sense of the duties people owe to ‘the sovereign’¹⁶⁵ (for example, acquiescence to a culture of surveillance and reporting the activities of their fellow civilians to global and domestic regulators). As such, not only do these ruling ideas create and reinforce existing power relations (for example, between developed countries, that are part of influential networks such as the G7, and developing ones), they also enable the creation of institutions such as FATF or laws such as AML-CTF regulation that embody this power. Further, these ideas legitimate both the exercise of power as well as the holders of power.

While both Bourdieu and Foucault endorse the essential idea of a shared worldview, their respective approaches are subtly different from both Marx and Gramsci as well as each other. Both Bourdieu and Foucault see language as the primary mediator for an empirical, external reality: language does not just name and label realities, it also constructs them in a discursive interaction between the speaker, the listener and the context in which they operate¹⁶⁶. Foucault sees discourse as a strategic and polemical game, in which a subject constitutes herself within history and is constantly established and re-established by history through discourse¹⁶⁷. As Hunt and Wickham read this, discourse refers to the substantial role played by language “in constituting social subjects, the subjectivities and identities of persons, their relations and the field in which they exist, but only within a context of institutional practices ... [that is,] in a particular culture at some particular point in time¹⁶⁸.”

¹⁶⁴ SPN supra note 76 at 350

¹⁶⁵ Leviathan supra note 33 at 291

¹⁶⁶ Symbolic supra note 38 at 38-9; Hunt & Wickham supra note 75 at 7

¹⁶⁷ Power supra note 54 at 3

¹⁶⁸ Hunt & Wickham supra note 75 at 7-9

Seen so, language or, more specifically, discourses become the building blocks of power. As Bourdieu puts it, language is the principal support of “the dream of absolute power” because it produces existence – by producing the collectively recognised and thus, realised representation of existence¹⁶⁹. In the AML-CTF discourse, for example, the label of “non-compliant” is not an objective statement of fact; it is a *political* utterance based on a *subjective* assessment – a scarlet letter, of sorts. The label is designed to create a social subject (the ‘delinquent’ state) by imposing a particular identity on a jurisdiction and collective recognition of this identity – by FATF members and all those subject to the AML-CTF regime – *collectively wills it into existence*. This freshly-minted identity then places the jurisdiction within an existing matrix of power relations – in a subservient, deferential role to FATF and “compliant” jurisdictions.

As illustration of the power of discourse, Bourdieu presents a fascinating exploration of how a delegate exercises power over the group that ostensibly gave him power. Building on Nietzsche’s idea of the self-consecration of the priest, Bourdieu says the priest’s discourse *creates* the conditions by which he acquires and maintains power. The priest consecrates himself by basing universal values on himself, appropriating values, requisitioning morality and thus monopolising the notions of God, Truth, Wisdom, People. In this act that Bourdieu calls ‘usurpatory ventriloquism’, “the spokesperson gives voice to the group in whose name he speaks, thereby speaking with all the authority of that elusive, absent phenomenon ... [I]t is in abolishing himself completely in favour of God or the People that the priest turns himself into God or the People. ... [He] speaks in the name of something which he brings into existence by his very discourse¹⁷⁰.” Bourdieu sees this usurpation, this “monopolisation of collective truth”, as what enables the priest (or politician, for that matter) to exercise power and compels obedience to his command. Similarly, FATF problematizes money laundering through processes of social construction so as to win the right make the rules around laundering and to secure the compliance of those who have not been involved in the rule-setting process¹⁷¹.

For Foucault, however, a discourse is a politically constituted body of knowledge that ends up structuring the field of *what can be thought*: it “structure[s] the possibility of what gets included

¹⁶⁹ Symbolic supra note 38 at 42

¹⁷⁰ Symbolic supra note 38 at 210-2

¹⁷¹ Hulsse supra note 129 at 156; 160. He distinguishes his approach from the epistemic community literature by arguing that the latter is focuses on the interpretation of problems, not their making. Also at 162

or excluded and of what gets done or remains undone¹⁷²”. Foucault explains this process where he speaks of the “tyranny of globalising discourses”¹⁷³, which simultaneously devalue certain knowledges and privilege others to produce a particular truth as “a system of ordered procedures for the production, regulation and distribution, circulation and operation of statements¹⁷⁴”. To be considered valid and legitimate then, a statement needs to remain within the parameters of the knowledge that is legitimated by the discourse. (As discussed in Chapter 3, FATF remains completely impervious to calls from academics, thinktanks and legal practitioners to expand its definition of money laundering; abandon the obsolete placement-layering-reintegration model of money laundering and revamp its simplistic understanding of terrorism financing.) The terms may be different but the similarities with Althusser’s conceptions of knowledge; apparatus of thought and the invisible-inside-the-visible (see above) are striking. However, the triggering event for both are different. While Althusser pegs his apparatus of thought to a “natural and social reality¹⁷⁵”, for Foucault, ‘truth’ is produced and sustained through power and power cannot be acquired or exercised except through the production of truth¹⁷⁶ (elsewhere he calls this “a regime of truth”)¹⁷⁷. Practically, Foucault’s truth is produced by “apparatuses of knowledge” similar to the data excavation methods deployed by FATF: methods of observation, techniques of registration, procedures for investigation and research, apparatuses of control¹⁷⁸.

Meanwhile, the difference between Bourdieu and Foucault’s conceptions of discourse is – as ever – of scale. While Bourdieu’s discourse remains confined to individual speakers, Foucault’s discourse is capable of being operationalised by groups, classes and institutions as well. Bourdieu’s discourse compels obedience because it posits itself as truth; Foucault’s discourse compels obedience because it eliminates other, competing truths by redefining what truth is or can be. The veracity of the first is still capable of contestation; the second is not. To mask self-interest, Bourdieu’s speaker conceals himself *in relation to* and *within* another (God/ Truth/ People). The speaker speaks in the name of an external Other; he draws authority and power

¹⁷² Hunt & Wickham supra note 75 at 8

¹⁷³ “Two Lectures” in Colin Gordon, ed, *Michel Foucault: Power/Knowledge: selected interviews and other writings: 1972-1977* (New York, Pantheon Books, 1980) at 83. [P/K]

¹⁷⁴ “Truth and Power” in Power supra note 54 at 132

¹⁷⁵ Althusser et al supra note 24 at 42

¹⁷⁶ “Two Lectures” in P/K supra note 173 at 93.

¹⁷⁷ “Truth and Power” in Power supra note 54 at 132

¹⁷⁸ “Two Lectures” in P/K supra note 173 at 102

from those he speaks of; he abolishes himself to *become* this Other. The ‘deceit’, as such, consists in the positing of the speaker’s *creation* (God/ Truth etc) as an independent, autonomous entity. Foucault’s discourse, however, is not constructed in direct relation to another *entity*; it seeks to construct a knowledge in derogation of other *knowledges*. This act of creation – and the shearing of other knowledges – is a manifestation of the speaker’s own authority and power. However, his self-interest is better concealed by the fact that his ‘creation’ and its opposition are both seemingly depersonalised, apolitical knowledge/s. The ‘deceit’ perpetuated here is that knowledge, by its very nature, is neutral and autonomous.

Productive detours aside, the most succinct explication of group think falls to Poulantzas. Encapsulating the worldview, power relations, institutions and legitimacy debates, he argues that ideology is not just a system of ideas or representations designed to generate consensus but also “a series of *material practices*, embracing the customs and life-style of the agents and settling like cement in the totality of social (including political and economic) practices [emphasis in original]¹⁷⁹”. While effecting homogeneity of ideas among different classes and factions is essential, so are the apparatuses that embody ideology and help elaborate, inculcate and reproduce that ideology¹⁸⁰. This, he concludes, is what enables the constitution of relations of possession and economic property and the social division of labour at the heart of the relations of production. FATF is one such ideological apparatus.

Bureaucratic power

The true worth of bureaucratic power lies in its seeming depersonalisation and depoliticisation. The institutionalisation of this power is far clearer than with other instrumental powers – for example, the institutions that mobilise the power of crises are far less visible than a bureaucratic apparatus – but the fact of institutionalisation has the advantage of obscuring the political origins of this power. The primacy of ‘rules’ – for example, the FATF 40 – suggests adherence to universal and apolitical norms and values, which are rarely so in operation. The violence embedded in the institution is thus concealed beneath a depersonalised façade.

¹⁷⁹ Poulantzas supra note 49 at 28

¹⁸⁰ Poulantzas is talking specifically about the State’s ideological apparatuses. Supra note 49 at 28

Marx seems to advert to this depoliticisation and depersonalisation when he says that bureaucracy is the formalism of a content that lies outside it¹⁸¹. To him, the hierarchy of bureaucracy is a “hierarchy of knowledge”. Unlike Foucault, Marx is not interested in the content or construction of knowledge itself; he is more preoccupied by the impregnable nature of the bureaucratic order. As he says, the “general spirit of bureaucracy is the *secret*, the mystery, preserved inwardly by means of the hierarchy and outwardly as a closed corporation [emphasis in original]”. This secrecy is reflected by, for example, FATF’s limited membership policy and closed-door meetings. Marx seems to suggest that the desire for secrecy overwhelms every political impulse that the bureaucrats may harbour since both “political spirit and disposition” are seen as betrayals of the mystery. Such a reading is corroborated by his assertion that authority is the principle of bureaucracy’s knowledge and deification of authority its disposition¹⁸². Not only does this demonstrate a loyalty that outweighs every other, it also reflects the depersonalised, de-temporalised nature of it: rather than to a person or an institution at a moment in time, loyalty is owed only to the current holder of the sceptre.

While Marx focuses on how the hierarchical order protects the mystery from the political in a process internal to the bureaucracy, Poulantzas takes up the imperviousness of the bureaucracy to rank outsiders. For Poulantzas, all power exists in apparatuses, both state and otherwise, which also play a role in the constitution of power¹⁸³. The secrecy of power and bureaucracy, he contends, are designed to create recognised networks within the state that will favour pronouncements from certain quarters¹⁸⁴ and exclude popular masses from “centres of decision-making”¹⁸⁵. He builds on Marx’s closed corporation thesis to argue that the framework of the apparatuses of the *capitalist* state – army, courts, administration, police, ideological apparatuses and state apparatuses – rest on the permanent and specific exclusion of the popular masses. (As a non-representative body, FATF is not accountable to non-members, even if they are affected by its regulations; since the regulations are pitched as “technical” and not political, they are rarely debated by legislative bodies – even when FATF mandates particular changes in laws – and are mostly implemented by apolitical state institutions such as central banks, other regulators and

¹⁸¹ Early Marx supra note 111 at 12

¹⁸² Early Marx supra note 111 at 13

¹⁸³ Poulantzas supra note 49 at 44-5

¹⁸⁴ Poulantzas supra note 49 at 32

¹⁸⁵ Poulantzas supra note 49 at 56-60

law enforcement agencies¹⁸⁶.) Poulantzas' contribution is thus the important insight that political networks and alliances – as reflected, for example, by the “capitalist state” – are critical to navigating bureaucracies. The mystery of the bureaucracy is a mystery only to those excluded from the corridors of power, not allies of the power.

Weber similarly captures the essentiality of bureaucratic power. He sees every domination (whether a monopoly domination or an authority one¹⁸⁷) expressing itself and functioning through administration¹⁸⁸ and every bureaucracy the expression of a rationally consociated conduct of a dominational structure¹⁸⁹. The value of a bureaucracy, to Weber, is that it provides precision, speed, consistency, availability of records, continuity, possibility of secrecy, unity, coordination, minimisation of friction, and expense for material and personnel¹⁹⁰.

Tracking the evolution of bureaucratic structures from honoraries to administration by princes to modern bureaucracies, Weber contends that bureaucracies were born of the technical requirements of administration. First, the more stable a prince's power, the more the prince tended towards unity, order and cohesion of his realm¹⁹¹. To this end, there arose the need to deploy a small number of rulers and maintain secrecy (in contrast to the ease of communication between the ruled); easily organise power; and easily preserve secrecy regarding the intentions and resolutions of the rulers¹⁹². (This is seen in FATF's existing governance structure, for example.) But the other push towards bureaucratisation, Weber finds, owes to the personal interests of the prince's officials regarding career advancement and lateral moves¹⁹³. As Marx puts it, the aims of state become the aims of bureaucracy and the aims of bureaucracy become the aims of state¹⁹⁴.

In modern bureaucracies, Weber argues, the law embodies what was once the will of the prince. “Bureaucracy provides the administration of justice with a foundation for the realisation of a

¹⁸⁶ See Chapters 3 and 4

¹⁸⁷ A monopoly domination is the domination of a constellation of interests whereas an authority domination is domination by virtue of authority. Weber *supra* note 32 at 324

¹⁸⁸ Weber *supra* note 32 at 330

¹⁸⁹ Weber *supra* note 32 at 337

¹⁹⁰ Weber *supra* note 32 at 349-51

¹⁹¹ Weber *supra* note 32 at 268

¹⁹² Weber *supra* note 32 at 334

¹⁹³ Weber *supra* note 32 at 268

¹⁹⁴ Early Marx *supra* note 111 at 13

conceptually systematised rational body of law on the basis of ‘laws’”, he says. According to Weber, the more depersonalised a bureaucracy, the better it serves capitalism since it carves out a space for the emotionally detached, professional expert¹⁹⁵.

Thompson has a useful explication regarding Weber’s detachment theory. The development of objectified institutions in modern society, says Thompson, reduces the importance of symbolic mechanisms in sustaining dominance through interpersonal relations. As he sees it, individuals need not dominate because violence is built into the institution itself, which provides a practical justification of the established order. To put it another way, the ability to surveil a jurisdiction or to demand changes in its laws, for example, appears less of an intrusive imposition when it comes from FATF – the ‘global’ regulator, *charged with protecting* the global financial system from laundering and terrorism financing – rather than from the US or the G7. Further, institutionalisation enables those who benefit from the established order to convince themselves of their inherent worthiness while preventing those who benefit least from understanding the basis of their deprivation¹⁹⁶. Institutional mechanisms fix the value assigned to different products, allocate them differentially and inculcate a belief in their value¹⁹⁷. For example, while Pakistan has frequently been upbraided by FATF for failure to crack down on cash couriers (FATF Recommendation 32; see Chapter 4), the US’ inability to enforce beneficial ownership rules (FATF Recommendation 24 & 25) have not attracted similar attention¹⁹⁸. Institutions such as FATF can thus be seen as both legitimating (in how they defend the status quo) *and* self-legitimating (in how their objectification creates the presumption of neutrality). As Bourdieu puts it: these institutions select and educate producers of ideology, codify rules, rationalise competence required in the political universe while legitimating themselves by assuming the

¹⁹⁵ Weber supra note 32 at 349-51. For a contemporary account of the role of experts, see David Kennedy, *A world of struggle: how power, law and expertise shape global political economy* (Princeton, Princeton University Press, 2016). He argues that expertise provides plausible deniability regarding the agency of individual decision makers and, in the context of war and law, allows actors to shirk responsibility for their decisions by using the process of abstraction (at 111; 275).

¹⁹⁶ Thompson in Symbolic supra note 38 at 24-5

¹⁹⁷ Thompson gives the example of education where certain credentials or qualifications become a mechanism of creating or sustaining inequality such that overt force isn’t required. Thompson in Symbolic supra note 38 at 24.

¹⁹⁸ Ironically, the Global Financial Integrity report notes that in several states in the US, procuring a library card requires the provision of more information than it does to set up a shell company. Global Financial Integrity, *The Library Card Project: The Ease of Forming Anonymous Companies in the United States* (March 2019); online https://www.gfintegrity.org/wp-content/uploads/2019/03/GFI-Library-Project_2019.pdf

appearance of scientificity and “treating political questions as matters for specialists which it is the specialists’ responsibility to answer in the name of knowledge and not class interests¹⁹⁹.”

Yet, as Marx seems to caution, the deification of authority is the problem and not whether the dominance is sustained *vide* interpersonal relations or objectified institutions. As he notes, deification is what turns into a “crass materialism, the materialism of passive obedience, of trust in authority, the mechanism of an ossified and formalistic behaviour, of fixed principles, conceptions and traditions²⁰⁰”. As Marx describes it, the individual in modern society exists in a twofold organisation: the bureaucratic, which is a manifestation of the state, of executive power, which does not touch him and his independent actuality; and the social, which is the organisation of civil society, in which he is a private man outside the state, which does not touch the political. To exist as a citizen of the state who has both political significance and efficacy, says Marx, the individual must abandon his civic actuality²⁰¹. And bureaucracy can only be abolished when universal interest actually becomes a particular interest, which is only when a particular interest becomes universal²⁰².

2.2.2.2. Category B

Science as fetish

The scientific rationality thesis of the Enlightenment has been attacked by waves of scholars of power²⁰³. The power of science to authorise and legitimate ideas and practices is undisputed; these theorists document instead the *way* science is deployed to bolster the arguments of those who wield power. (Interestingly, however, the fetishisation of science itself receives little attention.)

The germ of the idea of science can be found in Marx’s early writings, where he talks of how the division of labour enslaves man. The specialisation he refers to where “everyone has a definite,

¹⁹⁹ Symbolic *supra* note 38 at 176-7. Both Thompson and Bourdieu attribute the rise of professional politicians to the development of these objectified institutions. For a more contemporary account of the role of ‘experts’, see Kennedy *supra* note 195.

²⁰⁰ Early Marx *supra* note 111 at 13

²⁰¹ Early Marx *supra* note 111 at 16-7

²⁰² Early Marx *supra* note 111 at 14

²⁰³ Foucault, for example, claims that one of the main tasks of Enlightenment was to multiply the political powers of reason. Power *supra* note 54 at 299

exclusive sphere of activity which is imposed on him and from which he cannot escape²⁰⁴” is crafted from a seemingly impartial assessment of individuals in line with certain predetermined principles and logic. However, the effect of this categorisation is the creation of a ‘logic’ that enables the construction of definite power relations. The segregations that determine the division of labour in Marx’s scheme – industrial or commercial versus agricultural labour; industrial versus commercial; patriarchy versus slavery etc²⁰⁵ – bear a marked resemblance to modes of scientific classification; in the FATF scheme, such segregation is conducted on the basis of compliance/ non-compliance. The naming of things in an ordered, rational fashion that is further capable of being reproduced and reapplied to new things is one of the hallmarks of all scientific disciplines.

Unlike Marx who sees the scientific method in the processes of commodification of labour alone, Foucault extends the parameters of the applicability of science. He sees science as one of the three modes of objectification of humans²⁰⁶ – he talks about how normalizing, corrective knowledge about the individual enables the “so-called human sciences” and the appearance of man as an object of science²⁰⁷. Analytically, the comparison with errant jurisdictions holds: normalising, corrective knowledge about a jurisdiction allows for the construction of said jurisdiction as an object of science amenable to correction, rehabilitation. Foucault sees “medicalisation”, “penal arithmetic” and “psychiatrization of criminal danger”²⁰⁸ being used to legitimise the exercise of power and the reproduction of relations of power in society. Elsewhere, he speaks of the political, economic and technical “incitement” to talk about sex in terms of “analysis, stocktaking, classification and specification, quantitative or causal studies²⁰⁹”.

Science, argues Foucault, is what enables the holders of power to ‘quantify’ nebulous concepts such as the inherent dangerousness of an individual, to empirically ‘measure’ his potentiality and determine how much protection society needs from them²¹⁰. This measurement and assessment,

²⁰⁴ Early Marx supra note 111 at 132

²⁰⁵ Early Marx supra note 111 at 149

²⁰⁶ Power supra note 54 at 326. The other two modes are dividing practices (or classifications, which separate the sick from the healthy, the sane from the insane) and the way humans turn themselves into subjects (as with sexuality).

²⁰⁷ Power supra note 54 at 87

²⁰⁸ Power supra note 54 at 179-87; D&P supra note 23 at 37

²⁰⁹ HoS supra note 48 at 23-4

²¹⁰ Power supra note 54 at 189-194

he maintains, is what enables such subjective decisions to assume the ring of ‘truth’ – a truth accepted by both society and the individual himself. More critically, this scienticised truth is what allows power to exercise control over an individual’s future: the subjectivity concerns man’s potentiality, not his actuality. As such, the punishment morphs from being seen as “legal vengeance” to “a technical prescription for a possible normalisation²¹¹” – a transformation that obliterates the political imperatives within such judgements and makes punishment appear as a retribution the offender owes to society²¹². The insight holds great value in the context of AML-CTF regulation: the risk-based approach (FATF Recommendation 1) that undergirds the regime is meant to be an assessment of the ‘inherent dangerousness’ of a jurisdiction – a (necessarily) subjective evaluation of its potentiality but couched in language that suggests a more empirical consideration – and a determination of how much protection global society needs from such jurisdictions. Similarly, the Suspicious Transaction Reports are an assessment of an individual’s potentiality, not their actuality: *could* they be a terrorist? This scienticised ‘truth’ is then written into the country evaluations that allow for the ‘technical’ prescriptions for ‘normalisation’: for example, stricter monitoring of informal value transfer systems (IVTS); better terrorism financing investigations; greater controls on cash transactions. The political imperative within the judgement – for example, that a country crack down on IVTS or a cash-intensive culture – is subsumed by the notion that the jurisdiction *owes* this retribution to society.

Although Bourdieu does not use the word scienticisation, he takes up similar themes when he talks of what is regarded as “commonsensical”. According to him, dominant individuals propagate the status quo by imposing a universal commonsensical discourse which is pitched as necessary. Much like the operation of science, this common sense undermines politics through a depoliticised political discourse produced through a neutralisation or negation of the heretical subversion, through the rhetoric of impartiality and scientificity²¹³. But, Bourdieu cautions, even neutral science has non-neutral effects²¹⁴. The commonsensical then becomes the legitimating device as well as the site for the construction of power relations by those who define the commonsensical. For, as Bourdieu contends, common sense brings into existence, publicly and

²¹¹ D&P supra note 23 at 18-21

²¹² D&P supra note 23 at 108-9

²¹³ Symbolic supra note 38 at 131-2

²¹⁴ Symbolic supra note 38 at 134-5

explicitly, that which hasn't an objective collective existence and was in a state of individual or several existence²¹⁵. The fact of being articulated as 'common sense' is what enables it to assume existence as such.

Key here is what Bourdieu calls the inherent politicity of language. This property gives primacy to relations over elements, to form over substance; it conceals the repressed elements by integrating them into a network of relations which modify their value without modifying their substance. The example Bourdieu uses to demonstrate this is of the use of specialised language by specialists. This, he says, allows for the profit of saying and the denying of what is said by the way it is said²¹⁶. The elevated form of the specialist discourse ensures laypersons stay at a distance because the text is thus only a) to be read within the limits of the text, and b) by professional readers²¹⁷. (Critically, in the AML-CTF context, neither domestic legislatures nor regulators count as professional enough: the FATF rules do not specifically discount their input but – as the Pakistan example shows in Chapter 4 – FATF arrogates to itself the right to determine whether the input is adequate.) The discourse – or science – is both self-referential, in that it secures its reading within the confines of a prescribed text, as well as self-legitimizing, in that it specifies who is authorised to read it.

Weber, meanwhile, finds a similar trend towards scientification in what he calls “modern legal science”. The construct he describes emerges as a self-contained, self-referential edifice of rationality: every social action of humans is seen as either application, execution or infringement of legal propositions and whatever cannot be construed legally in rational terms is legally irrelevant. Accordingly, every legal decision must apply abstract propositions to concrete facts using legal logic in a “gapless” system of legal propositions²¹⁸. Like every scientific discipline, the frontiers of law are self-determined; to be legally valid, an action must adhere to the internal logic of the law. Furthermore, the drive towards increasing rationality and specialised legal knowledge create the need for professional lawyers²¹⁹ – the only ones deemed capable of

²¹⁵ Symbolic supra note 38 at 236

²¹⁶ Symbolic supra note 38 at 142-3. The example he gives is of how politeness conceals the problematic/ hostile/ arrogant content of an order or question.

²¹⁷ Symbolic supra note 38 at 152

²¹⁸ Weber supra note 32 at 64

²¹⁹ Weber supra note 32 at 96

participating in the conversation, much like Bourdieu's "professional readers" – thus closing the circle completely.

Crisis as vehicle

The power of the 'crisis' in constructing legitimacy and, thereon, power relations is undeniable. The crisis is what authorises a break from the status quo and, in doing so, allows for the previously untenable to be regularised and incorporated into the current reality²²⁰. Significantly, it neutralises possible resistance by evoking visions of community, even if the said community is a fiction, and simultaneously underscores the need for urgent redressal. Finally, the power to define what constitutes a crisis invests the holder of this power with both legitimacy and the power to exclude other, competing definitions of a crisis. Since its inception, AML-CTF regulation has regularly reverted to crises as legitimation devices: from the war on drugs to the war on terrorism; from weapons of mass destruction to financial crises. Each of these crises have enabled significant departures from the status quo: the war on drugs, for example, allowed for civil forfeiture laws to be fashioned to track criminal proceeds²²¹; the war on terrorism authorised an unprecedented level of financial sector surveillance and the abandonment of constitutional and criminal law safeguards²²². Finally, the focus on organised crime as the primary source of money laundering has deflected attention from the role of capital in laundering.

Although Weber is speaking of actual wars, much of what he says about the conditions generated by war hold equally true for crises in contemporary society. War and its effects on economy and social order, he writes, "secularises" the thinking about what should be valid as norm because it becomes clear to everyone that the status quo isn't sacred. The need for security against internal and external enemies compels a new rationalisation of law-making and law-finding, which is

²²⁰ That said, crises function as catalysts only where the previously untenable was implicitly part of the existing discourse. For example, though bank bailouts have been a historical feature of the financial industry, the policy had been largely discontinued and the idea of the US and UK governments bailing out their banks would have been anathema prior to the subprime crisis of 2007.

²²¹ R. T. Naylor, *Wages of crime: Black markets, illegal finance and the underworld economy* (Montreal, McGill-Queen's University Press, 2002) at 248-52

²²² See, generally, Michael Gold & Michael Levi, *Money laundering in the UK: An appraisal of suspicion-based reporting* (London, The Police Foundation and University of Wales, 1994); Michael Woodiwiss, *Organised crime and American power: A history* (Toronto, University of Toronto Press, 2001); Valsamis Mitsilegas, *Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles*. (PhD dissertation, University of Edinburgh, 2000/ The Hague, Kluwer Law International, 2003).; Naylor supra note 221.

why Weber insists that “war and warlike expansion have at all stages of historical development often been connected with a systematic fixation of the law both old and new.” Unfortunately, Weber does not explore the consequences of this power to define enemies (and, by negative definition, to define allies – the Us-Them binary so favoured by former US president George W. Bush) and to determine the specific form of rationality the new law is to favour. But he recognises that war bestows a military character to political associations and greater influence over disputes and law to the military. The latter, he insists, is particularly important since the army is likely to be free of traditional constraints²²³. (This was particularly relevant in the development of CTF regulation in the wake of 9/11.)

Fortunately, Bourdieu picks up from where Weber leaves off and develops a sophisticated account of how representation (or the power to identify enemies, in the Weberian example) affects power relations and legitimacy. He contends that the representation of a world – as opposed to only factual, objective manifestation – contributes to its reality. To have efficacy as an instrument of power, crises require the creation of a new commonsense. For Bourdieu, heretical discourse (or the articulation of the previously unthinkable) produces this new commonsense by integrating the previously repressed or tacit experiences of the group (the unthinkable) and investing them with the legitimacy conferred by public expression and collective recognition. For example, pre-9/11, the notion of prosecutions based on suspicion or the requirement that an accused prove their innocence were once unthinkable according to established criminal law principles; similarly, the idea that banks would share information about their clients or of a law without a statute of limitations were also once heretical. After 9/11, however, public legitimacy endowed the AML-CTF regime to deploy and exercise all these powers.

This becomes possible because, as Bourdieu puts it, every language that makes itself heard by an entire group is an authorised language invested with the group’s authority; it authorises what it designates at the same time it expresses it. The language thus draws its legitimacy from the group over which it exercises authority but simultaneously also helps constitute by offering the group a unitary expression of its experiences²²⁴. This political labour of representation (in words,

²²³ Weber *supra* note 32 at 91

²²⁴ Symbolic *supra* note 38 at 128-9

theories, ceremonies, demonstrations or any form of symbolisation of division or opposition), says Bourdieu, allows political agents to construct new identities based on newly discovered commonalities that were earlier isolated, divided and demobilised²²⁵.

The points he makes merit further consideration. Where representation shapes reality, the subjectivity of the representation assumes greater significance. The demarcation of a crisis – be it a financial crisis or a spike in white-collar crime – thus contributes to its objective, factual existence as a crisis. To rephrase: it becomes a crisis *also* because the new common sense calls it a crisis. The legitimacy of the group attaches to both the common sense and the crisis it constitutes and the identity of group is further cemented by its ownership of the new common sense and the crisis. (For example, as with anti-corruption watchdogs.) Critically, the political labour of representation by political agents that makes all this possible, passes under the radar.

The significance of the above becomes more pronounced in the context of the global economy. To rephrase Foucault, the exercise of pastoral power by the modern state is predicated on a new conception of ‘salvation’²²⁶: FATF repeatedly invokes its desire to save the world from the effects of money laundering and terrorism financing. However, the point that merits recognition is that the invasive technologies and apparatuses that enable the exercise of this power (by developing knowledge of individuals) are entirely dependent on the definition of ‘salvation’ in terms of health, security, etc and who defines it so. That is, FATF’s peculiar definition of salvation – one predicated on a tenuous linkage between global financial health and organised crime (see Chapter 3 for details) – is what *authorises* its deployment of invasive technologies and apparatuses.

As Gramsci correctly notes, economic crises don’t produce fundamental historic events but create a terrain more favourable to the dissemination of certain modes of thought and ways of problematising the subsequent development of national life²²⁷. Similarly, while the issues of money laundering and terrorism financing have yet to trigger a global financial meltdown, they have already inculcated what Tsingou refers to as “surveillance creep²²⁸”: the idea that surveillance is the right of regulators and to be surveilled is the duty of citizens. The

²²⁵ Symbolic supra note 38 at 129-130

²²⁶ Power supra note 54 at 334

²²⁷ SPN supra note 76 at 184

²²⁸ Tsingou supra note 101 at 629, 632

militarisation Bourdieu speaks of consists in assuming authority on the basis of the “war” situation confronting the organisation, a situation that can be produced by working on the way the situation is represented so as to produce and reproduce constantly “the fear of being against”. This, he says is the ultimate basis of all militant or military disciplines: the characterisation of all opposition as collusion with the enemy. Militarisation, argues Bourdieu, is reinforced by the Us-Them binary and the perception of “the besieged ‘us’”, which predisposes people to military obedience and annuls all practical possibility of being against “by exploiting the euphoria of adherence or the anguish of exclusion and excommunication”²²⁹.

Divisive power

Dividing practices are essential to the project of power. By setting up separations, they impose identities as well as certain relations of power and even structure the parameters of dissent.

As discussed above, Marx sees division of labour as one of the principal powers at work²³⁰. For him, the imposition and inevitability of “a definite, exclusive sphere of activity ... from which he cannot escape²³¹” is the most potent manifestation of this power. Using the example of guilds, he shows how the organisation of guilds gave masters a direct influence over the entire life of the worker and installed the workers in a pre-existing complex of power relations. There was obviously the power imbalance between the worker and the master, both in terms of knowledge and know-how but also the tying of the worker to the existing order by his interest in eventually becoming a master himself. However, Marx also points out other relations of power: the bonds between workers working for one master; their unification against the workers of other masters; and their separation from other masters. Caught so in the network of power, Marx says, the only subordinations these workers managed were within individual guilds²³². As discussed above, FATF’s grey and blacklists similarly install jurisdictions within power networks. Like workers tied to guilds by their self-interest, jurisdictions also remain tied to the AML-CTF regime through their efforts to achieve whitelisting.

²²⁹ Symbolic supra note 38 at 202

²³⁰ Early Marx supra note 111 at 145

²³¹ Early Marx supra note 111 at 132

²³² Early Marx supra note 111 at 157

Arendt makes a similarly powerful analysis of how dissent is managed through dividing practices. She quotes Montesquieu as saying that the outstanding characteristic of tyranny was isolation: of the tyrant from his subjects and the subjects from each other through mutual fear and suspicion. This made tyranny contradict the essential human condition of plurality, which is the condition for all forms of political organisation. As Arendt reads this passage, tyranny prevents the development of power in its entirety; it generates impotence as naturally as other bodies politic generate power²³³. The insight regarding suspicion is particularly important in the context of the AML-CTF regime: not only does FATF alienate and label jurisdictions based on its subjective assessments regarding the dangerousness, it further divides individuals between themselves by fostering a culture of surveillance and suspicion and by co-opting professional bankers, jewellers, casino owners, realtors etc in policing each other. As Chapter 5 discusses, this culture has a significant impact on how people in societies relate to each other.

Foucault's contribution is the dissection of this impotence and its causes. He sees norms and "mechanisms of exclusion ... apparatuses of surveillance, the medicalisation of sexuality, of madness, of delinquency" as techniques of power incorporated into the social whole²³⁴. Dividing practices or segregation – of the sick from the healthy, the sane from the insane, for example – divide the subject both within himself and from others²³⁵. The wholeness or plurality Arendt espouses as a precondition for politics thus becomes an unattainable goal for this subject. The twofold division by what Foucault calls "the government of individualising" or "individualising power" is critical: the individual is categorised and marked by his individuality but he is also attached to his own identity by the imposition of a law of truth on him that he must recognise and have others recognise in him. This is how, Foucault concludes, power makes individuals subjects in two senses: subject to control and tied to their own identity by a conscience or self-knowledge. It's a form of power that subjugates and makes subject to²³⁶. The control exercised over this individual is thus both external or disciplinary *and* internal or inculcated (discussed later).

Bourdieu agrees with the power inherent in the institution of an identity, which signifies to an individual what he is and how he should conduct himself as a consequence. He also concurs with

²³³ Hannah Arendt, *The Human Condition* (Chicago, The University of Chicago Press, 1958/1998) at 202

²³⁴ "Two Lectures" in P/K supra note 173 at 101.

²³⁵ Power supra note 54 at 326

²³⁶ Power supra note 54 at 330-1

Foucault that all social destinies and boundaries are fatal because they enclose whom they characterise and prevent those inside from leaving²³⁷. But part of this ‘magic’, for Bourdieu, lies in that the identity is instituted by saying it in front of everyone: the authoritative manner in which an individual is informed of what he is and what he must be stems from the authority of ‘everyone’²³⁸. As he reasons, every group is the site of a struggle to impose a legitimate principle of group construction. Accordingly, the principle of classification ought to be one that is capable of uniting the members but also annulling their previous identities²³⁹. (This shows up in, for example, FATF’s naming-and-shaming of non-compliant jurisdictions.)

While Foucault’s concern are the effects of dividing practices, Bourdieu highlights two critical aspects about the practices themselves. First, he argues that all rites of institution consecrate or legitimate an arbitrary boundary by fostering a misrecognition of its arbitrariness; all rites either encourage a recognition of the boundary as legitimate or the solemn, lawful transgression of a limit, which constitutes a social and mental order the rites are supposed to safeguard. But the rite – be it classification as a high-risk jurisdiction or to mark the transition to adulthood – ends up focusing attention on *the passage* and not the arbitrariness of the line itself²⁴⁰. The politicity of the line ends up subsumed by the factual passage over it. For example, as Chapter 4 shows, Pakistan attracted FATF’s ire in 2007, *for doing what it had been doing since the late 1970s*.

Second, Bourdieu invites attention to the fact that while a line separates a before and an after, it also defines an instituted group in relation to a hidden set of people – the visible-invisible dichotomy espoused by Althusser. The example Bourdieu chooses is regarding male circumcision. While circumcision apparently distinguishes the boys from the men, the rite also separates – unnoticed – those who’re subject to it (boys, men) from those who are not (girls, women). That is, the girls/women are always present though invisible in the rite of circumcision. By treating the visible and the invisible separately, Bourdieu contends, the rite consecrates and institutes a simple difference of fact as a legitimate distinction, as an institution. Rites assign properties of a social nature in such a way that they appear as properties of a natural nature²⁴¹.

²³⁷ Symbolic supra note 38 at 122

²³⁸ Symbolic supra note 38 at 120-1

²³⁹ Symbolic supra note 38 at 130

²⁴⁰ Symbolic supra note 38 at 118

²⁴¹ Symbolic supra note 38 at 118-9

Similarly, while greylisting ostensibly separates the compliant from the non-compliant, it also separates those who are subject to it from those who, due to political privilege, *are not*. For example, despite having financed terrorism and encouraged money laundering, neither Saudi Arabia nor the US have been sanctioned for the same.

Agamben builds on Bourdieu's visible-invisible preoccupation with his inclusion-exclusion principle by arguing that the exclusion (separation, for Bourdieu) has the effect of including – and thus perpetuating control over – even that which has been othered²⁴². His example of the concentration camp illustrates this: the creation of the exception (the temporary suspension of fundamental rights) places the concentration camp outside the 'normal order'. However, that which was the state of exception within the polity (temporary suspension) becomes the rule for the camp²⁴³. Even in its state of exclusion, the camp is subject to the rules of the polity. The power to define the exception thus expands even when it appears contractionary. And so, despite its pariah status, every non-compliant jurisdiction remains subject to the rules of the AML-CTF regime – as evidenced by their effort to achieve compliance.

The advantages of control, of the misrecognition of arbitrariness and of expanded ambit are significant in and of themselves. However, as Foucault notes, dividing practices also carry economic advantages or political utility²⁴⁴. This utility shows up in, for example, crime control policies targeting “man, the soul, the normal or abnormal individual²⁴⁵”. Attacks on the individuality of man, his “dangerousness” and his potentiality *legitimizes* the exercise of external discipline through supervision, control and correction. As such, this individualising power delivers legitimate control over an individual's future²⁴⁶. The utility of this power can also be seen in what Foucault calls “institutional networks of sequestration” such as prisons, factories and schools. Here, individuals are sorted into groups and then controlled by the instituting of controls over their time and bodies as well as through the creation of a new polymorphous, polyvalent power that is economic (for example, the power exerted by he who pays wages), political (for example, the power to set rules or determine the basis for exclusion from groups),

²⁴² Agamben supra note 52 at 20-1

²⁴³ Agamben supra note 52 at 167-169

²⁴⁴ “Two Lectures” in P/K supra note 173 at 101.

²⁴⁵ D&P supra note 23 at 24

²⁴⁶ Power supra note 54 at 57-9

judicial (the power to punish and reward) and epistemological (the power to extract knowledge from and about individuals with a view to perfecting control)²⁴⁷. In every case, the exercise of individualising power is seen as delivering even more power to its holder. Significantly, FATF exercises all these powers: economic (for example, the ability to limit access to capital markets); political (the power to set rules as well as the decision regarding when to flout them); judicial (the power to reward and punish); and epistemological (the power to extract knowledge from and about jurisdictions, their economies, their citizens, with a view to perfecting control).

2.2.2.3 Category C

Dressage

The term ‘dressage’ here is not used in the Foucauldian sense (discussed later). Instead, it refers to the equestrian art of training, whereby a trained horse learns to execute precision movements in response to barely perceptible signals from its rider²⁴⁸. The emphasis is on the intensiveness of the training and conditioning that first, renders the movements of the horse predictable, and second, economises the input of the rider. To rephrase, control is complete and perfected only when the subject internalises discipline such that they require minimal external control.

Interestingly, the question of an internalised discipline preoccupies mostly the latter wave of the power theorists surveyed here. (Poulantzas, perhaps, is the only exception.) Foucault, Bourdieu and Lukes variously explore the notion of internalised discipline as dressage, responsabilisation, internalisation and inculcation. While there is no significant explanation of why this is so, part of the reason may have to do with temporality: Foucault, for example, contends that disciplinary power is a modern power that remains outside the construct of a traditionally defined sovereignty of the state²⁴⁹ whereas state sovereignty was a core concern of the other scholars discussed here.

Interestingly, the core theory of disciplinary power propounded by all three theorists remains strikingly similar. Foucault, for example, defines dressage as a core docility which joins the analysable body to manipulable body that can be subjected, used, transformed and improved²⁵⁰.

²⁴⁷ Power supra note 54 at 79-84

²⁴⁸ Merriam-Webster Dictionary, available online at <https://www.merriam-webster.com/dictionary/dressage>. Accessed May 3, 2018

²⁴⁹ “Two Lectures” in P/K supra note 173 at 105-7

²⁵⁰ D&P supra note 23 at 136

(For example, by determining the specific ways an economy ought function by proscribing a cash-intensive culture; see Chapter 5.) The techniques deployed by disciplinary power are small powers – “micro-powers” or “infrapowers” – which rely on the production of ‘docile bodies’ through the repetition of detailed tasks as in prisons and hospitals²⁵¹. The techniques of surveillance – methods of observation, recording and training – thus engender a new universal recoding where the individual absorbs and internalises the discipline he is subject to. Critically, this power seems to obviate the use of force or coercion as an impetus to obedience²⁵².

As Hunt and Wickham read Foucault, disciplinary power exhibits three basic characteristics: hierarchical observation; the operation of norms and normalising judgement; and a mix of micro penalties and rewards²⁵³. The FATF governance structure manifests all these: the tiered observation by the FATF-style regional bodies, the Egmont Group, the IMF and the World Bank; the norms and judgements regarding money laundering and terrorism financing practices; the naming-and-shaming techniques and the public commendations on achieving progress. As Foucault explains in *The History of Sexuality*, these techniques arise out of existing hierarchies of power: the state has an interest in knowing about the sexual lives of its citizens and how sex is used so that the state can control it to secure a sexuality that is economically useful and politically conservative (visible as steady population growth and labour capacity and the perpetuation of social relations). The norms prescribed by the experts then help define ‘deviance’, thereby expelling from the discourse all sexual practices deemed useless by the state²⁵⁴. Even difference – aberrant sexualities, as it were – is to be rendered useful by giving it an analytical, visible reality that can be used for classification and intelligibility²⁵⁵. Finally, as Hunt and Wickham contend, the advantage of the micropenalties that Foucault puts at the heart of all disciplinary mechanisms is that they take possession of ever-widening fields of behaviour. That is, whereas penalties track offenses, micropenalties can be used to arrest minor deviations and individualise punishment²⁵⁶.

²⁵¹ Hunt & Wickham supra note 75 at 20

²⁵² “Two Lectures” in P/K supra note 173 at 105-7

²⁵³ Hunt & Wickham supra note 75 at 21

²⁵⁴ HoS supra note 48 at 26-37

²⁵⁵ HoS supra note 48 at 42-4

²⁵⁶ Hunt & Wickham supra note 75 at 21

Bourdieu, meanwhile, speaks of this internalised discipline as a consequence of the consecration of difference (discussed above). The person consecrated is transformed, he says, because of the simultaneous transformation of the perception he has of himself and behaviour he feels obliged to adopt in order to conform to that representation²⁵⁷. The “universally adopted strategy” of preventing a person from leaving the box of his social destiny, says Bourdieu, is the naturalisation of difference by turning it into second nature by inculcation in the form of habitus²⁵⁸. The key advantage of inculcation is that it seeks to naturalise the differences that constitute an arbitrary limit in the form of “a sense of limits” so that people are deprived of a sense of deprivation²⁵⁹. That is to say, the external limits imposed on an individual are so internalised that he begins valuing them for their own and forgets to resist them as an external imposition.

Lukes has a similar read: he argues that A exercises power over B not just by getting him to do what he does not want to do by also “by influencing, shaping or determining his very wants²⁶⁰”. Lukes takes issue with the pluralists who contend that actual conflict is necessary to power and argues instead that the most invidious and effective form of power is where the conflict is prevented from rising in the first place; where grievances are pre-empted from being articulated because the people accept their role in the order of things or because they cannot imagine an alternative or because they see it as natural or as beneficial and divinely ordained²⁶¹. The Pakistani interlocutors who profess to want whitelisting need to be seen as such: even if their aim is to access foreign capital or to prevent terrorism within the country, the self-identification with FATF and its aims is deeply problematic since the FATF rubric comes embedded with its own politics and power relations.

The most strident critique of such an internalised discipline comes from Poulantzas. He insists that Foucault underestimates both the role of law in the exercise of power as well as the role of the state with its repressive apparatuses (army, police, judicial system etc)²⁶². The repression-ideology couplet or the techniques of power, he says, focus attention on how consent is secured –

²⁵⁷ Symbolic supra note 38 at 119

²⁵⁸ Symbolic supra note 38 at 123

²⁵⁹ Symbolic supra note 38 at 123

²⁶⁰ Lukes supra note 51 at 27

²⁶¹ Lukes supra note 51 at 28

²⁶² Poulantzas supra note 49 at 76-9

through “law-love” or “prohibition-desire”²⁶³ – while the role of violence in grounding power is undermined. This focus, Poulantzas claims, eclipses the “positive *material reasons* [emphasis in original]” for securing consent, such as the concessions made to the masses by the existing power (the Gramscian influence is clear though Poulantzas does not acknowledge this). Here, in a persuasively argued passage, he goes for Foucault’s jugular: if disciplines of normalisation were enough to account for submission, there would be no space for struggles or the resistances that Foucault himself recognises as inscribed in power. Violence, like consent, owes its existence to the universality and primacy of exploitation-based struggles²⁶⁴.

As ever, Poulantzas turns to class to justify his thesis. Organised physical violence is critical to the existence and reproduction of labour, he contends, and all phenomena of power – the capitalist techniques of power, the disciplinary devices and the ideological-cultural institutions – presuppose the state’s monopoly over violence. “*State-monopolised physical violence permanently underlies the techniques of power and mechanisms of consent: it is inscribed in the web of disciplinary and ideological devices; and even when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear* [emphasis in original]”. The violence, however, remains concealed by the shift of legitimacy towards legality and by the rule of law²⁶⁵.

There is a strong case to be made for both sides. But if Foucault and Co’s defect is a failure to adequately theorise the role of the state, Poulantzas’ is that the state is too much with him. There is no denying the significance of the state – still – but as the fulcrum or the locus of all power may be an oversimplification in contemporary times. As Pearce and Tombs note, recent governmentality literature has upended the belief that the state is at the epicentre of social ordering; instead, such accounts privilege the governance of self, the actions of others and relations within populations as their object²⁶⁶. To be fair to Poulantzas, such regulatory technologies were nascent or non-existent at the time of his writing and the emergence of global regulation and the transnational capitalist class were a way off. The materiality of the state in

²⁶³ The former is consent founded on the wish of the masses while the latter is obedience secured by the desire and love inculcated in subjects through the presence, self-expression and discourse of their “Master”. Poulantzas supra note 49 at 78-9

²⁶⁴ Poulantzas supra note 49 at 79

²⁶⁵ Poulantzas supra note 49 at 81

²⁶⁶ Frank Pearce & Steve Tombs, “Foucault, Governmentality, Marxism” (1998) 7:4 Soc & Leg Stud 567-575 at 1

international law has since been productively mined, for example, by scholars such as Chimni and Hay. Chimni, for example, applies a Marxist lens to international law to argue that first, international relations depend on how each state has developed its productive forces, the division of labour and internal dialogues. Second, that foreign policy proceeds from domestic policy and is located within a socio-economic context based on a dominant mode of production. Third, in the international arena, states advance the interests of the ruling class and do not represent ‘national interest’. Finally, the international system has an identity distinct of the sum of its parts²⁶⁷.

However, even such advances remain locked in the materialist framework and fail to take adequate account of other forms of power such as military (as distinct from the state); religious/ideological and political. Further, there is little recognition of the fact that the interaction of powers in a society frequently produces results that cannot be completely predicted by or even explained in terms of a single, predominant power. As Dupont and Pearce read “The Confession of the Flesh”, even Foucault recognises that nobody controls the totality of the social. And yet simultaneously, they argue, he makes a persuasive case about the different strategic capacities used by different groups to take advantage of the unexpected, surprising effects of the operation of particular social apparatuses or dispositifs²⁶⁸. But the most significant aspect of the interaction of powers thesis is – to quote Hindess in another context – it requires the idea of a power whose effects are produced in ways that cannot readily be traced to the deliberate actions of any identifiable individual or group²⁶⁹.

2.3 Interaction of powers

Before proceeding to a discussion of how powers interact, it is essential to briefly revisit what power is. First, power is no zero-sum game with a definite, measurable amount of power; power is the capacity of one *or several* actors to realise their specific interests in derogation of the

²⁶⁷ B.S. Chimni, “Marxism and International Law: A Contemporary Analysis”, *Economic and Political Weekly* 34:6 (Feb. 6-12, 1999), 337-349; online

<https://www.jnu.ac.in/sites/default/files/Marxism%20and%20International%20Law%20BSChimni.pdf> at 337-8

²⁶⁸ Danica Dupont & Frank Pearce, “Foucault contra Foucault: Rereading the ‘Governmentality’ papers” (2001) 5:2 *Theoretical Criminology* 123-158 at 144

²⁶⁹ Discourses supra note 25 at 81. While Hindess is here talking about Lukes’ conception of the insidious power that operates on the thoughts and desires of people through the medium of social arrangements and patterns of behavior, conceptually, the analysis has merit in this context too.

capacity and interests of other actors in a relational field²⁷⁰. While the political power of an actor to realise their interests depends on their position relative to others, it is also conditioned by the position and strategy they display vis-a-vis others. Second, power originates from both economic and non-economic capital (political, cultural, social, symbolic etc). Third, power requires both broad strategies of effecting, maintaining and perpetuating domination ('constructive practices') as well as specific techniques and means of exercising it ('instrumental power'). The latter are also significant as they help reproduce the institutions of power.

The specificity of this definition provokes a series of interrelated but distinct questions related to the interaction of powers, more particularly, the intersection of politics, non-elite groups and institutions. First, to quote Parsons, the greater power is power *over* the lesser, not merely *more* power *than* the lesser²⁷¹. If all actors are powerful to varying degrees, what does their interaction look like? Who wins and is this always a predictable outcome, a given? Also, what constitutes a 'win': is a 'win' a watershed moment in a struggle between various groups *when a decision could have gone the other way*? If so, how are the individual contributions of each group to the (eventual) decision to be mapped? Or is a win more of an irresistible watercourse, where the direction of the current depends on the magnitude of the largest force (or some combination of the largest forces) applied and cannot be altered? Further, are the 'specific interests' of actors immutable or is there room for purchase or influence, for example, through the Gramscian concession? How do such concessions affect the purity of the interests and, as a corollary, the source of power itself? Finally, how does the 'subjective' (that is, the power and position of each actor *relative* to others) act upon the 'objective' (that is, the power and place of each actor in economic, political and ideological relations)? That is, how does the *interaction* between the various social groups – for example, between the capitalist class and the military – condition the power and place *of both*?

²⁷⁰ This is, of course, a modification of Poulantzas' original (described earlier), where he uses the word "classes" instead of "actors". The modification is essential to recognizing the status of forms of power other than economic (political, military, ideological etc). Further, the relational field argument does not preclude 'collective power', what Mann sees as actors multiplying their powers by acting in concert, since even the collectivity is working in opposition to other powers. Michael Mann, *The Sources of Social Power Volume 1: A History of Power from the Beginning to AD 1760* (New York, Cambridge University Press, 1986) at 6. [Mann 1]

²⁷¹ Talcott Parsons, *The Social System* (Abingdon, Routledge, 1991) at 85.

Second, if power is predicated on the accumulation of capital (whether economic or non-economic) and belongs to elite groups or the ruling class, what is the role of non-elite groups? Is their impotence inevitable? Further, where elite groups (such as capitalists) have constituencies comprising non-elite groups (such as workers, labour unions etc), what do these relationships look like and how do they affect the choices and decisions of the elite groups?

Third, while an understanding of how power is produced, ordered and deployed is crucial, the key question remains: where does power inhere? Is the relational field populated by individuals, groups, institutions or a mix of all? Further, where individuals and groups hold several memberships and identities simultaneously (for example, an ‘old money’ capitalist who has ties with the military or a religious group that has entered mainstream politics), how are the various *contributory* sources of their power to be mapped? Finally, are the institutions autonomous or merely reflective of the interests of actors and groups who run them? If the latter, do the institutions (and the positions they assume) manifest the *plural* identities of the groups?

To collapse this set of disjointed questions into one: how do all the moving parts cohere?

This is where Mann comes in. In a daunting four-volume series titled *The Sources of Social Power*, Mann traces the exercise of power, its sources and effects “from the beginning²⁷²” to present day. He builds on older models of social stratification (respectively, Marx’s economic-ideological-political and Weber’s class-status-party) to deliver what he calls his ‘IEMP model’: ideological, economic, military and political power as distinct and “relatively autonomous” sources of social power²⁷³. The point is to zoom in on what drives the ‘drivers’ instead of focusing on the faces of the actor/ institution/ network. Each of the four sources, says Mann, presents an alternative means of social control; at different times in history, each offered an

²⁷² Mann defines this moment as the beginning of recorded time.

²⁷³ Mann 1 supra note 270 at vii; Michael Mann *The Sources of Social Power Volume 4: Globalisations, 1945 – 2011* (New York, Cambridge University Press, 2012) at 1. [Mann 4]. While he relies on standard understandings of ‘economic’ and ‘ideological’ power, his segregation of military and political power merits further explication. To Mann, military power is focused, furious, lethal violence exercised by armies, terrorists, paramilitaries and criminals. Political power, on the other hand, is the centralized, territorial regulation of social life, through law and rule-governed political deliberations in centralized courts, councils, assemblies and ministries. Unlike Weber who thinks any organization (including NGOs, corporations and social movements) can have political power, Mann sees the state as the only spatial and institutionalised form of centralized, territorial power.

enhanced capacity for organization that enabled it to dictate – for a while – the form of societies at large²⁷⁴.

The list of Mann’s problems with most theories of power are too numerous to be cited here in full²⁷⁵ but three points are key. First, unlike most of the other theorists of power, he sees the drivers of history continually changing through history. (For example, the US compulsions in Afghanistan were different in the late 1970s from what they were in the noughties.) He repeatedly rejects every theory of primacy/ structural determinism to argue that human societies comprise “multiple, overlapping and intersecting sociospatial networks of power”²⁷⁶. While each network controls and reorganizes certain parts of social life, he believes none can fully control or systematize social life as a whole²⁷⁷. In Mann’s reading of power through time, the question of ‘who wins’ is obviated by social complexity. History, he argues, does not have a “fundamental unity” conferred by the history of, say, class struggle, modes of production, epistemes or discursive formations²⁷⁸ and abstracting even “several major structural determinants” tends to distort social complexity²⁷⁹. As such, he categorically rejects theories of systems and holisms that attempt to “reify societies”²⁸⁰.

While Mann does admit the governing logic or the ordering force of, for example, capitalism/ patriarchy/ multistate relations, he cautions against viewing any as the sole determinant of social change²⁸¹. Since social events and trends have multiple causes (discussed later), he thinks the notion of primacy is stillborn. Further, he contends that no power source has a given structure exerting “a steady, permanent influence” on social development²⁸²; structures are essentially the outcome of collective actors and groups forming around the distribution of power resources. That is, structures and institutions (including law and norms) are set up to distribute power *after* people enter into *cooperative* power relations in pursuit of *collective* goals²⁸³.

²⁷⁴ Mann 1 supra note 270 at 3

²⁷⁵ Among the theorists who particularly rouse his ire are Marx, neo-Marxists, Wallerstein and Parsons.

²⁷⁶ Mann 1 supra note 270 at 1

²⁷⁷ Mann 1 supra note 270 at 506

²⁷⁸ Mann 1 supra note 270 at xi

²⁷⁹ Mann 1 supra note 270 at 4.

²⁸⁰ Mann 1 supra note 270 at xi

²⁸¹ Mann 1 supra note 270 at xi

²⁸² Mann 1 supra note 270 at xxii

²⁸³ Mann 1 supra note 270 at x, 6-7.

Second, while Mann takes great pains to define each source of power as rigorously as possible, he is uncompromising in that each source is an idealtype. Although the sources are conceptually distinct, they are also “functionally promiscuous” in how they interact and operate *within* power actors in the ‘real’ world²⁸⁴. (The example he gives is of the state, which is both an economic actor and a political one.) A full appreciation of society, its structure and history, he argues, is predicated on an understanding of the *interrelationships* between the four sources of social power. These interrelationships, he says, are reflected by both networks of social interaction (that is, the interaction between individuals and groups) as well as institutions²⁸⁵.

The sources of power, claims Mann, develop in tandem: entwined and influencing each other’s development rather than undercutting it²⁸⁶. The interaction of these networks and institutions is critical because it *transforms* the nature of each power actor/ network/ institution – their “inner shapes” – *as well as* their “outward trajectories” in ways that are often unpredictable. (The internal transformation – or, to put it another way, the mutation of specific interests – is why he cautions against thinking of power sources as “billiard balls”, which change direction when they hit another but largely follow their own trajectory²⁸⁷.) This is because power organisations can never be entirely institutionalized or insulated from influences coming “interstitially” from either cracks within them or between them²⁸⁸. (For example, see the evolution of the military within Pakistan in Chapter 4.)

²⁸⁴ Mann 1 supra note 270 at 17

²⁸⁵ Mann 1 supra note 270 at xi, 1. In Mann’s conception, social groups coalesce around the social networks emanating from the four sources of power but rarely have these networks coincided in any period in history.

²⁸⁶ Mann 2; p ix. The example he uses here is of the development of nation states (political power) and classes (economic power) through 1760 and 1914.

²⁸⁷ Mann 1 supra note 270 at xi; Mann 2; p 2.

²⁸⁸ Mann 1 supra note 270 at xxii. An example of how the cracks within and between power organisations manifest themselves in the working of power would be the devise of the foreign policy agenda in liberal democracies. Despite being a *political* actor making a *political* decision, the state is profoundly influenced in its decision-making and fundamentally altered in its nature by its engagement with both military power as well as economic power. (One such decision would be a policy to engage with countries that could serve as potential buyers for the domestic arms industry.) Here, the state is both an actor with political and economic imperatives of its own (the cracks within) and an organization in direct competition with the military establishment and economic interest groups (the cracks between). Since the interaction is conditioned by a host of other factors simultaneously (for example, a historically adventurist military and/or an overwhelmingly negative balance of trade), the outcome of the interaction (that is, the eventual direction of foreign policy) as well as the lasting impact on the state as a political actor are not easy to predict. (Obviously, both phenomena will also alter the nature of and future decision-making by the military and economic actors.)

While the idea of a reflexive, dialectical interaction is as old as Marx himself, Mann's specific contribution rests on the blending of multicausality (as opposed to primacy) with unpredictability²⁸⁹. The combined operation of both, he seems to suggest, nullifies any questions regarding watersheds or watercourses. The insight is an important one and Mann deftly pulls examples from history to show the fusing of disparate power sources and objectives: for example, how ideological and economic power were essential to buttressing military power²⁹⁰ or how military power and economic power have been mobilized in the service of political power²⁹¹. He makes a convincing argument for unpredictability where, for example, he discusses US foreign policy in Southeast Asia during the Cold War. He insists that the US was "sucked into a militaristic strategy" due to the close ties of American capitalists with local upper-class conservatives who didn't want to yield any of their domestic power²⁹² – a moment that captures simultaneously the interrelationships of economic and political power in both the US and Southeast Asia respectively; the influence of economic/political power over military power in the US; and the transnational alliances between economic elites. The AML-CTF regime also merits examining through a similar lens since it brings together the various sources of power in a polity and beyond. Significantly, the direction of the regulation cannot be attributed to either a ruling class or to a hegemon: the US position, for example, is informed by its economic, political and military interests; the Pakistani position is informed by the political and economic interests of its military as well as the ideological interests of its populace.

The element of unpredictability also comes through where Mann struggles to evaluate the relative strengths of the power sources: he concludes that it is "difficult" to weigh the relative strength of "the two American motives: great power rivalry with communist powers or support

²⁸⁹ To illustrate this, Mann looks at general explanations of why twentieth century capitalism features both nation states as well as classes. He says that most such explanations focus less on the major political struggles of the nineteenth century – which concerned class, religion and regional movements – and more on the unintended consequences of that pressure: the need for various groups to organize themselves at the level of the state in order to further their collective goals. Mann 1 supra note 270 at xxiii.

²⁹⁰ Mann 1 supra note 270 at 19

²⁹¹ For a detailed discussion for this fusing in contemporary times, see, generally, Mann 4 supra note 273, especially his example of the operationalisation of the American "indirect empire" throughout the Cold War period, using a mix of economic, political, ideological and military power in – variously – the Middle East, Latin American countries, Southeast Asia, Afghanistan.

²⁹² Mann 4 supra note 273 at 101

for capitalists and landlords in the interests of American capitalists”²⁹³. The unspoken corollary to the foregoing is, of course, greater outcome unpredictability.

Unfortunately, Mann falters when it comes to demonstrating reflexive internal transformation. Despite the stunning promise of the insight – as well as its readily intuitive appeal – he fails to unpack the processes of its operation or even show how the theory applies to modern politics – at least not explicitly²⁹⁴. For example, when he discusses the US Supreme Court’s conservative and pro-capitalist bias, he concedes too readily that he is unable to understand why this is so²⁹⁵. (This is particularly ironic since the case has come to exemplify how political and economic power are individually transformed by their encounter and is now part of legal and political science folklore²⁹⁶.) Happily, Kennedy supplies the deficiency with an explanation that hews closely to Mann’s original with an additional contribution.

Like Mann, Kennedy, too, is no fan of ordered patterns as a heuristic device and sees actors and structures as constituted through engagement. But his key advancement over Mann is that he views actors and structures as the *outcomes of previous struggles*: “conflict is always already there, frozen perhaps, but there. The [] positions [of actors and structures] at rest are the outcome of those prior struggles²⁹⁷.” The quest for ordered patterns, maintains Kennedy, leads to an overestimation of the significance of agreement, collaboration, consensus or persuasion – what Mann would call interrelationships. But Kennedy refuses to characterize this interaction of powers as benignly, as pacifically as Mann does. Like conflict, says Kennedy, this collaboration

²⁹³ Mann 4 supra note 273 at 101

²⁹⁴ To be fair to Mann, he acquits himself far better on this count for earlier periods. In the first volume, for example, he makes the interesting observation that military superiority rests on economic preconditions such as the availability of ample grasslands (for chariots or cavalry) or an iron industry making cannons before it was turned to other manufacturing uses. (Mann 1 supra note 270 at xxiii) Economic power can then be seen as interacting with, affecting, influencing and transforming military power from within; military power similarly transforms economic power when wars and conquests yield more markets and resources for the economy. (Mann 1 supra note 270 at 511-2)

²⁹⁵ Mann contends that the court is biased towards business-dominated policies; that it legitimates neoliberalism in the US and allows economic power to corrupt democratic politics and weaken social citizenship. He sees this tilt evidenced by the court’s decision to strike down a campaign finance law in 2010 (*Citizens United vs Federal Election Commission* (558 U.S. 310 (2010))), apparently in a bid to protect corporations’ right to free speech. Mann 4 supra note 273 at 342-3; 356

²⁹⁶ For a particularly incisive critique, see Margaret E. Beare, “Entitled Ease: Social Milieu of Corporate Criminals” (2018) *Crit Criminol* (Special issue “Crimes of the Powerful: The Canadian Context”) 509-526, who sees the case as an example of how systemic corruption is normalized and embedded within the social fabric as well as legislative frameworks.

²⁹⁷ Kennedy supra note 195 at 78-9

“takes place on a terrain of distributed power and legitimacy. Agreement, like argument, is undertaken in a vocabulary whose effectiveness arises from its relative hegemony. Every collaboration rests on a status of forces and every persuasive argument rests on a canon of the plausible and the persuasive.²⁹⁸” To rephrase: the position of an actor/ structure and their specific interests are the ossification of earlier conflict and power battles. The positions and interests are the *manifestation* of the subjective acting on the objective; these positions and interests evolved as a consequence of previous encounters. The internal transformation that Mann speaks of is not a standalone event, episodic or even neoepisodic²⁹⁹; it is continuous, continual change in the Hegelian sense. The transformation is present in every position of an actor/ structure; the pro-capitalist tilt of the US Supreme Court is not *received* but the *result* of earlier encounters with economic, ideological and political power. Similarly, as demonstrated in Chapter 4, the ideological orientation of the military and judiciary in Pakistan is a consequence of their earlier encounters with religious groups.

While Mann’s inability to flesh out this specific case is puzzling – especially since he recognises a similar process at work when he lays out his thicker account of institutional development (discussed below) – it does not detract from the overall conceptual merit of his theory. He sees social change as the outcome of a combination of “creative group action” and “institutional development”. At major points of change in society, he argues, there is a series of conjunctions between causal chains – some novel, others interstitial (in that they emerge from gaps within and between existing power structures) – but also other conjunctions with deep-rooted institutions that are changing, albeit at a much slower pace³⁰⁰. In the latter case, change is the outcome of the interaction between older, institutionalized power models and newer power models that emerge interstitially³⁰¹. As if these variables weren’t enough, he also adds a third, contributory category: “mistakes, apparent accidents and unintended consequences³⁰²”. The cumulative effect of these

²⁹⁸ Kennedy supra note 195 at 79

²⁹⁹ Mann’s definition of neoepisodic change is that change, which comes in intermittent bursts of structural transformation, an unintended consequence of action from unexpected external events and even accidents. Mann 1 supra note 270 at x

³⁰⁰ Mann 1 supra note 270 at x-xi

³⁰¹ Mann 1 supra note 270 at xii

³⁰² Michael Mann, *The Sources of Social Power Volume 2: The Rise of Classes and Nation-States, 1760 - 1914* (New York, Cambridge University Press, 1993) at 3-4. [Mann 2] While the theory seems influenced by Gramsci’s notion of conjunctural movements, Mann does not acknowledge the debt. Gramsci saw conjunctural movements – as opposed to organic, relatively permanent movements – as occasional, immediate and almost accidental. (In an

four – the interactions between power sources, interstitial interlopers, institutional development and inadvertency (mistakes, etc) – is that the outcome of power struggles are rarely predictable. It is not enough to say, for example, that the US or G7 desire for greater financial-sector surveillance will materialize as a consequence of AML-CTF compliance: the military establishment in Pakistan, for instance, *will* attempt to derail implementation and the inadequacies of an underfunded police department *will* torpedo investigations. Chapter 3 talks in detail about the various compulsions of each source of power as well as the limitations they impose on each other.

Corroboration for such a reading of power comes from the area of elite studies. Introducing a special elite studies issue of the influential journal *Theory, Culture and Society*, editors Davis and Williams make a case for elite studies to recognize the fallibility of all kinds of power and map their intersection instead of aligning with one concept of power. “Many researchers have signed up to explore the hegemony of a single form of power, only grudgingly accepted its fallibility and never enquired about its intersections in a world where power’s reach often exceeds grasp. Those issues about fallibility and intersection cannot be avoided in the researching of new spaces where various elites (executive and intermediary, sectorally-based and politically sponsoring or expertly supporting) are tactically combined for offence or defence, often against competing groups”³⁰³.

Elite power, argue the two, has become more complicated since the Millsian notions of ‘money’, ‘power’ and ‘prestige’ rarely all reside in single individuals, be they political office bearers, politicians or CEOs. “[M]any of the most visible public figures in politics and business now resemble the type of celebrity that Alberoni (1960) once called the ‘powerless elite’. ... The idea of elite individuals being able to actively impose their will on others, because of their structural position and superior resources, has been reappraised”. Instead, Davis and Williams cite Foucault to contend that those at the top of the pyramid are as disciplined as those below: “[a]

accompanying footnote, Hoare quotes Gramsci as saying elsewhere that the conjecture is a set of circumstances, which determine a market in a given phase, provided that these circumstances are conceived of as being in movement, i.e. constituting the economic cycle.) The inability to differentiate between the conjectural and the organic, warns Gramsci, leads to the erroneous identification of some indirect causes as direct or only see the immediate causes as the effective ones. SPN supra note 76 at 177-8

³⁰³ Aeron Davis & Karel Williams, “Introduction: Elites and Power after Financialization” (2017) 34(5-6) *Theory, Culture & Society* 3–26 at 20

‘micro-physics’ or ‘capillary’ form of power works in all directions, with elite agency thoroughly diluted (Foucault, 1980: 156): ‘Power is no longer substantially identified with an individual who possesses or exercises it by right of birth; it becomes a machinery that no one owns’. As Foucault’s later work made clear, even rulers are ‘governmentalized’³⁰⁴. This insight is key to understanding the AML-CTF regime since it captures the fact that isolating a singular class or even *kind* of interest among the drivers of the regulation is inordinately difficult, if not impossible.

The second point is regarding the role of non-elite groups. If power is predicated on the ownership of capital (economic or otherwise), theoretically, non-elite groups ought to have no influence or power. Yet Foucault insists that the preoccupation with powerful/ powerless is largely futile since relations of power-knowledge are dynamic “matrices of transformation”. The strategy of power, he says, is conditioned by, first, the specificity of possible tactics, and second, by the tactics conditioned by the strategic envelope that makes them work³⁰⁵. This becomes clearer when he explains what he calls the “microphysics of power”. This power, he says, is a strategic position assumed by the dominant class that is sometimes manifested and sometimes extended by the position of those who are dominated; the microphysics of power is thus a network of relations constantly in action, not a property or privilege acquired or preserved by the dominant class. Power does not operate on the powerless but “invests them, is transmitted by them and through them; it exerts pressure upon them” even as they resist its grip over them³⁰⁶. As discussed above, Foucault sees the complicity of the subjugated as essential to the exercise of power. However, this complicity is neither born of impotence nor passive in its operation.

Sassen goes a step further by contending that there is puissance in even powerlessness. The interaction of powers, she says, gives birth to a new kind of political power for those who were powerless in conventional terms³⁰⁷. For example, she sees the law as having created the worker as a disadvantaged subject in relation to the capitalist and marks how law feeds into (and

³⁰⁴ Davis & Karel supra note 303 at 8-9

³⁰⁵ HoS supra note 48 at 99

³⁰⁶ D&P supra note 23 at 26-7

³⁰⁷ Sassen is talking specifically about how global cities create the conditions for the emergence of new types of political actors who were previously “submerged, invisible or without voice”. Saskia Sassen, *Territory, authority, rights: from medieval to global assemblages* (Princeton, Princeton University Press, 2006) at 316-7.

conceals³⁰⁸) the power of the latter. As such, the encounter between workers and the owners of capital, she contends, should have been entirely exploitative. Yet she notes how the workers, their organisations and political parties used the same law to secure greater rights for themselves³⁰⁹. The same argument can be extended a notch: since the workers are among the non-elite constituencies of the capitalist, the exercise of this ‘new’ power by workers would also influence future decision-making by the capitalist – an example of how a non-elite group, while being ostensibly powerless, can move the levers of power. This is evidenced in the influence of a non-elite group such as religious parties on politics in Pakistan: while lacking sizeable power of their own, these groups leverage their influence on broader society (through their ideological power as well as their welfare activities) as well as the Deep State’s dependence on them to direct the trajectory of AML-CTF regulation. (See Chapter 4 for a detailed discussion.)

The complexity of powerlessness, writes Sassen, stems from the fact that it is not simply the “absence of power” – only *some* constitutions of powerlessness feature impotence and invisibility. She further demonstrates this using the example of disadvantaged and minority groups in cities. “The fact that the disadvantaged in global cities can gain ‘presence’ in their engagement with power but also vis-à-vis each other does not necessarily bring power, but neither can it be flattened into some sort of generic powerlessness³¹⁰.” While this presence is in a broader political context that is not captured by the formal polity, it is still political action and shows how informal political subjects, despite their exclusion from the formal political apparatus, can still “make history”³¹¹.

Finally comes the question of where power inheres. The literature – as well as common sense – suggest a mix of individuals, groups and institutions drawing jointly and separately on various sources of power. Mann’s multicausality and functional promiscuity theses preclude the question of hierarchy between and within these actors. That is, few phenomena – if any – can be attributed to a singular, pure source of power prevailing over all others in a field. The problem of

³⁰⁸ Sassen supra note 307 at 201-2

³⁰⁹ Sassen supra note 307 at 110

³¹⁰ Sassen uses the example of how disadvantaged and minority groups in many cities have leveraged their ‘power’ by “political innovation” that destabilises older systems of organizing territory and politics to resist gentrification of their neighbourhoods. Supra note 307 at 317

³¹¹ Sassen supra note 307 at 319, 321. She sees the burghers in medieval society as a similarly ‘powerless’ group, which was able to capitalize on its power as merchants to contest the arbitrary exercise of power by kings, the nobility and the church. Also at 71.

promiscuity of sources is compounded further by the multiple identities of the actors. For example, a military owes its predominance to sources of power that are economic (the presence of ample grasslands, in Mann's example above), political (for example, inter-state conflict) and ideological (for example, nationalist), in addition to its own social power. Predominance achieved, the military develops its own power networks and institutions. These would include, for example, the military industrial complex (economic power) as well as its role in praetorian democracies (political power); both condition the strength of the military as an institution. If one were to attempt to predict the overall direction or strategy of this institution, how would the contributory influences be mapped *relative to one another*? The issue is not just of how the economic interests of the military are balanced and reconciled with its political interests. Far larger is the question of how this calculation manifests itself in the strategic direction assumed by the military.

Mann believes the calculation of interests is influenced by all entwined sources of power and always involves norms – both peaceful and violent – emanating from “complex attachments to the ‘imagined communities’ of class and nation”³¹². He illustrates this using the example of the state. Few states, he argues, are unitary actors and state elites are also plural, not singular. This diversity produces an incoherence, especially where states comprise a mix of groups and institutions (military, bureaucrats, political parties³¹³); are riven by multiple departmental autonomies; under pressure by capitalist and other interest groups; and hostage to specific foreign policy imperatives³¹⁴. In this mix, the traditional mechanisms deployed by states to allocate priorities – via legal codes and constitutions; budgets; party democratic majorities; monocratic bureaucracy – do not work³¹⁵. Where power crystallises around different networks (economic, military etc), a singular systemic state would theoretically have the capitalist class or the working class care about routine diplomacy; the military care about factory safety legislation.

³¹² Mann 2 supra note 302 at 50.

³¹³ Mann 2 supra note 302 at 51. Significantly, Mann does not include the judiciary as a separate source of power (discussed later).

³¹⁴ Mann 2 supra note 302 at 53

³¹⁵ First, constitutions do not indicate how priorities are to be set; second, the importance of a policy initiative is not directly proportional to its cost (or vice versa); third, party politics usually eschews head-on confrontation and ultimate decision making and “rarely choose between guns and butter”, instead preferring to compromise; and finally, the highest administrative levels are usually staffed with political loyalists not careerists. Mann 2 supra note 302 at 79

Since they do not, argues Mann, “[p]owerful political actors pursue most of the multiple functions of the state pragmatically, according to particular traditions and present pressures, reacting pragmatically and hastily to crises concerning them all³¹⁶.” The state, he concludes, is not conspiracy but “cock up”³¹⁷; the modern state has emerged “in forms intended by no one and has in turn transformed all their identities and interests”³¹⁸.

The point marks a critical feature of Mann’s thought: the state as both an actor and a place. (This, of course, contradicts Poulantzas and Gramsci’s insistence that the state is only a site and centre of exercise of power and not a player with power of its own³¹⁹.) As a place, the state is open to penetration by different power networks as well as geopolitical concerns³²⁰. Sassen, too, echoes the idea of state-as-space when she talks of how global processes are embedded in what she calls “national strategic spaces”: state institutions, territories and infrastructure³²¹. And yet, as an actor, Mann’s state manifests an autonomy, an identity independent of its multiple networks of power. State autonomy, he posits, may reside less in elite autonomy than in the autonomous logic of definite political institutions that rose during previous power struggles and were subsequently institutionalised and now constrain present struggles.

While Mann is specifically talking about the state here, his conclusions are generalisable for most institutions. Like states, most institutions are part of multiple networks of power and caught up in webs of influence that determine their evolution. While the influences of disparate power sources are easy enough to see, the interactions and the outcomes cannot be readily reduced to what Mann mockingly refers to as “ultimate relations³²²”. This is particularly so since the interactions have produced, over time, an institutional autonomy that generates outcomes that resist classification.

2.4 Conclusion

³¹⁶ Mann 2 supra note 302 at 80

³¹⁷ To appease the finer sensibilities of his American audience, Mann also translates the quintessentially British expression as “foul up”. Mann 2 supra note 302 at 53

³¹⁸ Mann 2 supra note 302 at 87

³¹⁹ Poulantzas supra note 49 at 148

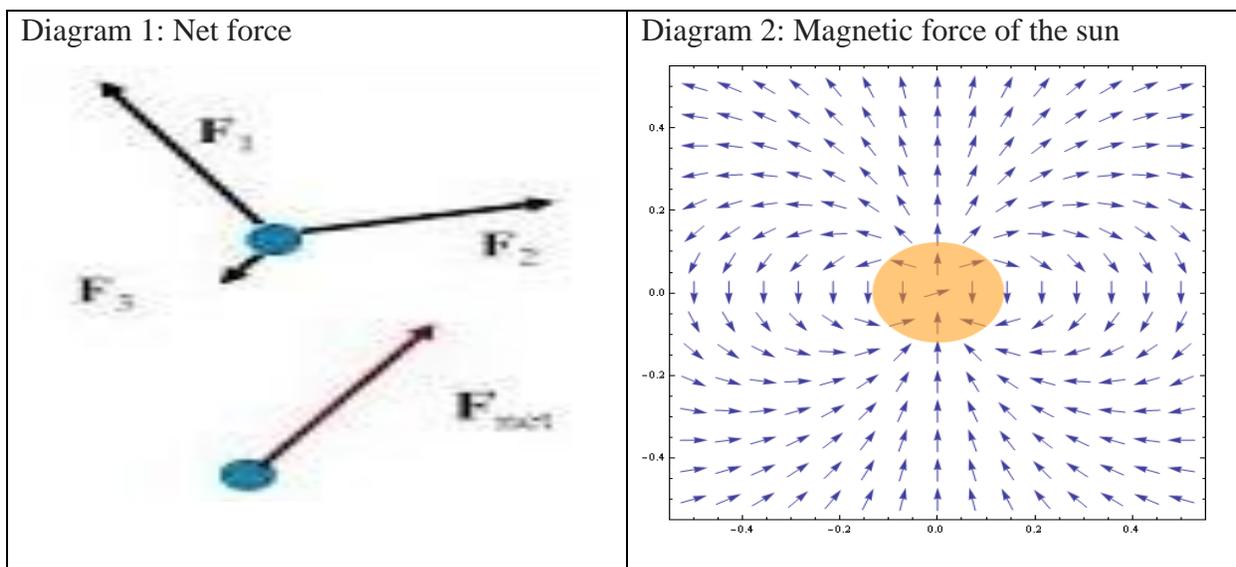
³²⁰ Mann 2 supra note 302 at 56

³²¹ Sassen supra note 307 at 381; 403

³²² Mann 2 supra note 302 at 86

In physics, vectors are used to describe the motion of a moving object in terms of the forces acting on the said object. The eventual displacement of the object from A to B is a function of the magnitude and the direction of the disparate forces operative on it (see diagram 1). When explaining social phenomena, it is tempting to conceive of the interaction of powers as orderly sets of quantifiable vectors representing the sources of power. These vectors would amplify and nullify each other's operations to produce entirely predictable displacement³²³; it would be possible, for example, to gauge the magnitude of economic power relative to ideological power in a situation and to predict the outcome of a collision between the two. However, as the foregoing shows, the outcomes of power struggles are rarely entirely predictable; even the powerless have some power over outcomes and institutions add further complexity to an already complex interplay. Vector diagrams are thus completely inadequate.

A more accurate diagrammatic analogy is of vector fields. In physics, they are used to model objects that are changing over time (for example, moving liquids or magnetic force). A vector is assigned to each point in a subset of space; each vector captures the strength and direction of a force *as it changes from one point to another* (see diagram 2). Not only does this capture the changing direction of the forces, it does so over time.



³²³ Displacement, in mathematical terms, refers to both the distance travelled by the object as well as the direction of its motion.

Knowing how power works, one can proceed to an examination of the complexities of the global anti-money laundering and counter terrorism financing architecture.

CHAPTER 3: Drugs, terrorism and weapons of mass destruction: power relations within the global AML-CTF regulation

The excavation and analysis of power relations in the anti-money laundering and counter terrorism financing (AML-CTF) regime is critical because financial regulation materially affects “livelihoods, health and living standards”³²⁴. Like economic regulation, financial regulation also responds to the logic of capitalism and constructs ‘winners’ and ‘losers’; it is – as Gilligan says – a social and political process, not a value-neutral and automatic system³²⁵. However, unlike economic regulation, most financial regulation remains politically uncontested, primarily because it operates through seemingly arcane ‘technical’ rules. Yet these rules affect aggregate demand, output, employment and the spending ability of individuals, firms and governments³²⁶. Banks subject to higher capital adequacy requirements³²⁷ have less to lend to individuals, businesses and the government: fewer goods are produced and consumed, tax revenues stagnate and public healthcare funding falls. Stringent criteria for Initial Public Offerings starve firms of capital, which affects the growth of the company as well as the economy. A country featured on the FATF blacklist struggles to pay trading partners³²⁸, import capital goods, create jobs and provide life-saving medicines to its citizens. As Picciotto argues, financial factors have “(re)distributional consequences or implications³²⁹” far beyond what is envisaged by a

³²⁴ Picciotto, Sol, “Liberalisation and democratisation: the forum and the hearth in the era of cosmopolitan post-industrial capitalism” (2000) 63 *Law & Contemp Probs* 157 at 163

³²⁵ Masciandro supra note 101 at 19.

³²⁶ Alexander et al supra note 153 at 5

³²⁷ A capital adequacy ratio is the amount of capital that financial institutions are required to maintain against their outstanding loans. This is not to be confused with reserve requirements which are the amount of money a financial institution must hold against the deposits made by its customers. The former is a provision against risk while the latter is a provisioning for expected losses (for example, bad loans). CARs are prescribed by the Basel Committee while the reserve requirements are usually specified by central banks.

³²⁸ This is because dollar payments around the world are cleared through New York and banks are either forbidden or ‘discouraged’ from doing business with FATF-categorised high-risk and Non-Cooperative Countries and Territories (NCCTs) and with other ‘undesirable’ countries. Often, the advice is followed even before ‘official sanctions’ are levied: for example, Iranians around the world were struggling to send money to Iran even before Trump undid the Obama nuclear deal and further tightened sanctions. Similarly, in a January 2005 interview, the country head of a foreign bank in Pakistan said that his bank was “actively discouraging” its people from opening correspondent accounts from Pakistan even though Pakistan was not an NCCT at the time.

³²⁹ Picciotto supra note 324 at 177

“technicist view of social management³³⁰”. As such, understanding the powers that shape financial regulation is essential.

Studying anti-money laundering and terrorism financing regulation as a type of financial regulation, this chapter deconstructs the architecture and the operations of the global AML-CTF regime with the aim of resolving its power into its constituent elements³³¹. A word about this approach: a more traditional approach to the issue of power would apply a theory (or even theories) of power to the global financial architecture. However, two issues peculiar to the AML-CTF regime necessitate the current approach. First, unlike most discussions of power in the context of politics or government, the AML-CTF regime lacks a locus of power or a ‘state’ as a centripetal force, which precludes a singular theory or explanation of power³³². Second, like most global governance regimes, the global AML-CTF architecture comprises overlapping layers of governance by multiple sets of actors, institutions and networks, each with their own strategic interests and sources of power. The simultaneity and complexity of these interactions makes it difficult to tease out individual interests, to gauge the strength of each actor relative to another (especially where they forge power alliances with other actors) and to identify the various levers they deploy to achieve these interests. As such, this chapter looks at how theories of power manifest themselves in the architecture and operations of the regime; it maps *relationships* of power based on the *exercise* of power.

The chapter comprises five parts. The first sketches out the historical evolution of AML-CTF regulation, from 1987 till date. The focus is on how key actors (the US, for example) and events (9/11, for example) shaped the trajectory of this regulation. The second part zooms in on the players themselves, their sources of power and how the dynamic interaction between them produces unpredictable regulatory outcomes. More specifically, this section examines how power *and powerlessness* constructs legitimacy and accountability mechanisms. The third part

³³⁰Picciotto supra note 324 at 160

³³¹ These would include actors (individuals as well as states), groups, institutions and networks.

³³² This is, of course, not to suggest that a state or any locus of power is necessarily unifocal in its motives. However, the existence of a locus or a state tends to organize power in ways that lends itself better to singular theories.

surveys contemporary critiques of the AML-CTF architecture, focusing on the conceptual and structural problems as well as the collateral damage inflicted.

The fourth part takes a critical view of the existing critiques by arguing five key points. First, even the critical takes remain, for the most part, firmly state-centric: regulation is seen as either a state-sponsored iteration or a balancing of competing state interests. Second, this state-centric focus renders invisible the interests of capital in the AML-CTF architecture. Third, even the critics do not answer *why* weaknesses are built into the regime. This section contends that the invisibility of capital, coupled with the specific advantages conferred on capital by the AML-CTF regime, suggests that the weaknesses of the regime were *planned*. Fourth, the multiplicity of powers has implications for accountability, which precludes a serious interrogation of these planned weaknesses. Given the foregoing, finally, money laundering and terrorism financing need to be situated and understood from within the broader political economy, not as a criminological exercise independent thereof.

The concluding part argues that the AML-CTF regime has consistently delivered both power and profits to key players in the last 30 years. To determine whether this is merely a happy coincidence, one needs to systematically interrogate the power-profits nexus.

3.1 Historical evolution³³³

Appreciating the evolution of global AML-CTF regulation requires some degree of familiarity with broad trends in the history of financial regulation. This is because AML-CTF regulatory trends mirror many of those developed during the harmonisation of banking regulation.

Despite the rapid globalisation of banks and financial markets during the 1960s and 1970s, the push towards the harmonisation of regulatory standards did not occur till 1974³³⁴. When the largest private bank in Western Germany Bankhaus Herstatt went bankrupt from its forex

³³³ An earlier version of the ideas expressed in this section can be found in Sanaa Ahmed, "The politics of financial regulation" (2015) 11:1 Socio-Leg Rev.

³³⁴ Braithwaite & Drahos supra note 147 at 103

dealings in June that year³³⁵, it was poised to take five US banks with it³³⁶: systemic risk and contagion had been born. The bank failures were attributed to the lack of an adequate transnational regulatory structure which would protect against financial risk³³⁷; the regulatory response constructed the issue as a universal problem and began the shift towards scientification by attempting to quantify the amount of risk posed by such banks. In 1975, the G-10 regulators and central bankers met at Basel, Switzerland, to form the Basel Committee for Banking Supervision – the first ‘global’ standard-setting body³³⁸. The inchoate, incipient power-knowledge bind – to know better to control better – was obvious even then: the self-confessed initial aim of the committee was to “close gaps in the supervisory net” through international cooperation but the “wider objective” was to “enhance financial stability by *improving supervisory knowhow* and the quality of banking supervision *worldwide* [emphasis added]”. The resulting Basel Concordat was a set of voluntary, non-binding international standards and rules of prudential supervision for the regulation of financial institutions, payment systems and foreign exchange markets designed to apply to just the G-10 countries³³⁹.

But this changed in the 1980s. The period marked a series of crises in the US banking industry: the Federal Deposit Insurance Corporation was forced to resolve some 1,650 federally insured

³³⁵ The demise of the Bretton Woods system in the early 1970s led to the privatisation of foreign exchange risk. In the absence of a fixed exchange rate system, banks with a high degree of concentration in the area of foreign trade payments were vulnerable to the vagaries of the foreign exchange (forex) markets. Basel Committee on Banking Supervision, *Bank failures in mature economies* (Basel, Bank for International Settlements, 2004); online http://www.bis.org/publ/bcbs_wp13.pdf at 5. [Mature economies] To minimise potential losses from forex dealings, banks chose hedging strategies involving the diversification of assets into multiple currencies and the creation of portfolios held in foreign and offshore jurisdictions. Alexander et al supra note 153 at 22

³³⁶ Alexander et al supra note 153 at 22. Earlier that year, the Franklin Bank in New York, the Union Bank of Switzerland, the Westdeutsche Landesbank – Gironzentrale and Frankfurt National Bank had also reported large foreign exchange losses; shortly after Herstatt, the British-Israel Bank in London and the Franklin National Bank in the US were also closed for insolvency. For the period 1980-95, Fratianni & Pattison estimate an average rate of banking crises at 1.44 a year. Michele Fratianni & John Pattison, “International financial architecture and international financial standards” (2002) 579 *Annals of the American Academy of Political and Social Science* 183 at 184.

³³⁷ Alexander et al supra note 153 at 22.

³³⁸ For details, see Bank for International Settlements, ‘A Brief History of the Basel Committee’; available at <http://www.bis.org/bcbs/history.pdf>

³³⁹ Alexander et al supra note 153 at 35. These standards and rules – as an example of the Foucauldian technical prescription for normalisation – were evolved through an informal consensus on “best practice” – the committee calls them “sound practices” now – and members adapted these in line with the peculiarities of their national systems. However, while ‘best’ and ‘sound’ suggest neutrality and technical superiority, the standards and guidelines issued by the committee were deeply politicised and could be moulded according to domestic political imperatives.

banks and the Savings and Loans crisis saw the failure of 1,320 financial institutions³⁴⁰. In 1983, widespread public agitation led the US Congress to pass a law mandating adequate capitalisation of all banks³⁴¹. The Savings and Loans crisis data suggested that “adequate” was eight per cent of the outstanding loan amount and the Congress rubberstamped the number. However, American bankers argued that the capital adequacy requirements placed them at a distinct disadvantage to foreign banks³⁴². Accordingly, at the 1988 Basel Committee meeting, the US strong-armed the other members and foisted the higher standards onto all members by a revision of the Concordat³⁴³. The rationale was that higher CARs would strengthen stability at a time crises were increasing³⁴⁴ and eliminate “competitive inequality arising from differences in national capital requirements³⁴⁵”. Significantly, the standard was ultimately pushed on virtually all countries with active international banks³⁴⁶.

The developments showcase various aspects of power and how it is operationalised. The interaction of powers within a polity shows up in the US government’s decision to bail out the banks as a consequence of the economic power wielded by banks and to tighten banking regulations as a consequence of the political power wielded by the electorate³⁴⁷. The position of

³⁴⁰The latter alone cost the government some 151 billion dollars in bailout packages. Mature Economies supra note 335 at 62

³⁴¹Accordingly, the Office of the Comptroller of the Currency and the Federal Reserve set minimum capital requirements for the multinational banks. Mature Economies supra note 335 at 63.

³⁴² Robert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton, Princeton University Press, 2001) at 275. Since banks subject to higher capital adequacy requirements have less money to lend, they also make less profit than the others.

³⁴³ Gilpin supra note 342 at 275.

³⁴⁴ Interestingly, the implementation of the higher capitalisation requirements subverted the touted objective of stability. The prescribed capital adequacy ratio for short-term loans was a significantly lower two per cent of outstanding loans. As a corollary to this directive, most banks started focusing on short-term lending which, apart from the economic detriment (economic growth usually accompanies long-term, productive investments) also introduced more volatility into the banking system through an increase in speculative activities and time mismatches between assets and liabilities of borrowers (that is, loans would typically mature before the investments).

³⁴⁵ Bank for International Settlements, ‘A brief history of the Basel Committee’; available at <http://www.bis.org/bcbs/history.pdf>

³⁴⁶ <http://www.bis.org/bcbs/history.pdf>

³⁴⁷ Since bank bailouts are typically funded by taxpayer monies, most governments characterise them as a political necessity in the sense of protecting both the interests of depositors (who stand to lose their savings) as well as the society and the economy (since financial institutions provide key functions as financial intermediaries who mobilise depositors’ monies to help finance productive – and hence, job-creating – activities in the economy). However, the ‘moral hazard’ school of regulatory thought contends that by providing a fail-safe option to financial institutions, governments actually insulate

the US at the Basel meeting shows how *domestic* sources of power (here, US bankers) inform a country's stand on the *global* stage. However, more significantly, it shows how the domestic imperative is transformed into a *global* imperative: by a specific *representation* of the social world that characterises the problem as a universal one; by deploying crises (here, the threat of financial crises) as a means to neutralise resistance from other jurisdictions; by touting higher CARs as a prescription for 'normalisation'; by scienticising risk (here, the stipulated eight percent CAR as the best 'protection' against risk); by the Gramscian concession to the subjugated (here, by convincing other jurisdictions that the enhanced standard will also help realise their concerns such as greater financial stability and the elimination of "competitive inequality").

The US victory introduced key trends to the regulatory market. First, it showed how global regulation could be crafted in line with the domestic imperatives of certain countries and how a small group could legislate for the world. Second, it showed that proposals to raise the bar could be presented as inherently beneficial and impartial advice – regardless of the motivations of the mover or the demonstrated efficacy of the proposals. Third, and most significantly, it showed that the opposition could always be disarmed by citing safety-related issues. Financial regulation, despite its shroud of *seeming* neutrality, was morphing into a formidable technique of power³⁴⁸.

them from the consequences of their actions and thereby, *encourage* riskier behaviour in the pursuit of greater profits. <https://www.investopedia.com/terms/m/moralhazard.asp> While the critical literature regarding moral hazard in bank bailouts is enormous, see, generally, Alexander et al supra note 153, Andy Haldane & Mark Kruger, "The resolution of international financial crises: private finance and public funds" (2001) Bank of Canada Review; online <http://www.bankofcanada.ca/en/review/2002/jointpapere.pdf>; Tony Ciro & Michael Longo, "The global financial crisis: causes and implications for future regulation: Part 1" (2009) 24: 12 J Intl Banking L & Reg 599-605; Tony Ciro & Michael Longo, "The global financial crisis: causes and implications for future regulation: Part 2" (2010) 25: 1 J Intl Banking L & Reg 9-18.

³⁴⁸ In more recent times, the US and the EU are accused of pushing hardest for more global regulations in the wake of the 2007-2009 financial crisis, despite the fact that the problem arose in the developed countries first. See, generally, Iris H-Y Chiu, "Legislative, regulatory and governance reforms in financial regulation: reflections on the global financial crisis" (2010) 31:6 Company Lawyer 165-166; Bertezolo supra note 153; Emiliios Avgouleas, "Governance of Global Financial Markets: the Law, the Economics, the Politics" (2013) 28:2 J Intl Banking L & Reg 96-97; Antonio Segura-Serrano, "International economic law at a crossroads: global governance and normative coherence" (2014) 27: 3 Leiden J Intl L 677-700; Roman Tomasic & Folarin Akinbami, "Towards a new corporate governance after the global financial crisis" (2011) 22:8 Intl Co & Com L Rev 237-249.

Many of these trends re-emerged during the development of anti-money laundering regulation. In their 2000 magnum opus, Braithwaite and Drahos conclude that money laundering occupies the top priority in the US scheme of globalised financial regulation³⁴⁹. Money laundering regulation in the US exemplifies Mann's interaction of powers thesis in how it captures the varying motives of a state: military, economic, political and ideological. The regulation was a convenient catchall for domestic priorities (for example, arresting the drugs trade) as well as national security and foreign policy imperatives (for example, the defeat of communism, the propping up of friendly dictators or the unseating of unfriendly 'strongmen'). The war on drugs itself, find Braithwaite and Drahos, was a useful weapon against General Noriega and his ilk while the CIA had "an interest in being a major launderer of dirty money itself, while making it harder for the competition to do so³⁵⁰".

While worries about increasing drug consumption – a political imperative – had preoccupied the US since the 1970s, impeding the drugs trade had proven more difficult. As Naylor builds on Reuter & Levi's reading of the history of AML-CTF regulation in the US, law enforcement agencies (LEAs) chose 'follow-the-money' methods of crime control for five reasons. First, since targeting capos (instead of lower-level drug dealers) made little difference to the trade, LEAs focused on seizing the money that provided the motive and the means. In 1978, LEAs won the right to proceed by civil forfeiture against both the 'proceeds of crime' as well as funds supposedly destined for use in narcotics-related offences³⁵¹. The second reason – an economic imperative – was the imagined size of the laundering pie: the worldwide drugs trade was understood as generating earnings worth \$500 billion annually and the US portion was pegged at between \$100 billion and \$120 billion³⁵². The third reason – another economic imperative – had to do with fiscal responsibility: US foreign misadventures had generated huge domestic budget

³⁴⁹ Braithwaite & Drahos supra note 147 at 105. Money laundering outranks uniform accountancy standards, harmonising tax, macroeconomic policy coordination and even capital adequacy for banks, something the authors find "somewhat shocking" (p 142). Compliance with money laundering standards is more strictly monitored than other financial standards (p 106).

³⁵⁰ Braithwaite and Drahos supra note 147 at p 105

³⁵¹ The advantage of civil forfeiture over criminal proceedings was that it allowed the state to seize the money directly. In criminal proceedings, the state would have had to prove its case against the accused beyond a shadow of doubt and further prove that the money stemmed from the crime alleged.

³⁵² The objective of the figures, Naylor says, is not to illuminate the shadowy world of crime but to enlighten politicians about the need for larger law enforcement budgets and more arbitrary police powers. Hence, he notes drolly, "those magic numbers assumed the status of religious cant and were rarely revised, except heavenward". Naylor supra note 221 at 250

deficits and with drug consumption at its peak, the “presumed untaxed wealth of drug barons” was identified as a potential source of revenue³⁵³. The fourth reason – an ideological imperative – was a broad shift in thinking about the causes of crime: the ‘old’ view of “economically-motivated crime” was pregnant with the need for the government to fix the underlying unequal social and economic opportunity. The ‘new’ idea of ‘bad people’ turning to crime after a considered cost-benefit analysis obviated the need for reform and turned resolution strategies into simpler affairs, where crime could be controlled by increasing the cost of crime (by increasing the risk associated with it) and confiscating its means. Finally, the focus on the money trail also reflected a fundamental shift in the *nature* of crimes targeted by the state: from predatory offences, attention moved to market-based crimes, which involve the production and distribution of illegal goods. Naylor sees this as a concerted effort to criminalise personal vice (gambling, sex, recreational drugs) by setting up as an abstract concept such as ‘society’ as the ‘victim’ of such crimes³⁵⁴.

In Cuellar’s reading of US legislative history, the money trail was also meant to help LEAs detect predicate crimes and to identify money laundering ‘specialists’³⁵⁵. However, as an example of how conflict *and* convergence between various sources of power within a polity generate unpredictable outcomes, Naylor argues that the strength and the ubiquity of the US dollar undercut the anti-money laundering effort. Legitimate and illegitimate trade around the world are mostly dollar denominated and US dollar deposits and US securities are globally seen as insurance against political and financial uncertainty. Since the US government gained in terms of seigniorage³⁵⁶, it had no incentive to reduce the export of dollars. However, since its large trade imbalances also necessitated the import of capital – much of it based on tax abuse and capital flight from other countries – the US could not afford to turn away funny money. Further,

³⁵³ Post 1984, US law enforcement was allowed to keep what they seized. Naylor *supra* note 221 at 249.

³⁵⁴ Naylor *supra* note 221 at 248-52

³⁵⁵ Mariano-Florentino Cuellar, “The tenuous relationship between the fight against money laundering and the disruption of criminal finance” (2003) 93 J Crim L & Criminology at 396

³⁵⁶ Seigniorage is the difference between the value of a unit of currency and the cost of its production. If the cost is five cents and the value is \$1, the seigniorage is 95 cents. This means that countries such as the US can make a profit or generate revenues just by the act of printing more money. This revenue is often used to fund state expenditure without increasing tax revenues. <https://www.investopedia.com/terms/s/seigniorage.asp>

in the 1980s, American banks were also eager to jump into the private banking business long monopolised by Swiss and British banks³⁵⁷.

The domestic, anti-drugs pressure led to the institution of the Money Laundering Control Act in the US in 1986 and the imposition of mandatory Currency Transaction Reports on banks³⁵⁸. But most other countries were not enthusiastic about anti-money laundering measures³⁵⁹, certainly not enough to initiate regulation. Yet the US pushed the topic onto the Basel Committee as a subject worthy of regulation and eventually drafted the Basel Statement of Principles on Money Laundering (approved by the committee in 1988)³⁶⁰. In 1989, the leaders of the G7 and the president of the European Commission established the Financial Action Task Force (FATF)³⁶¹. Boasting a total of 16 members drawn from the G7, the EC and eight other countries, FATF was to combat the perceived threat posed by money laundering to financial stability³⁶².

That both developments came at the behest of the lobby of American bankers was validated in the early 1990s, when Senator John Kerry forced Currency Transaction Reporting on all countries that wanted to access the US-based clearing system³⁶³. The stipulation demonstrates both the influence of economic power on the trajectory of regulation as well as the Hobbesian help-harm couplet as a guarantee of obedience by others. By leveraging both its hegemony as a financial nerve centre as well as its power as a leader at the Basel Committee and FATF, the US thus translated its domestic political and economic imperatives into global standards. This enabled US banks to overcome the competitive disadvantage they faced in the global market because of their adherence to domestic AML and CTR requirements³⁶⁴. Significantly, the

³⁵⁷ Naylor supra note 221 at 253-4

³⁵⁸ CTR requirements mandate that all transactions meeting a set criteria be reported to a central body. This reporting is meant to expose the laundering process at its vulnerable choke points, when the cash enters the financial system and when it is transferred between financial intermediaries.

³⁵⁹ Braithwaite & Drahos cite FATF figures stating that up until 1990, only six countries had chosen to model the US practice of declaring money laundering a specific criminal offence. Braithwaite & Drahos supra note 147 at 105

³⁶⁰ Braithwaite & Drahos supra note 147 at 105. Significantly, the Basel principles predate the UN Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

³⁶¹ <http://www.fatf-gafi.org/about/whatwedo/>

³⁶² <http://www.fatf-gafi.org/about/historyofthefatf/>

³⁶³ Margaret E. Beare, "Case Study – 'voluntary' ethical conduct: anti-money laundering compliance and the financial sector" in W. Craig, ed, *Ethics Codes: the regulatory norms of a global society* (Aldershot, UK, Edward Elgar, 2005) at 10.

³⁶⁴ A similar example would be of the US bid to internationalise its Foreign Corrupt Practices Act of 1977, which prevented US firms from bribing foreign officials, at the behest of US businesses. These firms argued that the law

developments also showcase the material – as opposed to the strictly ideational – aspect of power: while the global regulation may have been *represented* as a normative good, its institution also conferred *material* advantages to its movers.

Critically, Naylor's five reasons for US enthusiasm for AML-CTF regulation characterised (and continue to characterise) global AML-CTF regulations as reflected in the FATF-issued 40 recommendations: money laundering was depicted as the means for the growth of crime and civil forfeiture rules governed their seizure. The imagined amount of laundering was a key trigger and the idea of the launderer as a 'free rider' in the economic sense remained popular. Finally, 'bad people' and the risks they posed to 'society' were still dominant in the AML-CTF discourse.

Subsequently, 9/11 proved a watershed in the sense that, first, it mobilised the power of crises as an instrument of power to help authorise the previously untenable and impart a sense of urgency to the project of regulation. The crisis shifted the focus of AML-CTF discourse from the control of organised crime to 'national security concerns'. Critically, however, it simultaneously embedded a disciplinary surveillance – with all its implications for the power-knowledge bind – at the heart of the regulatory project through 'training and learning' apparatuses (Bourdieu's *habitus*). These apparatuses were the hardened enforcement and surveillance mechanisms used by the official sector and the market (discussed below). However, the disciplinary surveillance also reflected in the new normative framework for intelligence gathering, information sharing and cooperation between governments. Further, the 'national security' discourse also enabled a relatively frictionless expansion of the private sector in policing functions: other than banks, independent professionals (lawyers, accountants, stockbrokers etc) were also co-opted.

Second, terrorism financing was suddenly, inexplicably introduced into the mix with eight terrorism-financing recommendations tacked on to the FATF 40³⁶⁵. This happened, Beare says,

placed them at a competitive disadvantage since other countries did not impose similar requirements on their businesses.

³⁶⁵ The UN Security Council passed Resolution 1267 (regarding the imposition of economic sanctions against the Taliban in Afghanistan) in October 1999. While the UN Convention for the Suppression of Terrorism Financing was adopted in December 1999, only four countries had signed up for the same by 9/11. After 9/11, the US passed the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), which allowed for the indefinite detention of immigrants; the search of a home or business without the owner/occupant's consent or knowledge; the search of telephone, e-mail, and financial records without a court order; and the expanded access of law enforcement agencies to business records, including library and financial records. Meanwhile, the Security Council Resolution 1373 called for the

even though, first, there was no proof that the anti-money laundering regulations were reducing money laundering and, second, despite the lack of similarity between the phenomena of money laundering and terrorism financing (discussed below)³⁶⁶. As Eckert explains, relatively small amounts of money are required to effect acts of terrorism and the aim of militant organisations isn't to acquire more money. Further, the origins of money are also different: money laundering is the process of cleaning dirty money while terrorism financing is mostly clean money being used for illegal objectives³⁶⁷. Even so, the FATF strategy to target terrorism financing was principally the same as the one it had used for money laundering – choking the supply of funds to control crime³⁶⁸.

3.2 Present day

The most interesting feature about the global AML-CTF regime is that it is disaggregated in an ideational sense at every level of governance – standard-setting; enforcement; and surveillance – and often, even within individual levels. This section describes the present structure of the AML-CTF regime and how various actors, groups, institutions and networks feed into the global governance project. Each actor draws on their own sources of economic, political, ideological and military power and capitalises on or converts that power to influence regulation (for example, as seen above, banks use their economic clout to politically lobby the state). However, the interaction of these actors shows how they feed off each other's power and the consequent impact on their own.

As with other pluralistic international regimes such as trade, responsibility for the creation of global rules and standards regarding money laundering and terrorism financing is assigned to several different organisations, with the approval of the IMF and the World Bank. The bureaucratisation through law and experts that Weber speaks of is visible here: for example, the

criminalization of active and passive support for militants; the freezing of funds; the sharing of information by states; and enhanced multilateral cooperation. Thomas J. Biersteker & Sue E. Eckert, "Introduction: the challenge of terrorist financing" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007) at 2-3. The FATF 40 recommendations were originally rolled out in 1990 and revised in 1996 to reflect changes in money laundering methodologies. Eight terrorism financing recommendations were tacked on in 2001, which were revised to nine in 2003. The last major revision occurred in 2012, which synthesized the money laundering and terrorism financing recommendations and reduced the number to the original 40.

³⁶⁶ Beare supra note 363 at 6

³⁶⁷ Sue E. Eckert, "The US regulatory approach to terrorist financing" in Biersteker & Eckert supra note 365 at 218

³⁶⁸ Biersteker & Eckert supra note 365 at 2

Basel Committee handles banking supervision while FATF deals with money laundering and terrorism financing. Even so, the lines of responsibility are not clear as none of these agencies are discrete ‘legislative’ units. The Basel Committee, for example, has the banking portfolio but trade agreements and regional treaty arrangements such as the EU continue to affect financial regulatory standards³⁶⁹. Similarly, while FATF is charged with the devise of AML-CTF regulation, the Basel Committee is also actively involved in devising money laundering regulation and the regulation of systemically important payments lies with the Committee on Payments and Market Infrastructures (CPMI), earlier known as the Committee on Payments and Settlements System³⁷⁰.

Meanwhile, since 2009, the task of coordinating among the standard-setting bodies has been set to the G20-endorsed Financial Stability Board (FSB), earlier the Financial Stability Forum under the finance ministers and the central bank governors of the G7³⁷¹. Not only is the FSB tasked with assessing the vulnerabilities of the global financial system, it is also meant to help with policy development and implementation³⁷². Significantly, the FATF 40 are among the “key standards for sound financial systems” the FSB endorses³⁷³. Clearly, the importance of effecting regulatory convergence across jurisdictions is growing with global financial regulation evolving as “a dense web of influences”³⁷⁴ with multiple regulators for most areas.

As Bourdieu argues, the institutions legitimate themselves by assuming the appearance of scientificity, thereby obscuring the *political* origins of these rules. More important by far,

³⁶⁹ Alexander et al supra note 153 at 9-10. The authors explain this using the example of the World Trade Organisation. While the WTO has no ostensible role in setting domestic financial regulatory standards, the underlying free-trade principles influence how other international organisations and standard-setting bodies devise international standards of financial regulation. As far as money laundering is concerned, despite the FATF 40, the EU regulatory system also has its own minimum harmonised standards for money laundering.

³⁷⁰ <http://www.bis.org/cpmi/>. The bifurcation was interesting especially since till 2009, the CPSS comprised the same set of members as the Basel Committee – the G10 central bankers. The present 28 members include Argentina; Australia; Belgium; Brazil; Canada; China; the European Central Bank; France; Germany; Hong Kong; India; Indonesia; Italy; Japan; South Korea; Mexico; Netherlands; Russia; Saudi Arabia; Singapore; South Africa; Sweden; Switzerland; Turkey; the UK; US and the Reserve Bank of New York.

³⁷¹ <http://www.fsb.org/history-of-the-fsb/>. The FSB now brings together central banks, finance ministries, supervisory and regulatory authorities for the G20 as well as Hong Kong, Singapore, Spain and Switzerland. <https://www.fsb.org/work-of-the-fsb/>

³⁷² <http://www.fsb.org/work-of-the-fsb/>. The FSB also devises the IMF’s Crisis Resolution and Deposit Insurance standards. <http://www.imf.org/external/np/exr/facts/sc.htm>

³⁷³ http://www.fsb.org/work-of-the-fsb/about-the-compendium-of-standards/key_standards/

³⁷⁴ I owe the phrase to Braithwaite & Drahos supra note 147 at 13

however, is the *cross-referential legitimation of power*. This occurs in two ways. First, not only are the AML-CTF standards used by both the FSB and FATF the same (the FATF 40), the actors common to both the FSB and FATF *are the same*³⁷⁵. The deployment of the *same* standards by *different* organisations can thus be seen as *attenuation* of the original or perpetuation of groupthink. Second, by endorsing the standards authored by other regulators and embedding these within their own work, each regulator *legitimises* the jurisdiction, validity and legitimacy of the others. For example, drawing on the legitimacy of its parent organisation the Bank for International Settlements, which boasts 60 members from a mix of developed and developing countries, the Financial Stability Board provides greater legitimacy to the standards authored by the relatively exclusive 39-member FATF. Further, this endorsement/ embedding confers *recognition* of FATF's power in a relational sense, thereby creating the *perception* of neutrality regarding FATF standards.

Enforcement for these standards lies primarily with the 1995-established Egmont Group of Financial Intelligence Units, which is meant to facilitate international cooperation and the secure exchange of expertise and financial intelligence to combat money laundering and terrorist financing³⁷⁶. Each country is expected to set up a financial intelligence unit (FIU) that collects and analyses suspicious transaction reports and other information relevant to money laundering, associated predicate offences and financing of terrorism, and for the dissemination of the results of that analysis³⁷⁷. The countries are further organised into eight regional groups under the aegis of the Egmont Group³⁷⁸.

Meanwhile, additional enforcement mechanisms as well as the surveillance and monitoring function are given to the official sector. Since the demise of the Bretton Woods system, the IMF has slowly but consistently been mapping new areas of operations for itself. At present, the Fund describes its core activities as surveillance, providing technical assistance, lending, economic research and statistics³⁷⁹; development of standards and codes; and “the fight against money

³⁷⁵ Compare FN 371 with FN 394.

³⁷⁶ <https://www.egmontgroup.org/en/content/about>

³⁷⁷ <https://www.egmontgroup.org/en/content/financial-intelligence-units-fius>

³⁷⁸ These are the Americas; the Asia Pacific Group; Europe I; Europe II; Eurasia; Middle East and Northern Africa; East and Southern Africa; and West and central Africa region.

<https://www.egmontgroup.org/en/content/structure-and-organization-egmont-group-financial-intelligence-units>

³⁷⁹ <http://www.imf.org/external/work.htm>

laundering and terrorism financing”. However, ‘development’ seems to be a bit of a mischaracterisation here. Of the standards and codes governing the 12 key areas³⁸⁰, the IMF authors just three³⁸¹. For the other areas, the IMF simply rubberstamps the standards developed by other private sector agencies such as the Basel Committee, FATF and the OECD³⁸².

(Interestingly, money laundering and terrorism financing are the only key area that merits a separate mention in the IMF’s core activities.)

The role of the IMF further reinforces the cross-referential legitimacy issue discussed above. However, the surveillance functions of the AML-CTF regime are the visible manifestation of the power-knowledge bind. The FIUs as well as the self-reporting they mandate show the internalisation of the discipline and the power relations of the AML-CTF regime by individual jurisdictions. The duty to report – “dissemination” – speaks of the processual, strategic aspects of power that further objectifies subjects by extracting knowledge about them and further deploying that knowledge to control them better. The administrative categorisation of jurisdictions into eight regional groups is also interesting. At one level, it represents a categorisation that is broadly in line with scientific classificatory principles that facilitates the objectification of the subject: each jurisdiction is evaluated against its peers in a particular region. At another, the categorisation is an administrative hierarchy of knowledge in a bureaucracy. On a less benign reading, however, the classification is reminiscent of Arendt’s exposition regarding divisions: the managing of dissent by divisions that preclude coordinated political action. Further, such a division also carries the advantage of creating the perception of a dispersed – as opposed to a centralised – authority.

³⁸⁰ These are Data Transparency; Fiscal Transparency; Monetary and Financial Policy Transparency; Banking Supervision; Securities; Insurance; Payments and Securities Settlement Systems; Anti-Money Laundering and Combating the Financing of Terrorism; Corporate Governance; Accounting; Auditing; Insolvency and creditor rights <https://www.imf.org/external/standards/scnew.htm>.

³⁸¹ Significantly, even the Code of Good Practices on Transparency in Monetary and Financial Policies was developed *in conjunction with* the Basel Committee, the Center for Latin American Monetary Studies (CEMLA), CPSS, European Central Bank, International Association of Insurance Supervisors (IAIS), International Finance Corporation, IOSCO, OECD and the World Bank. <http://www.imf.org/external/np/mae/mft/>

³⁸² <https://www.imf.org/external/standards/scnew.htm>. For an interesting discussion of the origins of the standards, see Delonis. “The fact that these standards come from sources other than the IMF could theoretically pose a problem because the Fund generally prohibits cross-conditionality with the objectives of other organizations; however, as IMF General Counsel Francois Gianviti has stated, ‘If the Fund concludes . . . that certain reforms need to be made to give effect to its own purposes, the fact that these actions will give effect to other treaties . . . cannot bar the Fund from making them a condition of its financial assistance’”. Delonis *supra* note 147 at 597

With the IMF's active involvement, the standards and codes work their way into the fabric of all international economic transactions and relationships³⁸³. This technique of enforcement operates within the official sector as well as at the level of the market (discussed below)³⁸⁴. Within the IMF, these standards and codes have virtually colonised its operations and are a crucial component of four of its five functions. First, the IMF usually works in almost all of its officially supported standards and codes into its loan agreements with states³⁸⁵. Further, in some cases, compliance with standards such as those of the Basel Committee is a prequalification for IMF loans.³⁸⁶ In others, compliance is a guarantee of better terms on the next loan³⁸⁷.

The standards and codes are also at the heart of IMF surveillance operations. In 1977, surveillance of the “general economic situation and policy strategy of each member country³⁸⁸” became a key part of IMF operations. In 1995, the IMF began its “data dissemination” work³⁸⁹. But the most significant was the Financial Sector Assessment Programme (FSAP) which was launched in 1999 in conjunction with the World Bank. With the “soundness of financial systems” as its aim, the FSAP seeks to “analyze the resilience of the financial sector, the quality of the regulatory and supervisory framework, and the capacity to manage and resolve financial crises. Based on its findings, FSAPs produce recommendations of a micro- and macro-prudential nature, tailored to country-specific circumstances³⁹⁰”. The programme hinges on detailed assessments of the extent of a country's compliance with financial sector standards and codes³⁹¹. Not only are these assessments published as Reports on Observance of Standards and Codes (ROSCs), the FSAP also provides the groundwork for the Financial Sector Stability Assessments

³⁸³ Delonis supra note 147 at 623-4

³⁸⁴ Delonis supra note 147 at 595-6. See Chris Brummer, “Why soft law dominates international finance – and not trade” (2010) 13 J Intl Econ L 623, for an interesting discussion on the efficacy of reputational disciplines, market disciplines and institutional sanctions in effecting regulatory convergence.

³⁸⁵ Alexander et al supra note 153 at 89; Stiglitz supra note 3 at 44; Delonis supra note 147 at 597

³⁸⁶ Alexander et al supra note 153 at 39

³⁸⁷ Delonis supra note 147 at 612

³⁸⁸ <https://www.imf.org/en/About/Factsheets/IMF-Surveillance>

³⁸⁹ This comprises the General Data Dissemination System (approved by the IMF Board of Directors in 1996) which is aimed at all members and provides “recommendations of good practice” for the production and dissemination of macroeconomic and financial data (including the real, fiscal, financial and external sectors) as well as socio-demographic data (population, health, education, poverty). The Specific Data Dissemination System (approved in 1997), on the other hand, targets those countries having or seeking access to international capital and prescribes specific macroeconomic and financial standards that must be adhered to. <https://dsbb.imf.org/>; <https://dsbb.imf.org/sdds-plus/overview>

³⁹⁰ <http://www.imf.org/external/np/fsap/fssa.aspx>

³⁹¹ <http://www.imf.org/external/NP/fsap/fsap.aspx>

in which IMF staff address issues such as the stability of the financial sector and assess its potential contribution to growth and development³⁹².

While there has been considerable critical evaluation of how IMF conditionality regarding *economic* policies reinforces the skewed power dynamic between the global north and south³⁹³, there isn't sufficient attention paid to how *financial* regulations do the same. Some of this inattention owes to the language of the discourse: with “soundness” and “stability” as ostensible aims, it becomes hard to challenge both the regulations and the surveillance. Also, couched as the regulations are in the language of science – “analyse the resilience of the financial sector”; “recommendations of a micro- and macro-prudential nature” – the regulations become inaccessible to laypersons and only available for reading by specialists, which further legitimates the involvement of these specialist institutions. Finally, given the purportedly ‘voluntary’ nature of submission to FATF discipline as well as the fact that enforcement lies with separate institutions such as the IMF and the World Bank, there is even less consideration of the power relations that buttress the AML-CTF regime. More simply, while a country’s submission to both FATF and IMF discipline appears voluntary, it actually exemplifies Weber’s notions of the ‘unfree’ contract that stems from and re-inscribes problematic power relations.

The multiplicity of regulators and enforcers obviously muddles the assignment of responsibility as well as accountability: as discussed below, it becomes difficult to isolate legislative intent or escape regulation when multiple authors and enforcement agencies are involved. However, these difficulties are compounded by two additional issues: governance structures and legitimacy.

FATF itself exemplifies these problems. Although the number of its members has increased from the original G7 to 39³⁹⁴, jurisdictions of the global south are grossly underrepresented while the OECD contingent dominates³⁹⁵. This is significant primarily because the agency claims a global

³⁹² <http://www.imf.org/external/np/exr/facts/fsap.htm>

³⁹³ See, for example, Pahuja supra note 4.

³⁹⁴ Current members include [Argentina](#), [Australia](#), [Austria](#), [Belgium](#), [Brazil](#), [Canada](#), [China](#), [Denmark](#), [European Commission](#), [Finland](#), [France](#), [Germany](#), [Greece](#), [Gulf Co-operation Council](#), [Hong Kong](#), [Iceland](#), [India](#), [Ireland](#), [Israel](#), [Italy](#), [Japan](#), [Korea](#), [Luxembourg](#), [Malaysia](#), [Mexico](#), [Netherlands](#), [New Zealand](#), [Norway](#), [Portugal](#), [Russia](#), [Saudi Arabia](#), [Singapore](#), [South Africa](#), [Spain](#), [Sweden](#), [Switzerland](#), [Turkey](#), [UK](#), [US](#). Available at <http://www.fatf-gafi.org/about/membersandobservers/>

³⁹⁵ Interestingly, one of the criteria for membership listed on the FATF website is that the country be of “strategic importance”. While a list of “considerations” is given, there is no explication of what constitutes strategic importance. <http://www.fatf-gafi.org/about/membersandobservers/fatfmembershipolicy.html>

regulatory ambit: it assumes for itself the responsibility to “set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the *international* financial system [emphasis added]³⁹⁶” and also calls itself the “guardian and arbiter” of these standards³⁹⁷. The assumption of this ‘responsibility’ is, of course, predicated on a certain representation of the social world that conceives money laundering and terrorism financing as “threats to the integrity of the international financial system” (see below for critiques of this assessment) but also on a constructed myth of superiority over all others. However, this act of usurpatory ventriloquism – the right to speak for all – is free of both democratic representation and a mandate³⁹⁸. More specifically, FATF’s governance structure – as an example of a closed bureaucracy – is *designed* to exclude other voices through, for example, membership criteria. As such, many of the jurisdictions affected by these regulations will never get a seat at the table.

The lack of representation is – or should be – a blow to FATF’s legitimacy as a global organisation. However, the effect is mitigated by both its ‘output legitimacy’ (that is, the legitimacy conferred by the perceived efficacy of the regulations; discussed below) and the relational legitimisation of FATF by other organisations. For example, after the IMF added the FATF recommendations to its list of standards and codes in 2002, the World Bank and the IMF “substantially increased” technical assistance available to those countries looking to strengthen financial, regulatory, and supervisory frameworks for anti-money laundering and the combating of terrorism³⁹⁹. In the last 10 years alone, some 40 countries have availed of AML-CTF capacity building funded by IMF partners⁴⁰⁰. While one reading of this turn of events posits the IMF and the World Bank as prime instruments of regulatory convergence⁴⁰¹, the increasing numbers of

³⁹⁶ Emphasis added. <http://www.fatf-gafi.org/pages/aboutus/whatwedo/>

³⁹⁷ <https://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf>

³⁹⁸ The FATF mandate for 2012-2020 was endorsed by its members only, in 2012. In 2019, FATF members conferred an “open-ended” mandate on themselves. <http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf>

³⁹⁹ International Monetary Fund, ‘The IMF and the Fight Against Money Laundering and the Financing of Terrorism’ <http://www.imf.org/external/np/exr/facts/aml.htm>

⁴⁰⁰ <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism>

⁴⁰¹ Braithwaite & Drahos supra note 147 at 115; Alexander et al supra note 153 at 36

jurisdictions signing up for AML-CTF capacity building also suggests enhanced legitimacy of FATF and its 40 recommendations.

The legitimising effect of this approval becomes even more pronounced in the context of the market. A study of enforcement practices at the level of the market shows how the market functions as an IMF/ World Bank *amplifier* and thus, indirectly, buys into the AML-CTF discourse and adds to the legitimacy of the FATF 40. Some commercial banks, for example, insist on IMF conditionality as a precondition to lending to states⁴⁰². The debt ‘clubs’ usually insist on an IMF clause in their agreements with countries⁴⁰³. Many private financial institutions and investors base investment decisions on IMF surveillance data⁴⁰⁴. As a result, the publication of AML-CTF compliance data brings to bear an inordinate amount of pressure on the non-compliant state⁴⁰⁵, which is looking to the international financial markets for funds. Not only do states with better compliance have lower debt risk premia and better sovereign credit ratings⁴⁰⁶, even states use compliance as a ‘signalling device’ to potential trading partners and international investors in order to attract trade and investment⁴⁰⁷ – an interesting example of a jurisdiction recognising the identity imposed upon it by FATF. As Brummer argues, non-compliance with key international standards (such as AML-CTF regulation) poses significant reputational risks: not only does it cause counterparties in international financial agreements to re-evaluate their expectations regarding a regulator’s future conduct, it also undermines incentives to cooperate with such a regulator in the future⁴⁰⁸. Even market players, he says, generally perceive adherence to major international standards as a mark of good regulatory practice⁴⁰⁹. Further, in the specific context of money laundering and terrorism financing, some of these surveillance and enforcement functions have also been privatised with the responsabilisation of financial

⁴⁰² Stiglitz *supra* note 3 at 44

⁴⁰³ Pahuja (2000) *supra* note 4 at 765

⁴⁰⁴ Delonis *supra* note 147 at 609. Delonis cites the specific examples of PricewaterhouseCoopers and the California Public Employees Retirement System.

⁴⁰⁵ Delonis *supra* note 147 at 595-6. In a similar vein, Braithwaite & Drahos recount the example of how the US and UK coerced countries into complying with capital adequacy standards in 1987 by linking compliance with entry to their markets and threatening “inefficient financial regulatory systems” with the “spectre” of loss of business. Braithwaite & Drahos *supra* note 147 at 132.

⁴⁰⁶ Delonis *supra* note 147 at 610-1

⁴⁰⁷ Rhys Bollen, “The international financial system and future global regulation” (2008) 23: 9 *J Intl Banking L & Reg* 458-473 at *468

⁴⁰⁸ Brummer *supra* note 384 at 8

⁴⁰⁹ Brummer *supra* note 384 at 8

institutions as well as independent professionals (lawyers, accountants, jewellers and brokers etc).

At a country-level too, the multiplicity of regulators and enforcers at the global level is reproduced with equally dizzying results (see Chapter 4). As far as the state is concerned, the involvement of finance ministries, central banks and law enforcement agencies is presumed; however, in states as markedly different as the US and Pakistan, the military has also elbowed its way to the table. While the interest of the legislature in the regulation is justified, the preponderant influence of *religious* groups on the regulation in Pakistan makes little sense (see Chapter 4). Theoretically, this disaggregation of powers ought to make little difference: since all states are obliged to adopt the FATF 40, ostensibly there isn't too much autonomy left for national-level institutions (discussed below)⁴¹⁰. However, this assertion of power by FATF does not preclude the possibility of an *active* resistance by individual jurisdictions: since all states are partially responsible for implementing and enforcing the regulations, this 'discretionary window' becomes the prize fought over by existing power players within the polity. (For a detailed discussion of how this plays out in a mid-sized economy such as Pakistan, see Chapter 4.)

3.3 Of harms, inadvertent and deliberate

The problems with the AML-CTF regime identified in contemporary literature are diverse but can be usefully categorised into three sets: conceptual problems; structural or procedural problems; and collateral damage⁴¹¹.

Conceptual problems

The primary problem, as Halliday et al delicately phrase it, is that it is hard to find clear objectives for the AML-CTF regime since international organisations and states themselves "seek to use AML/CFT to solve different problems"⁴¹². Given the fogginess of FATF's declared

⁴¹⁰ For a detailed discussion of the implications for state sovereignty and the prospects of democracy, see Chapter 5.

⁴¹¹ While there aren't too many case studies regarding the deleterious consequences of AML-CTF regulation, see Sharman & Mistry (supra note 18) for a useful study of Barbados, Vanuatu and Mauritius.

⁴¹² Terence Halliday, Michael Levi and Peter Reuter, "Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism" (2014) Centre on Law and Globalisation; online <http://www.undrugcontrol.info/en/issues/money-laundering/item/6740-global-surveillance-of-dirty-money> at 13-14

objectives for preventing money laundering, it is perhaps inevitable that the most excoriating of critiques focus on the rationale for the AML-CTF regime. The term ‘money laundering’ was originally coined to describe the practice of sluicing dirty money through store-front operations (such as laundromats) and cash-intensive businesses (such as car washes)⁴¹³. The operation created the impression the money was legitimately earned and thus, protected against seizure by law enforcement agencies. Nearly 100 years after this coinage, however, FATF still speaks of the phenomenon as flowing from profit-generating “criminal acts⁴¹⁴” and sees money laundering as the “processing of these criminal proceeds to disguise their illegal origin ... [so that] the criminal [may] enjoy these profits without jeopardising their source⁴¹⁵”. Given how financial crime has evolved since, it is hard to see the FATF-generated discourse as anything other than the active work of political representation designed to authorise – as Bourdieu would call it – collective action in the aid of those making such representations.

Accordingly, most critics take exception to the FATF definition and argue for the expansion of the term to cover crimes *and* misdemeanours that embody the spirit of the practice: tax abuse (including tax evasion and avoidance)⁴¹⁶; trade-related malpractices (including transfer pricing and Base Erosion Profit Shifting, for example)⁴¹⁷; white-collar crime⁴¹⁸; capital flight and the proceeds of informal economies. Ruggiero, for example, contends that it was well known by the 1990s that drugs money is a very small component of dirty money and these other categories make up for the rest⁴¹⁹. As he argues persuasively, crime/ drugs/ terrorism money occupies the popular imaginary as well as the official rhetoric or discourse against money laundering and gives rise to myths that “clean but vulnerable financial institutions are being soiled by contaminating criminal attacks” and that militant groups are “violent entrepreneurs rather than

⁴¹³ Although Naylor dates the origin of the phenomenon of money laundering to medieval Europe and of offshore havens to the early seventeenth century, the term ‘money laundering’ first arose in the 1920s in the US. Naylor *supra* note 221 at 134-5

⁴¹⁴ These include, for FATF, primarily drugs and arms trafficking, smuggling and sex work although it also admits that embezzlement, insider trading, bribery and “computer fraud schemes” can also generate large profits. While FATF has included terrorism financing, the financing of weapons of mass destruction and corruption within its ambit, the nexus with specific illegality remains intact.

⁴¹⁵ <http://www.fatf-gafi.org/fag/moneylaundering/#d.en.11223>

⁴¹⁶ For a detailed account, see Pogge and Mehta *supra* note 7.

⁴¹⁷ See, generally, Passas *supra* notes 7 and 106.

⁴¹⁸ This would include political, corporate and criminal corruption. See Beare *supra* note 7

⁴¹⁹ Ruggiero *supra* note 7 at 202

religious or political combatants⁴²⁰. As such, this discourse merits unpacking to reveal the myths as *representations* of reality, not reality itself.

FATF's explications regarding how laundering affects business and the global economy are similarly rejected as unpersuasive. The FATF discourse claims that the banking and financial industry depend on their reputation for integrity; that criminal complicity would damage "the attitudes of other financial intermediaries and of regulatory authorities, as well as ordinary customers"; and that money laundering "damages the integrity of the entire society and undermines democracy and the rule of the law" by rewarding crime and thus propagating it⁴²¹. This discourse further mobilises the instrument of 'science' or technicalities by citing consequences such as changes in money demand, prudential risks to bank soundness, contamination effects on legal financial transactions, and increased volatility of international capital flows and exchange rates due to unanticipated cross-border asset transfers⁴²². Illicit money is also posed as a threat to the functioning of the market: the infusion of dirty money allows unprofitable enterprises to survive and present unfair competition to legitimate businesses that do not have access to such pools of funds. FATF also maintains that economies with growing or developing financial centres – as distinguished from developed economies – are *potentially at highest risk* because "established financial centre countries implement comprehensive anti-money laundering regimes" and launderers prefer countries and financial systems with weaker or ineffective countermeasures. This, FATF cautions, may entrench organized crime within such jurisdictions and will dampen future foreign direct investment because the country's commercial and financial sectors will be seen as subject to "the control and influence of organised crime". The fight against money laundering, says FATF, is a fight against crime since starving the criminal enterprise of funding will necessarily arrest its continuation. In simultaneous play here are several of the constructive and instrumental techniques and strategies of power: there is the divisive power that sets up arbitrary boundaries – compliant/ non-compliant; strong systems/ weak systems – to segregate the individual jurisdiction from others as well as within itself (by imposing a particular identity on the said jurisdiction). There is also an identification of the 'inherent dangerousness' or the 'potentiality'

⁴²⁰ Ruggiero supra note 7 at 203

⁴²¹ <http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223>

⁴²² <http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223>

of a jurisdiction as opposed to its actuality in terms of the risk it poses to the global system. Finally, there are the vivid descriptions of the impending crisis: risks to bank soundness, increased volatility of capital flows, entrenchment of organised crime, for example.

Each of these arguments is categorically debunked in the critical literature. Many critics argue that reputational costs for financial institutions are overblown⁴²³ and point to the growing number of global banks – many from the purportedly safe “established financial centres” – that have emerged unscathed from AML-CTF investigations⁴²⁴. The phenomenon offers one of the clearest examples of the difference between ideational power and the way it is materially organised. Despite frequent incidents of money laundering detected by regulators, say the critics, these banks have not been held liable for criminal prosecution nor have their licences been withdrawn – most get away with fines and only the marginal players are ever forced to give up licences⁴²⁵.

The laundering-crime causality is similarly refuted. Swathes of critics have pointed to the lack of evidence that AML-CTF methodologies prevent crime⁴²⁶. As Naylor explains, supply-side criminologies, or crime control policies that target offenders, were evolved in response to predatory crimes (robbery, fraud, counterfeiting etc); their transplant to “demand-driven crimes” does not work because such markets cater to the impermissible desires of “polite society”⁴²⁷. While there is demand for drugs or tax abuse methodologies, there will be supply of laundering services. Further, he argues, contrary to popular perception, crime *does not* pay and certainly not as much as it is assumed to. This is largely because the risk of getting caught forces criminals such as drugs traffickers to set up additional layers of intermediaries, each with their own cut.

⁴²³ Halliday et al supra note 412 at 48. In their country studies of mid-sized havens Barbados, Mauritius and Vanuatu, Sharman & Mistry interview industrywallahs and regulators and find that enhanced reputation confers no commensurate benefits (with the conclusion that either reputation doesn’t really matter; reputations are not enhanced by more regulations or invisible benefits have accrued); that potential foreign clients are better placed to answer the question than regulators and industry players; or the benefit of regulation is just the “avoided cost” of damage caused by a FATF blacklisting. Sharman & Mistry supra note 18 at 164-5. Hulsse supra note 129 goes a step further when he argues that money laundering, per se, does not confer a bad reputation; it is FATF’s characterization of money laundering as a global problem that does so.

⁴²⁴ For example, HSBC, Barclays, Citigroup etc.

⁴²⁵ Favarel-Garrigues et al 2008; p 3; Halliday et al supra note 412 at 53

⁴²⁶ See, generally, Margaret E. Beare & Stephen Schneider, *Money laundering in Canada: Chasing dirty and dangerous dollars* (Toronto, University of Toronto Press, 2007).; Levi supra note 103; Reuter and Truman supra note 6.

⁴²⁷ Naylor supra note 221 at 10-1; 41-2

While the fear of state sanctions reduces the size of the ‘take’ at each level, it does not eliminate the *incentive* to commit the crime. The idea of fabulous wealth being reinvested into the business can thus be seen as one borrowed from corporate history and is contradicted by the operations of criminal enterprises⁴²⁸. And while illicit money can create market distortions, this applies as much to white-collar crime as it does to drugs money⁴²⁹.

The FATF argument about volatility and cross-border flows are similarly discredited. First, as Halliday et al argue, there is no scientific evidence to prove AML-CTF regimes produce domestic and/or international financial stability⁴³⁰. Second, as Ruggiero points out, the laundering of drugs proceeds isn’t transnational but mainly a localized endeavour, effected through real estate, construction or accomplices in the economic or political sphere (lawyers, accountants, corrupt politicians etc)⁴³¹. Finally, as Naylor contends, criminal enterprises are rarely structured like transnational corporations with established supply chains: convergences between criminals in different jurisdictions are generally episodic and short-lived and rarely, if ever, correspond to the ‘Godfather’-like relationships popularised in fiction and cinema⁴³². Significantly, the insight also holds true for militant organisations⁴³³.

FATF’s perception about the vulnerabilities and risks to economies with growing or developing financial centres is also challenged. First, AML-CTF controls in developed countries are as lax as the ones in other jurisdictions⁴³⁴. Indeed, some critics see the perception of lax controls in the growing/ developing countries as having been deliberately created at the behest of the onshore

⁴²⁸ Naylor supra note 221 at 2-3; 21; 31

⁴²⁹ Ruggiero supra note 7 at 201

⁴³⁰ Halliday et al supra note 412 at 5

⁴³¹ Ruggiero supra note 7 at 203.

⁴³² Naylor supra note 221 at 2-3; 21

⁴³³ Jessica Stein & Amit Modi, “Producing terror: organizational dynamics of survival”, in Biersteker and Eckert supra note 365 at 27-8. The authors argue that commander-cadre militant organisations – as opposed to “network” organisations – can only exist in particular circumstances: in weak or failed states; in regions within states that are outside of government control; or in countries where governments or parts of the government allow the groups to function. This is because militants violate laws and require secrecy to commit their crimes and hierarchical organisations are more susceptible to detection by law enforcement agencies.

⁴³⁴ Alldridge (supra note 101 at 445) argues that the political nature of FATF is evident in the fact that the US has not drawn any adverse consequences for its failure to meet AML-CTF requirements; see also Cuellar supra note 355.

jurisdictions to stave off competition from the offshore jurisdictions⁴³⁵. Second, the regulatory capture FATF fears is already in effect in *developed* countries: shortcomings in AML-CTF models are introduced at the behest of domestic economic and political interests⁴³⁶. Further, since regulators develop their thinking in close and constant relationships with those they regulate, the regulations often resonate with contemporary market philosophies and imperatives. Ruggiero demonstrates this using the example of financial regulators who begin to perceive new financial products and associated risks as a necessary part of market innovation and so, opt for what he calls “light-touch regulation⁴³⁷”. Third, launderers *prefer* jurisdictions with stable political systems with strong rule of law and vibrant finance industries, such as those found in developed countries. This is why laundered monies are frequently routed through smaller jurisdictions to destination countries such as the US, UK, Switzerland, Canada, Japan, Hong Kong and Luxembourg⁴³⁸.

However, despite their criticism of FATF’s rationale, few critics thoroughly investigate other possible objectives for increasing regulation. While some posit the use of such regulation as a political tool in line with foreign policy objectives⁴³⁹, others view it as a domestic law enforcement policy tool⁴⁴⁰ or even a bid to increase the arbitrary powers available to law enforcement agencies⁴⁴¹. Some have set out state greed – for confiscated assets⁴⁴² or tax evasion dollars⁴⁴³ – as a possible motive; still others point to the construction of a multimillion dollar ‘compliance industry’ on the edifice of this regulation and its growing ‘exports’ of training and

⁴³⁵ Tsingou supra note 101 at 630; Alldridge supra note 101 at 444; see also Masciandaro supra note 101; Andrew P. Morriss and Clifford C. Henson, “Regulatory effectiveness and offshore financial centers” (2013) 53:2 Va J Intl L 417–466.

⁴³⁶ See Mark Pieth, “The prevention of money laundering: A comparative analysis” (1998) 6:2 Eur J Crime, Crim L & Crim J 159- 168.

⁴³⁷ Ruggiero supra note 7 at 170

⁴³⁸ Interestingly, Baker et al see the unbridled growth of the finance sectors of such countries as problematic. They argue that oversized finance crowds out investment from the productive and services sectors of the economy. Andrew Baker (University of Sheffield), Gerald Epstein (University of Massachusetts Amherst) & Juan Montecino, *The UK’s Finance Curse? Costs and Processes* (University of Sheffield, 2018) at 12; online <http://speri.dept.shef.ac.uk/wp-content/uploads/2019/01/SPERI-The-UKs-Finance-Curse-Costs-and-Processes.pdf>. See also Shaxson supra note 2.

⁴³⁹ Beare and Woodiwiss supra note 104 at 546.

⁴⁴⁰ Kilchling supra note 102 at 657-9

⁴⁴¹ Naylor supra note 221 at 11

⁴⁴² Kilchling supra note 102 at 659

⁴⁴³ Levi supra note 103 at 420-1

education initiatives⁴⁴⁴. Although each account is compelling and accurate on its own, these alternative rationales lack a unifying thread. Each of the ‘motives’ can trigger increasing harmonization. But none of them individually have the force to carry through a project as ambitious as global harmonization because there are too many voices around the table, both at a global level and within a jurisdiction. At a global level, the power of ‘strong’ states is countered by resistances from weaker ones; at a domestic level, the interaction between the sources of power (military, economic, political etc) within a polity as well as the multiple interests of each actor/ institution/ network affect the trajectory of regulation. More simply, as corroborated by accounts of global trade regulation, global harmonisation of AML-CTF standards cannot be attributed to the desires or the power of one.

First, while the US has certainly deployed AML-CTF regulation as a foreign policy tool to further its political objectives, there seems little reason for *all other states* to throw their collective weight behind the regulations and to implement the same *within their own jurisdiction*. This would be particularly true of the states that are the *subject* of US foreign policy. Second, the insistence on *global* harmonisation makes little sense if the regulatory objective is to control crime within *individual* jurisdictions. Even if, for the sake of argument, the theory regarding globalised crime networks were to be accepted, as Naylor contends, such syndicates do not have footprints extensive enough to merit *world-wide* regulation. While jurisdictions within the operative network of the crime cartel would have incentive to harmonise regulation, unaffected jurisdictions or even those on the periphery would have little reason to do so. Particularly since *preventive* regulatory efforts require significant budgetary outlay but do not confer commensurate, quantifiable political advantages (for example, voter-pleasing, precise data about the quantity of harm prevented). Third, state greed for confiscated assets or tax evasion dollars can only be a real regulatory imperative for countries seeing such outflows. Other jurisdictions with economies that stand to benefit from such inflows – onshore and offshore jurisdictions etc – are unlikely to be as enthusiastic about implementing AML/ CTF regulation. This is a point confirmed by the Panama and Paradise Papers disclosures. Finally, only countries that have the infrastructure and capability to export AML-CTF ‘compliance’ products would benefit from the

⁴⁴⁴ Beare supra note 7 at xv-vi

creation of a harmonized, captive market. The ‘importers’ of such products are thus unlikely to endorse the creation of such a regulatory market.

There is also a significant strand in the critical literature regarding the subversion of law. First, AML-CTF regulation proceeds on the basis of suspicion⁴⁴⁵. It overturns the criminal law presumption of innocence and places the burden of proof on the accused. Second, it deviates from fundamental legal principles such as due process⁴⁴⁶; reasonable suspicion and even evidentiary requirements⁴⁴⁷. Third, the regime responsabilises private-sector third parties for reporting crimes, even those who are in relationships traditionally protected by the law⁴⁴⁸. There is also strong criticism about the use of laundering offences as a “proxy”: since proving criminal liability in predicate offences is harder, prosecutors often substitute the easier-proven laundering offences and draw “disproportionately severe penalties” for laundering for predicate offenders⁴⁴⁹. This also has the consequence of expanding prosecutorial discretion and power – including the ability to expand the scope of evidence that can be admitted at trial or documents that can be subpoenaed⁴⁵⁰.

While most critics rightly identify the war on drugs/ terrorism/ weapons of mass destruction as the *moment of crisis* that authorised this departure from established law, too many fail to address the full implications of such departure. First, with its norms and normalising judgement, its hierarchical observation, its rewards and penalties, the AML-CTF regime normalises a culture of

⁴⁴⁵ See, generally, Gold & Levi supra note 222; Woodiwiss supra note 222; Mitsselegas supra note 222; Naylor supra note 221.

⁴⁴⁶ Mitsselegas supra note 222

⁴⁴⁷ For example, the accused is expected to present evidence in his favour; evidence can be seized without warrants; and the standard of proof required for conviction is considerably relaxed as compared to other crimes.

⁴⁴⁸ On responsabilisation, see Mitsselegas supra note 222. Responsibilised parties include lawyers, accountants, real estate brokers, gems and jewellery traders and financial institutions, among others. Significantly, in 2015, the Canadian Supreme Court found the rule violated client-attorney privilege and, as such, ran against charter freedoms. <https://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/lawyers-win-exemptions-from-money-laundering-law/article22984504/>

⁴⁴⁹ Cuellar supra note 355 at 406-8. The findings are based on a) a survey of the records of all federal charges in the US for the fiscal year 2000 and b) a randomized sample of 50 reported district court opinions and depositions between 1999 and 2002, which mentioned money laundering and involved violations of the major anti-money laundering laws in the US. Cuellar also notes the fact that the number of defendants charged with money laundering offences alone (that is, third-party launderers as opposed to criminals who laundered their own money) is small and finds that laundering offences are mostly tacked on after the discovery of a predicate offence.

⁴⁵⁰ Cuellar supra note 355 at 410-11

suspicion, of surveillance⁴⁵¹. Second, by projecting money laundering and terrorism financing as affronts to global society, as it were, the AML-CTF regime captures the essence of what Foucault would call punishment-as-duty. Launderers and terrorists but also those who aid, abet and facilitate them – even unwittingly – are deemed culpable for “the crime that has wronged them all⁴⁵²”. Finally, even the *departure* from established legal conventions and principles is *law*, in that it empowers some and entrenches certain interests.

There are also issues with the governance structure of the AML-CTF regime regarding, particularly, legitimacy, accountability, bias, transparency and opportunism. There are concerns about the “de-territorialisation of jurisdiction” – both for the offence of laundering as well as reduced significance of the geographical location of the predicate offence – by assigning the devise of regulation to a “deliberately unrepresentative agency”⁴⁵³. Significantly, as Halliday et al confirm, several assessors and country officials say that their professional judgements were pushed aside by “political” concerns during FSRB and FATF plenaries⁴⁵⁴ – a point corroborated by some Pakistani interlocutors. While there is considerable truth to such charges, the complete picture is more complicated, as evidenced by a simultaneous reading of Hulsse, van Duyne and Sassen in the context of legitimacy and authority.

Hulsse’s deeply insightful contribution is that voluntary compliance with global rules requires persuasion about the rules but also the problem the rules are meant to solve. In a vein similar to Bourdieu’s explication regarding self-consecration by a priest, Hulsse argues that international organisations problematize money laundering through processes of social construction so as to win the right make the rules around laundering and to secure the compliance of those who have not been involved in the rule-setting process⁴⁵⁵. Since ‘club organisations⁴⁵⁶’ such as FATF lack democratic legitimacy (or ‘input legitimacy’), they choose problematisation as a means of

⁴⁵¹ For thoughtful reads regarding the links between AML-CTF regulation and surveillance, see, generally, Tsingou (supra note 101) and Anthony Amicelle, & Vanessa Iofolla, “Suspicion-in-the-making: surveillance and denunciation in financial policing” (2018) 58 Brit J Crim 845–863.

⁴⁵² D&P supra note 23 at 109-110

⁴⁵³ Alldridge supra note 101 at 455-6; 443.

⁴⁵⁴ Halliday et al supra note 412 at 28

⁴⁵⁵ Hulsse supra note 129 at 156; 160. He distinguishes his approach from the epistemic community literature by arguing that the latter is focuses on the interpretation of problems, not their making. Also at 162

⁴⁵⁶ The club often comprises a small group of states that assume global standard setting functions. Hulsse supra note 129 at 164.

generating ‘output legitimacy’ for themselves (that is, the legitimacy acquired when rules are perceived as effective for resolving the problems they are meant to address)⁴⁵⁷. Leveraging its position as the only international organisation dealing exclusively with money laundering allows FATF to build the myth about its superiority. According to Hulsse, FATF “talks” money laundering into existence as a global problem that can only be resolved by “international countermeasures”⁴⁵⁸. Further, adds van Duyne, FATF does so in emotive language designed to convey the seriousness of the threat by an “inflationary ‘colouring’ of reality”. The object, he contends, is the construction of “a rhetoric of fear” that articulates imaginary risks to society and the global financial system – the discourse of crises. This fear – of drugs, of organised crime, of terrorism –, in conjunction with political rituals such as the threat of exclusion, negates all opposing views and helps further the objectives of the regime⁴⁵⁹.

While Hulsse and van Duyne do not delve into how the rules are operationalised, Sassen offers key insights that can usefully be applied to the AML-CTF regime. Global regimes, she argues, become operative once “instantiations of the global” are constructed *within the national*. That is, ‘global rules’ are operationalised after they enter the national domain through national legislatures and judiciaries; the worldwide operation of national firms and markets; political projects of nonstate actors; diasporic networks; and changes in the relationship between the citizen and the state. These “denationalised processes” – that is, networks and formations, including normative orders, that connect subnational or national processes/ institutions/ actors but not necessarily through the supranational or interstate system – are oriented towards global agendas and systems and away from historically shaped national logics⁴⁶⁰. This is exemplified by the attitudes of those in the financial industry and from disparate states who – despite the differences between their jurisdictions – advocate for similar rules. (van Duyne mockingly refers

⁴⁵⁷ Hulsse supra note 129 at 164. See also Black (supra note 145) for an interesting discussion of how legitimacy is constructed, especially “legitimacy networks” that work to create a self-perpetuating, dialectical legitimizing strategy by leveraging the legitimacy of each ally. One of the examples she gives is of how FATF trades in on the credibility of the IMF and the World Bank to bolster its own legitimacy.

⁴⁵⁸ Hulsse supra note 129 at 167-2; 175. According to Hulsse, FATF does so by using three rhetorical techniques: declamation (using its dominant discourse position to make truth-claims others are not in the position to challenge); objectivation (through “awareness raising rhetoric” since implicit in raising awareness about an issue is recognition that the issue exists); and explanations regarding the problem (as contained in FATF’s annual reports).

⁴⁵⁹ Van Duyne supra note 129 at 3, 13-4, 29-30; van Duyne et al supra note 6 at 139

⁴⁶⁰ Saskia Sassen, “The participation of states and citizens in global governance” (2003) 10 *Ind J Global Leg Stud* 5 at 1-3

to them as “the congregation of believers⁴⁶¹.”) However, a point that merits greater recognition is that the domestication of global rules also confers additional legitimacy to these rules by stripping them of their global, political origins.

Questions of power aside, there is also a significant thread in the critical literature dealing with the lack of evidence regarding the efficacy of AML-CTF regulation. There are frequent questions about the appropriateness of the measures to combatting all kinds of money laundering or the financing of militancy, especially since the latter follows no detectable patterns⁴⁶². The 9/11 operations were mostly routed through large US and British banks and even Financial Intelligence Unit personnel admit (the then) FATF’s nine Special Recommendations would not have caught the transactions of the conspirators⁴⁶³. This is also because the financing of militancy is generally cheaper than is envisaged⁴⁶⁴. There are as many questions about continued laundering by the banks and about the regime’s ability to distinguish between countries with high levels of corruption and huge levels of illicit monies; significantly, even FATF has not been able to demonstrate how compliance with its standards can help achieve its stated objectives⁴⁶⁵.

Crucially, most critiques inadvertently illustrate the material versus ideational dichotomy when they – explicitly or implicitly – speak to the lack of corporate and political will in combatting money laundering and/ or terrorism financing. The corporations are seen as interested in only profits⁴⁶⁶ and resist AML-CTF compliance by pursuing what McBarnett calls “creative compliance” strategies⁴⁶⁷ – what Lukes would call “hidden transcripts” – when they are not

⁴⁶¹ Van Duyne supra note 129 at 31

⁴⁶² Cuellar supra note 355 at 414. See also Beare & Schneider supra note 426; Woodiwiss supra note 222; Kilchling supra note 102; Levi supra note 103.

⁴⁶³ Passas supra note 106 at 319, 321-3

⁴⁶⁴ According to Passas, the 9/11 operation was the most expensive (about \$320,000) but the London attacks required a few hundred British pounds sterling; the bombings of US embassies in Kenya and Tanzania about \$10,000; and the pre-2006 Paris bombings, just a few hundred euros. Passas supra note 106 at 325

⁴⁶⁵ Halliday et al supra note 412 at 9

⁴⁶⁶ Beare supra note 363 at 19; 30-1

⁴⁶⁷ McBarnet defines creative compliance as an attitude towards the law that sees the law not as an authoritative and legitimate policy to be implemented but as material to be worked on or tailored according to one’s own (or one’s client’s) interests. Doreen McBarnet, “When compliance is not the solution but the problem: From changes in law to changes in attitude” (2001), Working Paper no 18, Centre for Tax System Integrity Research School of Social Sciences Australian National Univ. Canberra, ACT at 3; online <https://pdfs.semanticscholar.org/2a67/58231f73c3a177535f6df9ae0d347fb19bb1.pdf>. Tombs and Whyte call this “law avoidance” (Steve Tombs and David Whyte, *The corporate criminal: Why corporations must be abolished* (London, Routledge, 2015)).

protected by beneficial ownership laws. The states, meanwhile, have their own logics, determined by the interaction of the sources of power within the polity and the multiple interests of the actors/ networks/ institutions involved with or affected by the AML-CTF effort. Apart from the issues of policy capture and regulatory capture, some authors note the gaming of system by states, which stick to the letter of the law to effect a potent resistance to the regime⁴⁶⁸. The impact of regulations depends on how they are enforced and discretion and lax enforcement are often baked into national regimes. As Cuellar contends, even where countries sign up for FATF standards, national governments still maintain control over budgets, enforcement policy and prosecutorial discretion (for example, prosecutors' salaries or the number of regulatory investigators)⁴⁶⁹. However, the most profound consequences of the lack of political will – or the mounting of resistance – come into play on the global level: the AML-CTF regime cannot prevent money laundering by states⁴⁷⁰, terrorism financing by states such as Saudi Arabia and Qatar⁴⁷¹ or even the shoddy implementation of regulations by recalcitrant states such as Pakistan (see Chapter 4 for detailed discussion). While the cooperation between states in effecting repatriations, for example, is obviously conditioned by their politics, nowhere are political considerations more important than where states are directly or indirectly involved in any of these activities. As the *New York Times* editorial notes, both Saudi Arabia and Qatar are key US allies and this translates to lack of action against them on the AML-CTF front.

The conceptual issues associated with terrorism financing regulation are even more problematic than those associated with money laundering. The primary problem with regulation attacking terrorism financing is that it ignores the *demand* for terrorism: militant organisations cater to the emotional, spiritual and financial needs of their supporters and volunteers who comprise the “alienated, disenfranchised and humiliated⁴⁷²”. Instead, the dominant discourse regarding terrorism financing constructs an alternative reality, which characterises militants as violent entrepreneurs. As Stern and Modi caution, any regulation that does not address this core issue is bound to fail. Further, current terrorism financing regulation rests on a series of erroneous

⁴⁶⁸ Halliday et al supra note 412 at 32-3

⁴⁶⁹ Cuellar supra note 355 at 440

⁴⁷⁰ States do this by hiding the financial transactions associated with illegal political practices at the international levels: “the clandestine financing of friendly parties or allied ruling elites abroad”. Ruggiero supra note 7 at 205-6.

⁴⁷¹ Editorial, *New York Times* (June 19, 2017)

⁴⁷² Stern & Modi in Biersteker & Eckert supra note 365 at 41.

assumptions. First, counter-terrorism financing regulation is predicated on the simplistic assumption that all such organisations are similar⁴⁷³. Second, it is further assumed that the transfer of terrorist finances occurs within formal financial institutions; in amounts capable of detection; and in distinguishable patterns. Third, it is assumed that the principles of regulation applicable to formal financial institutions (for example, Customer Due Diligence or CDD) can easily be extended to informal value transfer systems (such as hundi/ hawala operators) or other potential sources of financial transfers. Fourth, Informal Value Transfer Systems (IVTS) are erroneously understood as key actors in the financing of terrorism. Finally, an emergent nexus between terrorism and organised crime is assumed⁴⁷⁴. None of these assumptions are borne out by reality.

The regulators' conception of militant organisations is mostly derived from the structures of *transnational corporations*, which operate on the basis of centralised, hierarchical decision-making with functionally specialised units and systems in a transnational context. First, as Stern and Modi explain, militant organisations are markedly different from each other in organisational structure, goals and form. Second, while some do follow the hierarchical commander-cadre structure envisaged by regulators with the 'parent' organisation providing funds (whether on an episodic basis or an ongoing basis), others operate as relatively independent nodes of a network, with each organisation responsible for their own fund mobilisation and generation⁴⁷⁵. Third, funding patterns for such organisation are both variegated and evolving. Besides drawing on state support, charitable donations and direct solicitations, these organisations are involved in a mix of legitimate businesses and illegitimate ones (such as extortion rackets, kidnappings for ransom, bank robberies etc)⁴⁷⁶. The point that needs underscoring is that militant organisations do not *rely* on crime – let alone organised crime – for financing. While militant groups may have

⁴⁷³ See for example, the essays by Stern and Modi as well as Jeroen Gunning, "Terrorism, charities and diasporas: contrasting the fundraising practices of Hamas and al Qaeda among Muslims in Europe" in Biersteker & Eckert supra note 365 at 93-125

⁴⁷⁴ Biersteker & Eckert supra note 365 at 4-5

⁴⁷⁵ The 'commander' in a network is mainly relied on for ideological indoctrination. The primary advantage is that the network is "maximally resistant to disruption" by law enforcement. Stern & Modi in Biersteker & Eckert supra note 365 at p 23-6

⁴⁷⁶ Thomas J Biersteker & Sue E. Eckert, "Conclusion: taking stock of efforts to counter the financing of terrorism and recommendations for the way forward" in Biersteker & Eckert supra note 365 at 292.

transactional relationships or tacit alliances with criminal groups, these are usually temporal or episodic in nature⁴⁷⁷.

Further, the relative composition of funding also evolves as the organisation evolves in response to internal and external pressures. Internal pressures, such as a strategic alliance with a criminal group, for example, would trigger a greater reliance on criminal funding while an alliance with a madrassah would increase the dependence on state funding (foreign and domestic) as well as charitable donations. External pressures, such as an internationally coordinated crackdown on money transfers, would push many militant organisations to explore both domestic sources of financing as well as diversify into legitimate businesses, which could provide a steady income stream. In the decade after 9/11, for example, Al Qaeda transformed its global funding strategy to set up more legitimate businesses⁴⁷⁸. While militant organisations may have some interface with both formal financial institutions and IVTS, their contact is not limited to either⁴⁷⁹. Further, IVTS are not designed like formal financial institutions and are unlikely to have the organisational or human resource heft required to implement the regulations applicable to banks (for example, CDD requirements)⁴⁸⁰.

Finally, there is the question regarding the resemblance of the surveillance apparatus to the Foucauldian version of Bentham's Panopticon⁴⁸¹, where the prospect of permanent visibility leads to an internalization of discipline by prisoners (here, broader society) and their self-surveillance. There is also a small chorus of concerns among the critics about the co-option of civil society in policing and surveilling potential offenders through a new paradigm of security governance: criminalization of new offences; responsabilisation and administration of knowledge⁴⁸². While the increasing cost of compliance has mostly been passed on to the private

⁴⁷⁷ Biersteker & Eckert *supra* note 365 at 292

⁴⁷⁸ Biersteker & Eckert *supra* note 365 at 291. See, also, Hasan *supra* note 17 for a political economy perspective of militant groups in Pakistan.

⁴⁷⁹ For example, a journalist interviewed in Pakistan spoke of the Saudi embassy in Islamabad in the 1980s handing out sacks of US dollars to militant groups while a former law enforcement officer said that Taliban groups in Pakistan have been known to charge 'protection money' in Bitcoin. Interview 10, senior journo; Interview 9, retd senior Nacta official.

⁴⁸⁰ This is because their documentation of transactions is different from those practiced by formal financial institutions.

⁴⁸¹ D&P *supra* note 23 at 202-3.

⁴⁸² See Mitsueltas 2000.

sector (banks etc), this has brought into sharp focus the costs of this passage: as Tsingou notes, there are also costs associated with assigning the legal role of guardian to the private sector⁴⁸³.

Structural/ procedural problems

The foremost problem still remains that of credible estimates regarding the volume of money laundering. A few authors have devised complex and involved methods of assessing volume⁴⁸⁴ but the most bandied about figure remains “two to five percent” of global GDP, first used by Quirk in a 1996 article and since 1998, attributed to then IMF managing director Michael Camdessus. The precision of the estimates has been further compounded by definitional issues over the years as ‘money laundering’ grew to encompass terrorism financing; the financing of weapons of mass destruction; corruption; tax avoidance and trade-related malpractices (including transfer pricing and Base Erosion Profit Shifting, for example)⁴⁸⁵. Some authors advocate the additional inclusion of white-collar crime⁴⁸⁶ while others point to capital flight and the proceeds of informal economies⁴⁸⁷. Further, AML-CTF is said to catch only a small proportion of criminal proceeds and exonerates political, corporate and criminal corruption. Post 9/11 particularly, there are concerns regarding the ability of the AML-CTF regime in capturing new digital and virtual currencies; underground economies and IVTS such as hawala/ hundi, fei ch’ien, Black Market Peso Exchange, and hui kwan⁴⁸⁸. This has compounded the estimation error, which obviously has consequences for any resolution strategies.

Another seemingly intractable problem is that the AML-CTF regime is predicated on a series of fundamental misunderstandings and many deliberate structural deficiencies. First, the regime

⁴⁸³ Tsingou supra note 101 at 621; Reuter and Truman supra note 6 at 94-103.

⁴⁸⁴ See, especially, Quirk (supra note 6) and Walker (supra note 6) for methodology.

⁴⁸⁵ See Sanaa Ahmed & Margaret Beare, “Money Laundering” in Beth M. Heubner, ed, *Oxford Bibliographies in Criminology* (New York, Oxford University Press, 2018); available online. For a good overview of the problems associated with estimating volume, see Michael Levi & Peter Reuter, “Money laundering: A review of current controls and their consequences” (2006) 34 *Crime and justice: A review of research* 289-375; online http://faculty.publicpolicy.umd.edu/sites/default/files/reuter/files/levi_and_reuter.pdf.

⁴⁸⁶ See, for example, Beare supra note 7

⁴⁸⁷ See, for example, Ruggiero supra note 7; Beare supra note 20.

⁴⁸⁸ These are informal systems used to transfer funds to third parties in different geographic locations. Typically, a hawaladar (remitter) accepts payment at one location and their counterpart at the other location releases the payment to the third party, often within twenty-four hours. Operating either in addition to formal financial systems or in jurisdictions where formal systems are not available, these systems operate on the basis of trust between the hawaladars (remitter and recipient) and are often preferred by clients due to speed, low transaction costs, less bureaucracy, and anonymity.

‘invisibilises’ or ignores the role of capital in influencing regulation and glosses over the fact that the final destination for illicit funds are onshore havens and not the offshore havens. Second, the system cannot separate the revenues of white-collar crime from those of organized crime⁴⁸⁹ and most regulatory activity ends up focused on the organised crime aspect alone. For example, there is an inordinate focus on currency transactions⁴⁹⁰ and the placement-layering-reintegration model, which is irrelevant for other financial crimes⁴⁹¹. Finally, the system wilfully ignores the issue of capacity: besides lax and myopic regulators with limited oversight capacity, many jurisdictions also have systemic capacity constraints that often leads to data overload of regulatory systems⁴⁹² and/ or law enforcement arms incapable of using the data generated in their investigations⁴⁹³. (Both phenomena are borne out by Pakistan’s experience; see Chapter 5.)

Collateral damage

Unfortunately, while the inadvertent harms caused by the AML-CTF regime are mounting, there are few considered analyses of the “bads” produced by the regime⁴⁹⁴. As such, mention of these harms remains peppered over the critical literature.

Tsingou speaks of the targeting of smaller jurisdictions and notes that developing countries can ill-afford the outlays on compliance⁴⁹⁵. Several authors speak of derisking (that is, when financial institutions terminate or restrict business relationships with remittance companies and smaller local banks in certain regions of the world) and the consequences for swathes of the population in poor countries⁴⁹⁶. These are particularly aggravated when chunks of the population are dependent on foreign remittances sent by family members working abroad through informal

⁴⁸⁹ Beare supra note 363 at 11

⁴⁹⁰ The only possible exception is the Know Your Customer/ Customer Due diligence requirement for banks etc. Cuellar supra note 355 at 425.

⁴⁹¹ Ruggiero attacks the model as “obsolete”. He argues that the money involved in already in the system when crimes such as insider trading and political and corporate corruption take place; that the idea of layering has law enforcement hunting for long and complex money trails and ignoring simpler but equally effective ones; that the idea of reintegration overlooks the reality that this stage is “frequently indistinguishable for the activity preceding it”. Ruggiero supra note 7 at 205

⁴⁹² Reuter and Truman supra note 6 at 55

⁴⁹³ Cuellar supra note 355 at 425, 433; Levi supra note 103

⁴⁹⁴ Halliday et al supra note 412 at 7, 47

⁴⁹⁵ Tsingou supra note 101 at 631

⁴⁹⁶ See, generally, Michael Woodiwiss & Dick Hobbs, “Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric of Organized Crime Policing in America and Britain” (2009) 49:1 Brit J Crim 106-128; Levi supra note 103.

value transfer systems (IVTS) such as hundi/ hawala. Halliday et al, for example, fear an AML-CTF-trigger crackdown on IVTS could potentially reduce remittances in these countries; increase administrative and financial costs on voluntary organisations that are unable to pay and reduce charitable donations to Islamic charities, which perform many public service functions in poor countries⁴⁹⁷. Similarly, Wilks thinks greater client scrutiny by financial institutions could increase the risks of profiling by governments in developed countries⁴⁹⁸.

Tsingou, meanwhile, makes an important generalised point when she cautions about greater tolerance of “surveillance creep”: not just more surveillance by states but more acceptance of the same by citizens everywhere. She quotes bank officials as saying that greater financial sector surveillance is an opportunity for financial institutions to know their clients better and tailor more products for them⁴⁹⁹. However, there is a darker side to this too: AML-CTF regimes may also be used against political opponents by authoritarian rulers to deny them banking or other facilities; to increase surveillance over their accounts; and prosecute or impose penal taxes for non-disclosure in addition to opening up more opportunities for illegal extortion for private gain⁵⁰⁰. While Cuellar also concedes the AML-CTF regime could give governments more power than society would like, he rather naively insists that that this is an argument for careful institutional design rather than the abandoning the objective of disrupting criminal finance⁵⁰¹. Critically, none of the above authors document or examine how AML-CTF regulation re-entrenches existing power relations at both the global and the local level.

3.4 The missing link

⁴⁹⁷ Halliday et al supra note 412 at 51. See also Chapter 5 for details on how this plays out in Pakistan.

⁴⁹⁸ Stephen Wilks, *Rethinking the dynamics of remittance regulation within the context of networked global governance* (PhD dissertation, York University, 2011) at 175-80. [unpublished]

⁴⁹⁹ Tsingou supra note 101 at 629, 632

⁵⁰⁰ Halliday et al supra note 412 at 50-1. See also Ben Hayes, *The impact of international counter-terrorism on civil society organisations: understanding the role of the Financial Action Task Force* (Washington DC, Bread for the World, April 2017); online https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf

⁵⁰¹ Cuellar supra note 355 at 391.

The criticisms against the AML-CTF regime are mounting up. Unfortunately, even the critical takes within the literature remain, for the most part, firmly state-centric and/or institutionally focused. This poses five distinct but interrelated problems.

First, regulation is seen as either a state-sponsored iteration; a balancing of the interests of competing states⁵⁰²; or the output of what Drezner refers to as a “club IGO⁵⁰³”. Treated independently, all three are conceptually problematic and entirely inadequate to their explanatory task. As used here, “state-sponsored iteration” refers to regulation that crystallises around, expresses and secures *the* interests of *the* state. The unarticulated assumption of most authors writing about AML-CTF regulation is of the state as a unidimensional, monolithic singularity with clearly defined and impregnable interests⁵⁰⁴. This assumption ignores the fact that as an *actor* (see discussion in Chapter 2), a state has multiple interests and objectives it pursues simultaneously while continually readjusting the weightage it assigns to each⁵⁰⁵. The assumption also neglects the fact that the state, as a *place*, is the site for competing power interests that find expression *through* state policy at various moments. That is, there are rifts and fractures within polities – interest groups working at cross purposes – and the regulation emanating from the state-as-place is driven in different directions by these sources of military, economic, political, and/or ideological power⁵⁰⁶. The interests and identity of ‘the’ state are clearly mutable; to privilege the notion of state-driven regulation is to attribute to the state a homogeneity of purpose and an autonomy that it clearly lacks.

Take the example of law and order. While the preservation of law and order is a key objective of the state-as-actor, so is the preservation of relationships integral to the functioning of the state.

⁵⁰² See, for example, Brummer *supra* note 384.

⁵⁰³ He defines IGOs as International NGOs that are limited by membership such as FATF, the G7 or the OECD. Daniel W. Drezner *All Politics is Global: explaining international regulatory regimes* (Princeton, Princeton University Press, 2007) at 67-8

⁵⁰⁴ For a useful exception, see Cuellar *supra* note 355 who breaks ‘the’ state down into legislators, regulators, law enforcement personnel and judges.

⁵⁰⁵ The reassignment of weightage is determined by the political, economic and social exigencies of the time; crucially, some readjustments result in conflicting sets of objectives (for example, the control *and* the facilitation of crime).

⁵⁰⁶ See, for example, the rich literature on the privatisation of state regulation or policy capture by big business through lobbying; campaign finance; the consolidation of elite interests in public and private sectors; and the phenomenon of the revolving door between the regulator and the regulated. Sklair *supra* note 4 remains an influential account but see also Tombs and Whyte *supra* note 467 for a more recent exposition.

And so, while states maintain law and order through crime control policies, states *also* sabotage crime control policies because of the reflexive relationship between organised crime, economic and political power⁵⁰⁷. Meanwhile, the regulation emanating from the state-as-place prioritises the preservation of law and order for its political constituency (voting citizens and their elected representatives) but also the disruption of law and order for the commercial interests of its economic constituency (the arms manufacturing industry, for example)⁵⁰⁸.

The notion of AML-CTF regulation as the outcome of competition between states is similarly flawed because it sets up a fictional monolithic state with ‘fixed’ interests against other, similarly fictionalised states. This reduces conflict on the terrain of regulation to unhelpful, simplistic binaries: “great powers concert⁵⁰⁹” versus the rest of the world; rich states versus poor states; onshore havens versus offshore havens; supply-side criminologies versus deviancy theories⁵¹⁰. Similarly, this notion does not admit of convergences or alliances between powers.

Problematically, this theory reads *unanimity of motivation* in mere regulatory convergence. More importantly, it diminishes the outcome of sophisticated power politics (including tactical alliances and oppositions) and involved bargaining to zero-sum games: AML-CTF controls or not. While Drezner correctly argues that power asymmetries affect both process and outcome in game theory as it applies to international bargaining by states on regulatory issues⁵¹¹, he doesn’t

⁵⁰⁷ See, generally, Frank Pearce, *Crimes of the Powerful: Marxism, crime and deviance* (London, Pluto Press Limited, 1976) for a trailblazing theory of Marxist criminology and the application of this analysis to the relationship between corporations, state and crime. Pearce develops the idea of an ‘imaginary social order’ to explain why the behaviour of police, state and corporation diverges from their stated priorities. See Woodiwiss *supra* note 222 for a fascinating account of how organised crime shores up existing structures of economic and political power and how states and corporations are complicit in promoting and propagating organised crime. For specific application of this theory to the Canadian financial services industry and the Montreal construction industry, see Margaret E. Beare, “Shadow Boxing against the Crimes of the Powerful” in Steven Bittle, Lauren Snider, Steve Tombs & David Whyte, eds, *Revisiting Crimes of the Powerful: Marxism, Crime and Deviance* (Abingdon, UK, Routledge Press, 2018) at 45-59.

⁵⁰⁸ Such a priority would manifest itself in state policy through, for example, gun controls or the lack thereof.

⁵⁰⁹ Drezner defines these as the governments that oversee large internal markets. Since 1995, he says, the great powers in the financial realm are the US and principal EU members as they have the largest capital markets in terms of bonds, equities and banks assets. *Supra* note 503 at 5, 123

⁵¹⁰ Simply, supply-side criminologies are techniques of crime control that begin with the premise that crime is a part of everyday, routine aspect of modern society and not a pathology or abnormality in an individual that requires special redress (deviancy theory). Accordingly, supply-side criminologies acknowledge the limited capacity of the state in controlling crime and responsabilise civil society to control crime by limiting the supply of criminal opportunities, shifting risks, redistributing costs and creating disincentives. For an excellent discussion, see David Garland, “The limits of the sovereign state” (1996) 36:4 *Brit J Crim* 445–471. For an instructive look at how the theory applies to contemporary crimes such as corruption, see Beare *supra* note 296.

⁵¹¹ Drezner *supra* note 503 at 51-2

address the issue of competition between the “great powers”⁵¹². As discussed in Chapter 2, the interaction of powers effects changes within actors and institutions as well as the positions they assume in relation to each other. However, the regulation-as-competition narrative does not admit such nuance.

This becomes clearer when one looks at how AML-CTF regulation came about. As seen above, the US was the primary mover of AML-CTF regulation, both at the time of its inception and after 9/11. However, the focus on the state-driven aspect of global regulation only succeeds in characterising the US as the playground bully or the hegemon that, for reasons specific to its domestic and foreign policy, induced, pressured and coerced the six other G-7 countries to sign up for the regulation. While there may be some truth to such a description, it is unlikely to be the only reason. (For example, at the time that the US and France pushed for the creation of FATF, Switzerland made its support contingent on an agreement that tax evasion would be kept beyond the FATF purview⁵¹³ – an example of how the Gramscian concession is sometimes essential to the mobilisation of consensus and how the interaction of powers produces change within groups.) Even if Canada agreed to support AML-CTF regulation to indirectly protect its status as an onshore haven from competition with offshore havens and France wanted to check tax evasion from its shores, the reasons for the UK endorsement are less obvious. This is because the reputation of several British Overseas Territories and Crown Dependencies as money laundering havens is well established⁵¹⁴ as is the fact that these jurisdictions function as ‘feeders’ for the City of London, which is the ultimate destination for laundered monies⁵¹⁵. Support for such regulation in the face of these political and economic links would have been problematic for the

⁵¹² His rather facile explanation is that the effects of power between great powers are largely cancelled out. Drezner supra note 503 at 58

⁵¹³ Levi & Reuter supra note 485 at 306

⁵¹⁴ Especially popular as tax havens are the British Virgin Islands, Cayman Islands, Bermuda, Anguilla, Guernsey, Jersey and Isle of Mann.

⁵¹⁵ See, generally, the UNCTAD (supra note 9) and the two OECD reports on illicit finance (OECD, *Illicit financial flows from developing countries: Measuring OECD responses* (Paris, OECD, 2014); online <http://dx.doi.org/10.1787/9789264203501-en>; OECD, *Better policies for development 2014: Policy coherence and illicit financial flows* (Paris, OECD, 2014); online <http://dx.doi.org/10.1787/9789264210325-en>). Also see Graham Vanbergen, “Money Laundering and the City of London’s ‘Crime Scene’: Haven of Tax Havens for the Mega-Wealthy”, *Global Research* (April 5, 2016); online <https://www.globalresearch.ca/money-laundering-and-the-city-of-londons-crime-scene-haven-of-tax-havens-for-the-mega-wealthy/5513335>

UK⁵¹⁶. There is even less to explain why Germany, Italy and Japan signed up as well. The notion of competition in this context suggests that all seven had clearly intelligible interests, were motivated by similar concerns and six of them allowed the political heavyweight (the US) to push them into endorsing AML-CTF regulation.

The theory of institutionally-driven regulation also fails because it imputes to the club INGOs an autonomy and legitimacy that do not exist independent of their members. Club INGOs, by definition, use membership criteria to exclude states with different preferences and confer benefits on members to ensure collective action⁵¹⁷. But such institutions borrow the authority of their members; they do not have authority or, indeed, legitimacy of their own⁵¹⁸. Further, the delegation of global regulation by great powers to a non-state actor such as a club INGO, argues Drezner, is a strategy to pre-empt objections to great power regulatory initiatives by weaker governments, corporations and other I/NGOs. The real purpose of a club INGO, he says, is to allow great powers to control the regime's governance structure in a less public way⁵¹⁹ – the secrecy or invisibility most theorists find essential to the most potent power. To contend that FATF, the G7 or the OECD can or do drive harmonization *on their own* is thus a mischaracterization. Clearly, state-centric and institution-specific accounts of global AML-CTF regulation remain problematic.

The second point is of *constructed invisibility*. To evoke Althusser again, the invisible becomes so because it is repressed from the field of the visible⁵²⁰. Privileging state-centric or even institution-specific accounts of the evolution of money laundering regulation necessarily makes invisible other actors and explanations because it posits the state as the primary beneficiary. It invariably results in a hunt for state motives. Accordingly, most of the critical literature locates rationales for AML-CTF regulation *within the project of the state*: foreign policy; greed for tax dollars; domestic law enforcement etc. Not only does this focus diminish complex, multifactorial accounts of power politics to bedtime stories of mean and usurious self-interest, these stories

⁵¹⁶ See, for example, the current tussle between the UK government and its crown dependencies over the latter's demand for public business registries. Christensen supra note 2.

⁵¹⁷ Drezner supra note 503 at 67-8

⁵¹⁸ Limited membership tends to reduce the legitimacy of the institution although some club INGOs can create their own legitimacy based on perceptions regarding their efficacy. Drezner supra note 503 at 68

⁵¹⁹ Drezner supra note 503 at 63-4; 73

⁵²⁰ Althusser et al supra note 24 at 24-5

invariably reinforce the state as the autonomous central character, the main beneficiary⁵²¹. As Althusser cautions, the *function* of the visible field (here, the state or institutions) is to forbid any sighting of the invisible; the invisible does not exist *outside* the visible but is “the *inner darkness of exclusion*, inside the visible itself [emphasis in original]”⁵²². The focus on states and institutions thus subsumes the other characters, the other beneficiaries.

This is not to imply that the motives attributed to the states are inaccurate; they are only incomplete since they provide the perspective of the fictionalized *autonomous* state alone⁵²³. But this incompleteness has critical consequences. Until the interests of other actors are factored in, these motives of state remain the sole basis for judging the efficacy, adequacy and excesses of the regulation. Even when the politics, structure, legitimacy, and accountability of the regulatory architecture are discussed, the extant literature sees AML-CTF regulation as a manifestation of a state’s policy objectives in a vacuum. That is, even the critics only assess AML-CTF regulation on whether, for example, it prevents drugs trafficking or terrorism; whether it stabilizes the global financial system; whether the regulations infringe on human rights; whether there is adequate political will to enforce the regulations. These are obviously important questions but regulation cannot be judged only on how it satisfies, exceeds or underdelivers on the objectives of one actor, however important. The omnipresence of the state cannot be denied but its omnipotence is questionable. Where power is both doing and not-doing, states express themselves through actions/reactions *vide* law and public policy but also, increasingly, through inaction at both⁵²⁴. As such, a state’s lack of political will, for example, must be seen to originate

⁵²¹ In Tsingou’s (supra note 101) otherwise sophisticated analysis of the political economy of money laundering, for example, the author continues to read the US and the OECD, to a lesser extent, as the fulcrum of the AML-CTF regime in a hermetically sealed governance bubble. Similarly, Sharman predicates the global diffusion of AML policy on the “power” of rich states. J. C. Sharman, *The money laundry: Regulating criminal finance in the global economy* (Ithaca, NY, Cornell University Press, 2011).

⁵²² Althusser et al supra note 24 at 24-5

⁵²³ As Tombs argues, while the ‘free market’ has always depended on the state, neoliberalism has resulted in the visible alignment of the state’s priorities with those of the market as well as the growing dependence of the state on private capital to provide needs it cannot meet due to economic or political imperatives. Steve Tombs, “The Real and the Imaginary Social Order: state-corporate symbiosis ‘after’ the crisis” (Paper delivered at “Revisiting Crimes of the Powerful: a Global Conversation on Capitalism, Corporations and Crime” symposium, Toronto, May 2017) [unpublished]. This, of course, renders the state susceptible to external influence and motivations.

⁵²⁴ These include, for example, policy capture or the active undermining of regulation by the state itself through the deliberate lack of enforcement of the same regulation.

elsewhere and benefit someone *other than the state*. But the focus on states diverts scrutiny of how the regulation satisfies *other, equally significant* actors.

Take the example of global capital, an indisputably powerful non-state ‘actor’⁵²⁵. Recent estimates regarding the volume of Illicit Financial Flows (IFFs) suggest corporations are responsible for the bulk of money laundering: the UNCTAD report of 2014 contends that money from crime (drugs, racketeering and terrorism) accounts for only a third of total IFFs; corruption contributes only 3 percent while two-thirds of the total IFFs stem from cross-border tax-related transactions, about half of which consist of transfer pricing through corporations. Comparatively, the Global Financial Integrity 2015 report estimates that trade mis-invoicing accounts for 83.4 percent of measurable IFFs on average. Clearly, global capital is a very significant character in the current AML-CTF regime and the material aspect of power and the way the AML-CTF regime is organised reflects this. Yet the definition of money laundering on the FATF website continues to speak of laundering in terms of “criminal acts” such as “illegal arms sales, smuggling, and the activities of organised crime, including for example drug trafficking and prostitution rings ... embezzlement, insider trading, bribery and computer fraud⁵²⁶”. More significant, however, is that the critical literature, too, does not seriously evaluate the role of global or local capital in shaping and/or enforcing the current AML-CTF regulation.

This is particularly surprising because several authors have noted the *absence* of a substantive treatment of capital in the AML-CTF regime. Early critics spoke of the omission of white-collar crime and corruption⁵²⁷; later critics pushed for the inclusion of corporate crimes including tax evasion and avoidance⁵²⁸. There is also a growing body of literature that looks at specifically trade-related malpractices⁵²⁹. Many have written about the lack of corporate will to combat money laundering and complained that the commitment to AML-CTF regulation lasts only

⁵²⁵ The use of the term ‘actor’ instead of the more commonly used ‘Transnational Capitalist Class’, ‘matrix’ or ‘network of actors and institutions’ is deliberate. This is because, first, class suggests that the conflicts of global – or even domestic – capital can only occur between classes determined by a mode of production and not between, for example, capital and military power. Second, neither ‘matrix’ nor ‘network’ can accommodate the encounter with the state.

⁵²⁶ <http://www.fatf-gafi.org/faq/moneylaundering/#d.en.11223>

⁵²⁷ See, particularly, the essays by Ruggiero (supra note 7) and Williams & Beare in Beare supra note 7

⁵²⁸ See, for example, Levi supra note 103; Beare & Schneider supra note 426; Ruggiero supra note 7; Pogge & Mehta supra note 7

⁵²⁹ See, for example, Passas supra note 7; the UNCTAD reports of 2014 (supra note 9) and the two OECD reports supra note 515.

during economic booms⁵³⁰; others have documented “law avoidance” or “creative compliance” by corporations as a means of getting around regulation⁵³¹. Both the mainstream media as well as scholars have picked up on the role of big banks in terrorism financing and remarked on the weak sanctions for them⁵³². Critically, many scholars recognise that rich countries benefit from the AML-CTF regime since they are mostly the final destination of laundered monies; interestingly, a few even admit that the purported laxity of regulation in the offshore centres is a bid by the rich countries to skew the regulatory market in their favour⁵³³. Unfortunately, none of these very significant insights are mounted into a larger discussion of the role of capital; the onus still remains on the state to remedy these non-systemic ‘defects’. Even the hypercritical strain in the literature continues to see global capital as an *inadvertent beneficiary* of regulation, not a driver⁵³⁴.

The point that merits underscoring is that the excluded or the invisible also shape policy *by the fact of their exclusion or invisibility*. To put it another way: the invisibility of an actor does not preclude their inclusion or the representation of their interests in a policy. If anything, their very absence helps strengthen the regime by reinforcing the perception regarding the impartiality of the policy and thus its legitimacy. Note, for example, that several critics speak of ‘weaknesses’ such as discretion and lax enforcement baked into the AML-CTF regime⁵³⁵. The Panama and Paradise Papers showed that AML-CTF controls in developed countries – particularly those with flourishing onshore centres – were as lax as those in other jurisdictions. These disclosures were subsequently borne out by a slew of investigative reporting and research. In Canada – one of the G7 proponents of AML-CTF regulation – Cribb and Oved emphasised how rules regarding beneficial ownership continue to encourage laundering. This is despite Canada having been asked at least four times to do away with such protections and for lawyers to be conscripted in

⁵³⁰ After the 2007 crash, there were widespread allegations that some banks were bailed out by organised criminals since the drug traffickers were the only ones with liquidity enough to save the banks. See, for example, Ahmed and Beare supra note 485.

⁵³¹ See, for example, Tombs and Whyte supra note 467.

⁵³² Favarel-Garrigues et al 2008; p 3; Halliday et al supra note 412 at 9, 53. The authors note that despite the plethora of such scandals, banks mostly pay fines and do not lose their licenses over such incidents.

⁵³³ See, for example, Morriss & Henson supra note 435; Masciandaro supra note 101.

⁵³⁴ See, for example, van Duyne supra note 129, who mentions corporations in passing or Hulsse supra note 129, who sets up a useful discussion on the operation of epistemic communities but fails to interrogate the origins of FATF’s offshore obsession and its unwillingness to take onshore havens to task.

⁵³⁵ See, for example, Cuellar supra note 355.

the compliance effort⁵³⁶. Meanwhile, the government-sponsored report on casinos in British Columbia revealed a laundering model sophisticated enough to merit its own name – the ‘Vancouver model’⁵³⁷. In the UK – another G7 proponent – after a banking leak exposed a Russian link to a charity run by Prince Charles⁵³⁸, a Treasury Committee concluded that “hundreds of billions of pounds” could have been laundered through the country each year but the government had no precise figures about the amount⁵³⁹. Meanwhile, the UK Foreign Office caved into threats of legal action or secession by the British Overseas Territories and withdrew its demand they set up public registries to reveal beneficial owners⁵⁴⁰. In each of these examples, the benefits to capital are clear but its influence on public policy is more tenuous, less visible.

Third, that these ‘weaknesses’ are built into the regime shows they are both systemic and deliberate – the ‘hidden transcripts’. These are not regulatory ‘loopholes’ or ‘defects’ serendipitously detected some 30 years after the UK and Canada signed up for the regulation; they were always intended to be part of the regime. As Tsingou and Segura-Serrano correctly argue, eliminating money laundering would be politically untenable since the developed countries that are home to the largest financial institutions or global centres of finance (for example, London or New York) would be loath to give up the political weightage they enjoy because of this position⁵⁴¹. But the critics of global AML-CTF regulation fail to interrogate the *causes* of this regulatory schizophrenia on part of the states – the desire to achieve two conflicting outcomes (the material and the ideational) with the same regulation. Tsingou, for example, says that the regime creates the appearance of public action while “less than more deliberately” strengthening the position of the biggest and strongest players: the onshore markets and the largest financial players. Who the regime acts for is something she does not explore in an otherwise sophisticated analysis of the political economy of AML-CTF. Only by admitting the power and influence of actors other than the state can the seeming schizophrenia can be seen for

⁵³⁶ See, for example, Canada’s 2008 Mutual Evaluation report; available at <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Canada%20full.pdf>

⁵³⁷ See German 2018. The Panama Papers investigation showed the Canada Revenue Agency and Canadian law to be both tolerant and encouraging of wealthy tax evaders/ avoiders, even in connivance with accounting firms such as KPMG. Despite the widespread recognition that beneficial ownership is a problem, just 10 percent of Canadian companies are registered federally; the rest are registered only provincially (Oved & Cribb 2017).

⁵³⁸ Garside & Barr 2019

⁵³⁹ Osborne 2019

⁵⁴⁰ Wintour 2019

⁵⁴¹ Tsingou supra note 101 at 630; Segura-Serrano 2014: *647

what it is: the output of the interaction of powers. In his explication of “sham standards”, Drezner argues that such standards are a “notional” set of global standards with weak or non-existent monitoring that “relieve or redirect domestic or civil society pressure for significant global regulations” in the absence of interstate consensus⁵⁴². As Beare contends: “the rhetoric of compliance can be very strong and serve to obfuscate a reality of neglect⁵⁴³”. What a state wants, what it professes to want and the regulation it agrees to are all conditioned by its interaction with other actors.

Fourth, the interaction of powers poses a formidable challenge to the issue of accountability within the AML-CTF regime. At the most granular level, the issue is of multiplicity of regulation. Take the example of the Customer Due Diligence (CDD) regulation. The regulation has long been an integral part of the Basel Core Principles for Effective Banking Supervision⁵⁴⁴ and the FATF guidelines elaborate on the same in great detail⁵⁴⁵. Meanwhile, both the Basel principles and the FATF guidelines are used in the IMF’s Reports on the Observance of Standards and Codes (ROSCs)⁵⁴⁶. Today, CDD procedures are a key requirement of most central banks and are accordingly woven into the domestic legislative or regulatory fabric. But despite there being so many authors of the said regulation, no single regulatory body can be held accountable, or even responsible, for the regulation⁵⁴⁷. As Black explains, polycentric regulatory regimes⁵⁴⁸ are not based on or mandated by national, supranational or international law. As such, they lack clearly defined structures such as courts, legislative committees, auditors and ombudsmen etc that can hold them accountable. Further, neither do they have clear jurisdictional boundaries nor do they boast an easily identifiable set of democratic participants in their

⁵⁴² Drezner supra note 503 at 81-5. Interestingly, while the example he uses is that of the International Labour Organisation, he doesn’t seem to recognise that corporate interests – not states, per se – are more invested in the attrition of the global standards on labour.

⁵⁴³ Beare supra note 363 at 3

⁵⁴⁴ <http://www.bis.org/publ/bcbs213.pdf>

⁵⁴⁵ http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁵⁴⁶ <http://www.imf.org/external/standards/index.htm>

⁵⁴⁷ This statement is supported by Braithwaite & Drahos’ assertion that histories of globalisation are complex and cannot be understood in terms of the agency of single actors using single mechanisms. Braithwaite and Drahos supra note 147 at 31

⁵⁴⁸ Black defines these as regimes marked by fragmentation, complexity and interdependence between actors, where state and non-state actors are both regulators and regulated. Significantly, the state is either not the sole locus of authority and at times plays no role at all. Black supra note 145 at 137

processes⁵⁴⁹. Finally, the diffusion of authority among many layers of regulation, enforcement and monitoring – as evidenced by the structure of the global AML-CTF regime – further complicates the issue of accountability. How, asks Black, is a standard-setter to be held accountable for the ways the rules are enforced or an enforcer accountable for rules it did not write⁵⁵⁰?

The accountability issue acquires even greater significance when seen in the context of FATF's evaluation processes. Black's critical contribution is how she deploys critical accounting literature to argue that "giving account" is a discursive schema – or habitus, in Bourdieu's view – through which participants in an accountability relationship (here, FATF and the jurisdiction being evaluated) make sense of their own and each other's roles, "which is constitutive of their relationship and is fundamentally shaped by it⁵⁵¹". To put this another way: the ability to hold certain *jurisdictions* 'to account' for AML-CTF failures draws on and thus reproduces the fundamental imbalance within the inter-state relationship.

There are also a slew of new accountability-related problems waiting to emerge. For example, the 2007 financial crisis wrought changes in the ownership structure of the big global banks as a consequence of the buy-ins by host governments as well as Sovereign Wealth Funds. This will set off regulatory conflicts of interest as home governments are transformed from regulators to part owners – a government that stands to profit directly from the laundering business has even less incentive to crack down on the same. However, the more problematic accountability issue is the acquisition of political roles by wealth funds owned by foreign governments such as Qatar, Kuwait, China and Singapore⁵⁵². As a financier of militancy or a tax haven, neither Qatar nor Singapore would be interested in strict AML-CTF controls. As owners of influential banks, they would be better positioned to lobby for the global regulation they want and even less accountable for it. At its core, the issue remains of mutability of actors, players and regulators; the interaction between them and the various levers each pulls.

⁵⁴⁹ Black supra note 145 at 138

⁵⁵⁰ Black supra note 145 at 143

⁵⁵¹ Black supra note 145 at 152

⁵⁵² Pistor 2009: *343

The final point is about silos. As the foregoing shows, there is an intimate nexus between the AML-CTF regime, the state and capital. However, there are very few attempts in the critical literature to consistently situate and understand AML-CTF regulation from *within* the broader political economy⁵⁵³, not as a criminological exercise independent thereof. This is particularly important since dependence on capital is a universal issue and cannot be categorised as a poor/developing country issue. While earlier waves of scholarship focused on offshore centres and the centrality of the laundering business to their respective economies, more recent work shows a similar dependence in many onshore centres too.

Financial institutions, for example, are obvious beneficiaries of money laundering. Despite ostensibly ever-tightening AML-CTF regulations, banks across the developed world are frequently embroiled in laundering scandals involving, among others, drug cartels, corrupt oligarchs and criminal organisations. While fines and investigations for money laundering have been a recurring and well-documented feature at Citigroup, Bank of New York, HSBC, Barclays and RBS, other global banks such as [Banco Santander](#)⁵⁵⁴, [Bank of America](#)⁵⁵⁵, BNP Paribas SA⁵⁵⁶, Commerzbank AG⁵⁵⁷, [Credit Suisse](#)⁵⁵⁸, Danske Bank AS⁵⁵⁹, [Deutsche Bank](#)⁵⁶⁰, [Goldman Sachs](#)⁵⁶¹, [J.P. Morgan Chase](#)⁵⁶², [MUFG Bank](#)⁵⁶³, Nordea Bank ABP⁵⁶⁴, [Société Générale](#)⁵⁶⁵,

⁵⁵³ Tsingou supra note 101 is a notable exception.

⁵⁵⁴ <https://www.reuters.com/article/santander-fine-idUSL8N1DT2TI>

⁵⁵⁵ https://www.huffingtonpost.ca/2012/07/09/los-zetas-laundered-money-bank-america_n_1658943.html

⁵⁵⁶ <https://www.bloomberg.com/news/features/2019-03-14/huge-pools-of-dirty-money-are-europe-s-worst-kept-banking-secret?fbclid=IwAR1a7XiXtiVg1o2mwST39GmGVO8GpChJHiwjEZ7piGwKrfNn5GSm5CBggwM>

⁵⁵⁷ <https://www.bloomberg.com/news/features/2019-03-14/huge-pools-of-dirty-money-are-europe-s-worst-kept-banking-secret?fbclid=IwAR1a7XiXtiVg1o2mwST39GmGVO8GpChJHiwjEZ7piGwKrfNn5GSm5CBggwM>

⁵⁵⁸ <https://www.cnbc.com/2017/05/29/singapores-central-bank-fines-credit-suisse-and-uob-for-1mdb-related-transactions.html>

⁵⁵⁹ <https://www.bloomberg.com/news/features/2019-03-14/huge-pools-of-dirty-money-are-europe-s-worst-kept-banking-secret?fbclid=IwAR1a7XiXtiVg1o2mwST39GmGVO8GpChJHiwjEZ7piGwKrfNn5GSm5CBggwM>

⁵⁶⁰ <https://money.cnn.com/2017/01/31/investing/deutsche-bank-us-fine-russia-money-laundering/index.html>

⁵⁶¹ <https://www.nbcnews.com/business/business-news/former-goldman-sachs-bankers-charged-multibillion-dollar-money-laundering-scandal-n929916>

⁵⁶² <https://www.bloomberg.com/news/articles/2017-12-21/jpmorgan-controls-faulted-by-swiss-in-1mdb-money-laundering-case>

⁵⁶³ <https://www.nytimes.com/2019/02/22/business/mufg-bank-japan-money-laundering.html>

⁵⁶⁴ <https://www.bloomberg.com/news/features/2019-03-14/huge-pools-of-dirty-money-are-europe-s-worst-kept-banking-secret?fbclid=IwAR1a7XiXtiVg1o2mwST39GmGVO8GpChJHiwjEZ7piGwKrfNn5GSm5CBggwM>

⁵⁶⁵ <https://www.wsj.com/articles/societe-generale-to-pay-1-3-billion-to-resolve-u-s-sanctions-money-laundering-violations-1542652611>

[Standard Chartered Bank](#)⁵⁶⁶, [Swedbank AB](#)⁵⁶⁷ and [UBS](#)⁵⁶⁸ have also faced trouble with regulators and investigators as has an unnamed Canadian bank. Significantly, most of these laundering events have taken place in the last five years; ironically, most of these banks are signatories to the Wolfsberg Principles⁵⁶⁹. Apart from the inefficacy of the regulation in preventing laundering, the business is clearly profitable enough to tempt banks to err repeatedly.

The advantages to banks are both in terms of profits and commissions on these transactions but also in terms of deposits, which banks then lend to individuals, businesses and governments. In consumption-driven credit economies such as the ones seen across most of the developed world, household savings rates are typically low and such deposits are key to shoring up financial intermediation⁵⁷⁰. After the 2007 financial crash, for example, the head of the UN Office on Drugs and Crime said that the proceeds of organised crime were "the only liquid investment capital" available to some banks on the brink of collapse and, according to evidence from officials in Britain, Switzerland, Italy and the US, a majority of the \$352 billion of drugs profits were absorbed into the economic system as a result⁵⁷¹. Further, when Americans were found to be using Swiss bank accounts to evade taxes in 2010, the US passed the Foreign Account Tax Compliance Act, which requires financial firms in other jurisdictions to reveal details about their American clients. Significantly, the US did not see fit to sign new international standards for exchanging similar financial information with other countries and US banks are known to be

⁵⁶⁶ <https://www.theguardian.com/business/2019/apr/09/standard-chartered-fined-money-laundering-sanctions-breaches>

⁵⁶⁷ <https://www.bloomberg.com/news/features/2019-03-14/huge-pools-of-dirty-money-are-europe-s-worst-kept-banking-secret?fbclid=IwAR1a7XiXtiVg1o2mwST39GmGVO8GpChJHijwEZ7piGwKrfNn5GSm5CBggwM>

⁵⁶⁸ <https://www.bloomberg.com/news/articles/2019-02-20/switzerland-s-greatest-hits-a-brief-history-of-swiss-bank-fines>

⁵⁶⁹ The Wolfsberg group is a club of global banks including Citigroup, HSBC, Barclays, [Banco Santander](#), [Bank of America](#), [Credit Suisse](#), [Deutsche Bank](#), [Goldman Sachs](#), [J.P. Morgan Chase](#), [MUFG Bank](#), [Société Générale](#), [Standard Chartered Bank](#) and [UBS](#). The group was set up in 2000 and evolved a common set of voluntary standards on AML-CTF, ostensibly to prevent regulatory arbitrage. For a credulous account, see Pieth & Aiolfi, who see the AML-CTF regime's risk-based (as opposed to rule-based) approach as "one of the main achievements of the banking industry" in the two years preceding publication of the article. Mark Pieth & Gemma Aiolfi, "The private sector becomes active: the Wolfsberg Principles" (2003) 10:4 *Journal of Financial Crime* 359-365. For a trenchant account, see Beare supra note 363.

⁵⁷⁰ According to Investopedia, in the 1970s and 1980s, US household savings rates were between five and seven percent of GDP, hitting a peak of 17 percent in May 1975. However, in the 21st century, the savings rate decreased to the one to three percent range. With the onset of the 2008 recession, the savings rate rose in the US to a peak of eight percent but has since fallen to below four percent. See <https://www.investopedia.com/terms/s/savings-rate.asp>; https://home.treasury.gov/system/files/226/quarterly_economic_data_tables.pdf

⁵⁷¹ Syal 2009

flush with money from foreign investors using shell corporations to hide money from their own governments and law enforcement⁵⁷².

Meanwhile, entire economies have grown up around laundering. The historic literature and reportage on laundering typically featured breathless accounts of the offshore centres and small jurisdictions – Switzerland, Luxembourg, Liechtenstein, ‘exotic’ islands such as the Bahamas, to name a few – that structured their economies and their financial industries around the laundering business. In the last 10 years, equally breathless accounts are surfacing about the onshore centres in the US, UK and Canada⁵⁷³. However, that the industries undergirding these centres are now critical to their *domestic* political economies is mentioned only in passing.

For example, the formation of shell companies is big business in the US, particularly Delaware, Nevada, Oregon and Wyoming⁵⁷⁴. A recent Global Financial Integrity report observes that more corporations are established annually in the US than in any other jurisdiction and cites an estimate pegging this number at two million⁵⁷⁵. The business obviously generates employment for a battalion of, among others, local lawyers, bankers, accountants, auditors, agents, lobbyists and government officials⁵⁷⁶, who plough their earnings back into the economy through consumption and pay taxes on incomes, investments and consumption. Additionally, the business also generates about 25 percent of Delaware’s budget in corporate taxes and fees⁵⁷⁷ – money that finances government spending. While the centrality of the business is reflected in domestic politics, it is rarely *articulated* in public policy⁵⁷⁸. Across the border, meanwhile, Canada’s reputation as a ‘clean’ jurisdiction has translated into a major marketing effort: Oved and Cribb

⁵⁷² Cohen 2016

⁵⁷³ See, for example, the 2012 New York Times article about Delaware, which opens with a detailed description of an unprepossessing office building that is “the legal address of no fewer than 285,000 separate businesses”.

Wayne 2012

⁵⁷⁴ Wayne 2012

⁵⁷⁵ Global Financial Integrity supra note 198 at p 1

⁵⁷⁶ Wayne 2012 notes that interestingly, the office of the [secretary of state](#) in Delaware stays open until midnight, Mondays through Thursdays, and until 10:30 p.m. on Fridays. Presumably, this is to cater for clients from other time zones.

⁵⁷⁷ Wayne 2012

⁵⁷⁸ Unsurprising, this dependence creates policy inaction. Since 2000, Senator Carl Levin has been pushing unsuccessfully for legislation that would force states to collect information regarding beneficial owners. However, he has been unable to overcome the joint opposition of the politically powerful [National Association of Secretaries of State](#); the Chamber of Commerce; the American Bar Association and the state of Delaware, which is the lone state to have hired a lobbyist to work on the matter. Wayne 2012

report that the Canadian flag is used on “dozens” of global websites to lure foreigners seeking anonymous companies fronted by nominee directors that can be set up overnight – a service known as ‘snow washing’⁵⁷⁹. As with the US, the infrastructure and human resources central to this enterprise – the lawyers, bankers etc – are key to the Canadian political economy; as in the US, they’re generally represented in domestic politics but absent in public policy⁵⁸⁰. The Peter Graham report for the government of British Columbia, too, speaks of how the casinos in Vancouver are key employers in their communities.

The impact of doing away with laundering will also be amplified wherever laundering is embedded in key political economy systems. While militant and criminal organisations as well as corrupt foreign politicians are often mentioned, laundered monies also fund charities⁵⁸¹, football clubs⁵⁸², Hollywood films⁵⁸³ and political parties in electoral systems where campaign finance is regulated⁵⁸⁴. As Ruggiero cautions, even the laundering of drugs money isn’t a transnational enterprise but a local endeavour that happens through real estate or construction or accomplices in the economic or political sphere (for example, corrupt politicians or officials; failing businesses; lawyers; accountants etc)⁵⁸⁵. Doing away with laundering will then entail a fundamental rethink of, for example, the role of corporations in campaign finance in the US.

Most significantly, from a critical political economy perspective, laundering has a nexus with property development in global cities such as London, New York, Toronto and Vancouver. In London, for example, the booming property market in high-end residential accommodation and ambitious commercial projects is attributed to waves of foreign investment, not all of it clean⁵⁸⁶. More than 60 percent of the owners of Britain’s tallest residential skyscraper, for example, were

⁵⁷⁹ Oved & Cribb 2017

⁵⁸⁰ After the Panama and Paradise papers disclosures, some Canadian public intellectuals pushed for public business registries, especially after the discovery that the federal corporate registry comprises only 10 percent of the national total and 90 percent is controlled by the provinces. However, the finance minister refused to commit to the same. Oved & Cribb 2017

⁵⁸¹ Garside & Barr 2019

⁵⁸² Katz 2019

⁵⁸³ The Wolf of Wall Street was produced by money funnelled from the Malaysian economic development fund 1MDB. Helmore 2016

⁵⁸⁴ Global Financial Integrity find that US shell companies have been used to fund superPACs. Global Financial Integrity supra note 198 at 1.

⁵⁸⁵ Ruggiero supra note 7 at 203

⁵⁸⁶ Taylor & Phillips 2016

foreign nationals, including a Russian oligarch with ties to Vladimir Putin, the former chairman of a defunct Nigerian bank and a Kyrgyz vodka tycoon; nearly a quarter of the transactions for the luxury apartments were routed through shell companies in secrecy jurisdictions⁵⁸⁷. While much is made of the laundering aspect and irrational market dynamics in property prices, there is inadequate attention paid to the fact that property development and construction provide both direct employment and a fillip to the manufacturing⁵⁸⁸ and services industries (financial service, real estate brokerage firms etc) associated with them. Given this nexus, a crackdown on money laundering would cause the speculative bubbles to burst but could also trigger and propagate steep economic downturns in the construction and property-finance markets. Further, the downturns would also manifest themselves in decreased consumer spending power in these economies. Interestingly, such linked effects are not limited to just the onshore and offshore centres but also countries that export capital to these countries. (For a detailed discussion, see Chapter 5.)

There are also fears regarding the effects on the *global* political economy. In their December 2015 report, for example, the research and advocacy group Global Financial Integrity estimates that \$1.1 trillion were funnelled out of developing countries in illicit financial flows⁵⁸⁹. As the laundering issue mills through its life cycle, there are concerns regarding increased calls for repatriation from developing countries⁵⁹⁰. This will, obviously, pose significant challenges for the jurisdictions asked to return monies.

This is borne out by the experience of the World Bank-OECD Stolen Asset Recovery (StAR) initiative, which facilitates the return of corruption monies to the countries of origin. In its 2014 report, the group says that between 2010 and June 2012, a total of 41 asset recovery cases were reported by eight countries – Belgium, Canada, Luxembourg, the Netherlands, Portugal, Switzerland, the UK and the US. Of these, 29 cases involved the freezing or seizing of assets and

⁵⁸⁷ Booth & Bengtsson 2016

⁵⁸⁸ Traditionally, some 52 industries (including cement, hardware, finishings etc) were said to be associated with the construction business. With multiple new sustainability-driven projects and products, it is hard to put a precise number on the amount of associated industries.

⁵⁸⁹ This “highly conservative” estimate was constructed using trade data and balance of payments leakages and does not pick up movements of bulk cash, the mispricing of services or many types of money laundering. GFI 2015. Comparatively, UNCTAD endorses the French NGO CCFD-Terre Solidaire’s estimate of €800 billion worth of IFFs per annum. UNCTAD 2014a, *supra* note 9 at 173

⁵⁹⁰ See, for example, Ahmed & Beare *supra* note 485.

12 were returns. However, only Switzerland, the UK and the US reported returns in the same period, a total of 12 cases valued at \$147.2 million. Between 2006 and 2009, \$276.3 million were returned. The report attributes the staggeringly low success rate – based on the proportion of returns relative to the outflows from developing countries – to the lack of coordination between all stakeholders in both requested and requesting jurisdictions, “including those responsible for setting policies, law enforcement and justice officials, banks, private companies and their intermediaries⁵⁹¹”.

The finding is corroborated by the experience of Switzerland. Several developing countries have variously petitioned Switzerland to return monies stolen by Politically Exposed Persons. In 2015, Switzerland instituted a law that allows for the return of funds held by foreign dictators in Swiss accounts⁵⁹². However, several provisions of the said law are open to entirely subjective interpretation that may be construed in derogation to the rights and interests of the countries of origin and thereby impede the return of monies⁵⁹³.

The critical point here is that both the above examples concern the return of *corruption* monies, a category that makes up just three percent of IFFs. Further, this category is possibly the easiest to

⁵⁹¹ Gray et al 2014 pp 17-18. Significantly, the report does not account for the effect of inadequate training and funding of law enforcement officers. The forensic audit skills required to trace monies held by multiple shell companies and parked in Special Purposes Vehicles across multiple jurisdictions require heavy training and funding inputs. OECD Better Policies supra note 515.

⁵⁹² Michael Shields, “Swiss to ease seizure, repatriation of dictators' funds”, *Reuters* (May 26, 2016); online <http://www.reuters.com/article/us-swiss-assets-idUSKCN0YG29Z>

⁵⁹³ The section regarding *progressive* conditions where an asset freeze is to be deemed admissible reads as follows: “[where] the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable; [] the level of corruption in the country of origin is notoriously high; [] it appears likely that the assets were acquired through acts of corruption or misappropriation or other crimes; [] the safeguarding of Switzerland's interests requires the freezing of the assets.” Available at <https://www.news.admin.ch/news/message/attachments/44109.pdf> at 2. Especially problematic are Article 15, which states that the presumption that the funds are of illicit origin will follow if “the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person; [and] the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office”, and Article 17, which prescribes conditions for repatriation of funds (“The restitution of assets is made in pursuit of the following objectives: [] to improve the living conditions of the inhabitants of the country of origin, or [] to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity.”).

prove and prosecute, given the visibility of the individuals involved⁵⁹⁴. Even so, the lack of success in repatriation suggests a key lack of political motivation on part of the destination states. *The material cannot be ignored and has a bearing on how even ideational power is enforced and implemented.* Where the expanded definition of illicit financial flows includes tax evasion and avoidance and the volumes of outflow are much higher (between two-thirds and 83.4 percent of measurable IFFs), the key question becomes: how will corporations respond to the calls for repatriation? Even if states had the forensic ability required to investigate and reconstruct the financial records of transnational corporations, do these states have the power and ability to resist the influence of these corporations? And finally, even if they had this power, would they want to exercise it to return the monies undergirding their own economies?

3.5 Conclusion

Despite the inexorable drive towards global harmonisation, there is much that remains deeply problematic about the AML-CTF regime. Its architecture as well as the evolution of global regulation testify to a fractured and incoherent politics at every level of governance and it is tempting to conclude, like Mann, that the regime is more cock up than conspiracy. However, despite the inherent unpredictability of outcomes in power plays, in the 30 years since its birth, *the AML-CTF regime has consistently delivered both power and profits to key players.* More simply: the power-profits nexus is too happy a coincidence to be either happy or, indeed, coincidental. Instead, one is reminded of Lee Stewart's gem: "Tax havens are the financial warehouses on the edge of town. We fuss about them, howl that the activity is illegal, but we don't shut them down, because the town fathers are in there with their pants around their ankles⁵⁹⁵".

⁵⁹⁴ This is because unfair enrichment is easier to prove in cases regarding Politically Exposed Persons, as compared to tax avoidance by a transnational corporation. Often, the state and media in the country of origin have investigated and proven many of the charges against the PEP. See Margaret E. Beare, "Canada: Internal Conspiracies – Corruption and Crime" in F. Allum and S. Gilmour, eds, *Handbook of Organized Crime and Politics* (Cheltenham, UK, Edward Elgar Publishing. Ltd, 2019) at 189-208 for an excellent account of the interweaving of political, financial and corporate corruption schemes. She focuses particularly on the Charbonneau inquiry into the construction industry in Montreal.

⁵⁹⁵ Lee Sheppard, "Our hypocrisy on tax havens", *Forbes* (July 22, 2010). Online <https://www.forbes.com/2010/07/22/tax-finance-havens-economy-opinions-columnists-lee-sheppard.html#5a550c5b5f49>

Until the AML-CTF regime is analytically situated within the broader global political economy, it will forever remain susceptible to hijacking by narrow interests in the name of ‘national security’ and ‘organised crime’. Given the multiplicity of competing – and often irreconcilable – interests of the actors, logically, regulatory harmonization *ought* to remain a pipedream. Simply put, there are just too many voices at the table for them to speak as one: globally, there are states vis-à-vis other states; developed states vis-à-vis developing ones; and individual states vis-à-vis transnational regulators. Even domestically, there is contentious opposition between the various arms of state (for example, the military vis-à-vis the judiciary); state bureaucracies (central banks etc) vis-à-vis domestic politicians; state institutions vis-à-vis the people; states vis-à-vis criminal organisations; and even regulators vis-à-vis industry. Given this complexity, the best way to proceed appears to be a careful study and articulation of the myriad interests at stake and how they fuse and diverge in a particular context and by consistently answering ‘who profits’, ‘which power’. The following chapter speaks to this.

CHAPTER 4: Power politics: the causes of the non-implementation of AML-CTF regulation in Pakistan

Since February 2018, Pakistan has been on the FATF grey list and under tremendous pressure to improve its conformity with global anti-money laundering and counter terrorism financing (AML-CTF) regulations. This chapter resolves that pressure into its constituent elements: why is it so important for Pakistan to implement AML-CTF controls and why it does not manage to do so.

The chapter draws off a set of 32 interviews conducted in Pakistan over the summer of 2018. Within the government, the interviewees included those with a deep understanding of the workings of the Ministry of Finance, the Ministry of Interior, the Ministry of Foreign Affairs as well as the National Counter Terrorism Authority; financial sector regulators within the State Bank of Pakistan; investigating officers within the Financial Intelligence Unit⁵⁹⁶ and the Federal Board of Revenue; law enforcement agencies (including public prosecutors; the police, the Federal Investigation Agency and the corruption watchdog National Accountability Bureau). Private-sector interviewees included industry participants, especially bankers who work on the AML-CTF compliance effort; lawyers; economists; academics; parliamentarians; charity organisations; rights activists as well as journalists who cover militancy in Pakistan. While most of the interviewees had intimate knowledge of Pakistan's AML-CTF regime because of their work, several also had direct knowledge of the details of Pakistan's interaction with global regulators since they represented Pakistan at some meetings.

The chapter opens with a brief discussion of Pakistan's AML-CTF architecture and then moves to a discussion of the themes identified in the interviews. The objectives of the interviews were twofold: first, to examine the operation of geopolitical power in the context of AML-CTF regulations. While the broader question was whether AML-CTF regulation poses a threat to the principle of sovereignty at international law, the more immediate line of enquiry was the relation between the current pressure on Pakistan on the AML-CTF front and international relations. That

⁵⁹⁶ The unit is located within the central bank and is called the Financial Monitoring Unit in Pakistan.

is, how does the pressure on Pakistan reflect its engagement with its key allies and adversaries as well as its appeasement or frustration of their political or geostrategic objectives?

The second objective was to study how global AML-CTF regulation filters into Pakistan through domestic power sources, which are military, economic, political, ideological and judicial⁵⁹⁷. The implementation of global regulation is conditioned by the variety of interests of each power source *as well as* the interaction between the sources of power within a polity. For example, given the predominance of the military establishment in the polity and its dependence on illicit monies for a variety of economic, political and geostrategic interests *in derogation of the interests of the other sources of power*, the establishment remains the first line of resistance against the implementation of AML-CTF regulation in Pakistan.

The concluding section argues that AML-CTF regulation needs to be understood as a technique of power subject to contestation. This contest between differently sized powers, which are also given to forming strategic alliances, necessarily preclude predictable regulatory outcomes. At the global level, it is not enough, for example, for the US as the sole superpower to want the regulation implemented; less powerful states – as well as groups within such states – still retain the ability to mount a significant resistance by impeding meaningful implementation. That said, as a technique of power, AML-CTF regulation also re-entrenches established power hierarchies within a polity and poses severe consequences for the citizens of a country, be it enhanced surveillance or political victimisation.

4.1 Pakistan's AML-CTF regime

Pakistan's endorsement of the FATF 40 is well-reflected by its domestic legal framework. The most significant of these legislative instruments are the Anti-Terrorism Act of 1997; the Anti-Money Laundering Act of 2010; the Foreign Exchange Regulation Act of 1947; the National Counter Terrorism Authority (Nacta) Act of 2013 as well as relevant portions of statutes such as the Pakistan Penal Code of 1860; the Companies Act of 2017; the Banking Companies

⁵⁹⁷ The categorisation hews close to Mann's IEMP model but with one addition: judicial power. While Mann collapses judicial power into the political category, this segregation does not hold true for Pakistan. Not only has the judiciary evolved into a power actor independent of the political class (as evidenced by key legal decisions regarding the military establishment), it has also been deeply influenced by the wave of Islamisation sweeping the country (ideological power).

Ordinance of 1962; the Income Tax Ordinance of 2001; the Prevention of Electronic Crimes Act of 2016; the Customs Act of 1969 as well as the Control of Narcotics Substances Act 1997.

Besides these, terrorism-related offences are also governed by minor laws such as the Chemical Weapons Convention Implementation Ordinance of 2000; the Investigation for Fair Trial Act of 2013; and the Arms Act of 1879. In addition to the laws, AML-CTF regulation is also affected by the National Action Plan to counter terrorism of 2015 as well as policy documents and guidelines issued by Nacta, which is the lead agency in dealing with terrorism financing in Pakistan; the State Bank of Pakistan, which is the banking sector regulator, and the securities regulator Securities and Exchange Commission of Pakistan.

Further, Pakistan is also signatory of a host of international conventions including the OIC Convention of Combatting International Terrorism; the UN Convention against Corruption; the SAARC Regional Convention on Suppression of Terrorism; the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) and the UN Convention against Organised Crime (the Palermo Convention). Pakistan has further signed up to implement UN Security Council Resolutions 1267, 1333, 1373, 1390, 1455 and 1526, which variously deal with the financing of terrorism; the banning of terrorist organisations, dismantling their apparatuses, choking terrorist funding and freezing their assets; as well as the freezing of assets of certain individuals and entities. Pakistan has also inked 29 bilateral/ multilateral agreements regarding terrorism and 29 extradition treaties⁵⁹⁸.

According to the existing structure for the enforcement of AML-CTF regulation in Pakistan, 27 federal and provincial agencies are involved in the effort. The most prominent among these are the Ministry of Foreign Affairs, the National Counter Terrorism Authority (Nacta), the Federal Investigation Agency (FIA), the Federal Board of Revenue (FBR), the Inland Revenue Department (Income Tax), the Directorate of Customs Intelligence and Investigations, the Anti-Narcotics Force, the corruption watchdog National Accountability Bureau, the State Bank of Pakistan, the Securities and Exchange Commission of Pakistan, the Frontier Corps, the Airport Security Force and the four provincial Counter Terrorism Departments.

⁵⁹⁸ Muhammad Subtain Raza, Muhammad Fayyaz, & Haseeb Ijaz, "The hawala system in Pakistan: a catalyst for money laundering and terrorist financing" (2017) 5:4 Forensic Research and Criminology Intl J 00167 at 3.

Pakistan's recognition of the validity of FATF and, as a corollary, its complicity in its own subjugation is evidenced by its assumption of membership of the Asia Pacific Group (APG) of the Egmont Group of FIUs in 2000. In 2007, then-president General Pervez Musharraf accepted the standard FATF prescription for 'normalisation' – a law to govern both offences that would be acceptable to FATF – by issuing a presidential ordinance called the Anti-Money Laundering Ordinance⁵⁹⁹. (Earlier legislation such as the Anti-Terrorism Act of 1997 – especially the 2002 amendments regarding the financing of terrorism and extremist groups – and the Control of Narcotic Substances 1997 both contained provisions against money laundering. However, neither was particularly effective since, first, they confined the scope to terrorism and narcotics as compared to the wider-ranging classification of money laundering as a predicate offence and second, there was limited implementation of the two.)

The institution of the law marked the beginning of a biannual surveillance discipline that set up Pakistan, like all other FATF-monitored jurisdictions, as an object of knowledge. Through a series of "reports and registers⁶⁰⁰", calibrated assessments and evaluations – the structured, structuring dispositions Bourdieu speaks of – FATF instituted a habitus that was oriented towards practical functions such as compliance with global standards but at a deeper level, was supposed to inculcate a way of acting and reacting according to principles that were never articulated as 'formal rules' – for example, the submission to constant surveillance.

In its February 2008 assessment, FATF flagged inadequacies and vulnerabilities in Pakistan's AML-CTF regime and pushed for greater compliance with its prescribed norms and standards⁶⁰¹. In October that year, FATF repeated this 'normalizing judgement'⁶⁰² and in 2009, Pakistan underwent its second mutual evaluation⁶⁰³, thereby implicitly accepting its identity as a vulnerable jurisdiction. While appreciating Pakistan's continued cooperation with the World

⁵⁹⁹ <http://www.apgml.org/members-and-observers/members/details.aspx?m=8fc0275d-5715-4c56-b06a-db4af266c11a>. According to one interviewee, the original draft law was sent to the US for approval and the Pakistani government asked the lawyer in charge of drafting to change the law according to the US requirements. The lawyer is said to have refused, saying that his was in compliance with FATF regulations. Interview; p 47.

⁶⁰⁰ D&P supra note 23 at 214. Foucault is elaborating on Bentham's Panopticon here.

⁶⁰¹ <http://www.fatf-gafi.org/countries/n-r/pakistan/documents/fatfstatement-28february2008.html>

⁶⁰² <http://www.fatf-gafi.org/countries/n-r/pakistan/documents/fatfstatement-16october2008.html>

⁶⁰³ <http://www.apgml.org/members-and-observers/members/details.aspx?m=8fc0275d-5715-4c56-b06a-db4af266c11a>

Bank and the APG, FATF's February 2009 assessment reiterated its concerns – concerns that were subsequently documented in the report on Pakistan's mutual evaluation in July 2009⁶⁰⁴. With its inordinate focus on risks, FATF captured the 'inherent dangerousness' of the jurisdiction. In its October 2009 statement, FATF spoke of the risks again and also pointed to the fact that the Anti Money Laundering Ordinance was set to expire in November that year. Urging Pakistan to adopt a more permanent law, FATF also threatened to consider taking action "to *protect* the financial system from the ML/FT [money laundering/ financing of terrorism] *risks emanating from Pakistan* [emphasis added]"⁶⁰⁵. FATF repeated the same call in February 2010, noting this time that the ordinance was set to expire in March 2010. FATF's representation of a common interest – the protection of the financial *system* – and the threat to take action *if Pakistan did not make the appropriate changes to its laws* worked: later that year, the law was revised and adopted by Parliament as the Anti-Money Laundering Act⁶⁰⁶.

In its June 2010, October 2010 and February 2011 statements, FATF remarked on Pakistan's "high level political commitment" to an action plan aimed at fixing its deficiencies by "adequate" criminalisation of money laundering and terrorist financing and the demonstration of procedures to identify, freeze and confiscate terrorist assets. While the reference to the political commitment suggests Pakistan's consent, the true balance of power is indicated by the use of the words 'adequate' and 'demonstration', which set up FATF as the arbiter and the authority on what constitutes either. While FATF commended, in progressive reports, Pakistan's expansion of

⁶⁰⁴ The 262-page report notes the "significant risks" of money laundering and terrorism financing that Pakistan faces and the "vulnerabilities" of its systems. The report suggests Pakistan expand its focus from predicate offences, particularly corruption, narcotics trafficking and terrorism, to include money laundering and terrorism financing associated with these and other predicate crimes. It notes further that launderers purchase real estate, abuse corporate entities to access the financial sector and launder money through trade and the abuse of informal channels in Pakistan while funds for terrorism came from the proceeds of crime (including bank robbery, kidnapping for ransom, and proceeds of drugs flowing from Afghanistan), with cases of cash couriers and misuse of charities facilitating terrorist financing. The report particularly flags the lack of investigative and prosecutorial capacity; the lack of beneficial ownership rules governing securities; the underreporting of Suspicious Transactions by banks; and the lack of data regarding the volume and techniques of laundering or terrorism financing. Significantly, the report also notes in passing Pakistan's failure to freeze the assets of individuals accused of terrorism (as opposed to organisations), particularly when the individuals have not committed acts of terrorism in Pakistan. <http://www.apgml.org/documents/default.aspx?s=date&c=7&pcPage=7>

⁶⁰⁵ <http://www.fatf-gafi.org/countries/n-r/pakistan/documents/fatfstatementconcerningiranuzbekistanurkmenistanpakistanandsaotomeandprincipe-october2009.html>

⁶⁰⁶ <http://www.apgml.org/members-and-observers/members/details.aspx?m=8fc0275d-5715-4c56-b06a-db4af266c11a>

money laundering predicate offences and the provision of guidance regarding Suspicious Transaction Reports (STRs) to financial institutions, it demanded Pakistan set up an “effective” Financial Intelligence Unit besides regulating money service providers and improving and implementing “effective” controls for cross-border cash transactions⁶⁰⁷. Again, only FATF could decide what constituted ‘effective’. In June 2011, FATF echoed the same concerns, additionally noting that Pakistan’s lack of implementation of the terrorism financing offence⁶⁰⁸.

In October 2011, FATF ratcheted up the censure. Pakistan was placed on the list of jurisdictions “not making *adequate* progress [emphasis added]” on the action plan and FATF peevishly noted that Pakistan had failed to give an “*satisfactory* response [emphasis added]” to its June 2011 concern about lack of implementation of the terrorism financing offence. Giving a deadline of February 2012, FATF threatened to “identify” jurisdictions such as Pakistan as “out of compliance with their *agreed* action plans [emphasis added]” and to ask its members “to consider *the risks arising from the deficiencies* associated with the jurisdiction [emphasis added]”⁶⁰⁹. While the querulousness of the tone and the patronising language could be considered offensive on their own, more significant was what the assessment *signified*: the establishment of power relations whereby FATF was empowered to demand and Pakistan, to comply; the representation of non-compliance as moral dereliction of a ‘duty’ owed to the world; and the subjective assessment of what construes ‘progress’, ‘adequate’ and ‘satisfactory’.

In February 2012, FATF made good on its threats regarding naming and shaming. As ever, in line with the “microrewards” Foucault speaks of, FATF appreciated Pakistan’s enhancement of the capacity of the FIU, the approval of an AML-CTF strategy and the provision of training to relevant stakeholders. However, simultaneously, FATF issued the same caveats about the need to institute *FATF-compliant* terrorism financing legislation; the ability to identify, freeze, and confiscate terrorist assets; money service providers and cross-border cash transactions⁶¹⁰. By

⁶⁰⁷ <http://www.fatf-gafi.org/countries/d-i/greece/documents/improvingglobalamlcftcomplianceupdateon-goingprocess-june2010.html>; <http://www.fatf-gafi.org/countries/d-i/greece/documents/improvingglobalamlcftcomplianceupdateon-goingprocess-october2010.html>

⁶⁰⁸ <http://www.fatf-gafi.org/countries/a-c/argentina/documents/improvingglobalamlcftcomplianceon-goingprocess-24june2011.html>

⁶⁰⁹ <http://www.fatf-gafi.org/countries/a-c/argentina/documents/improvingglobalamlcftcomplianceon-goingprocess-28october2011.html>

⁶¹⁰ <http://www.fatf-gafi.org/countries/s-t/turkey/documents/fatfpublicstatement-16february2012.html>

June 2012, Pakistan had additionally issued the United Nations Security Council (UNSC) (Enforcement) Order of 2012; issued AML-CTF guidelines to exchange companies and a currency declaration notification for the implementation of its cash border controls but FATF was still pushing for terrorism financing legislation and *demonstration of capability* to identify, freeze, and confiscate terrorist assets⁶¹¹. The inexorable dressage and the call for greater accountability – ‘demonstrated capacity’ – led Pakistan to introduce CTF measures in Parliament by October that year, but FATF maintained its reservations about the adequacy of the legislation⁶¹². In February 2013, FATF recognised that Pakistan had increased the maximum monetary sanction for non-compliance with the UNSC resolution (UNSCR) 1267⁶¹³. However, now FATF wanted Pakistan to amend its Anti-Terrorism Act to ensure it met FATF standards regarding the terrorist financing offence and the ability to identify and freeze terrorist assets⁶¹⁴. By June that year, Pakistan had amended its Anti-Terrorism Act but not enough to meet FATF’s mandated “international standards” regarding the identification and freezing of terrorist assets, hence FATF asked for further amendments⁶¹⁵.

By October 2013, Pakistan had sufficiently internalised the FATF discipline and a greater willingness to implement meaningful change: it issued a Statutory Regulatory Order redefining terrorism as well as an Anti-Terrorism Amendment Ordinance establishing procedures for the identification and freezing of terrorist assets. While noting that the new laws would allow Pakistan to implement UNSCR 1373⁶¹⁶, FATF worried about the temporal nature of both laws and asked Pakistan to expedite parliamentary approval of the two⁶¹⁷. **The invocation of the UN**

⁶¹¹ <http://www.fatf-gafi.org/countries/s-t/turkey/documents/fatfpublicstatement-22june2012.html>

⁶¹² <http://www.fatf-gafi.org/countries/s-t/turkey/documents/fatfpublicstatement-19october2012.html>

⁶¹³ The resolution was issued in light of the situation in Afghanistan and called on all states to deny support to the Taliban. FATF was particularly concerned about section 4, which reads: “Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need”. Available at <http://unscr.com/en/resolutions/doc/1267>

⁶¹⁴ <http://www.fatf-gafi.org/countries/s-t/turkey/documents/fatfpublicstatement22february2013.html>

⁶¹⁵ <http://www.fatf-gafi.org/countries/s-t/turkey/documents/public-statement-june-2013.html>

⁶¹⁶ The UN Security Council’s 2001 resolution calls for international cooperation to prevent terrorism and one of its key planks is attacking the sources of terrorism financing; available at <http://unscr.com/en/resolutions/1373>

⁶¹⁷ <http://www.fatf-gafi.org/countries/s-t/turkey/documents/fatf-public-statement-oct-2013.html>

Security Council is significant because it shows how FATF appropriates the ‘common interest’ – as represented by the UNSC – to conceal its own interests; the constant expression of dissatisfaction, meanwhile, strengthens FATF’s ability to *progressively mandate* further changes.

However, till February 2014, Pakistan had not managed to get the laws approved by Parliament and ended up reissuing the ordinance⁶¹⁸. By June 2014, FATF had been mollified enough to move Pakistan a notch higher: instead of calling on its members to consider the threats posed by Pakistan, FATF now asked members to consider the “significant progress” made by the jurisdiction on implementing its action plan, including the criminalisation of money laundering and terrorist financing; the establishment of procedures to identify, freeze and confiscate terrorist assets; the setting up of a fully operational and effectively functioning Financial Intelligence Unit; the regulation of money service providers; and the improvement of cross-border cash controls. FATF also announced a surveillance and monitoring mission – an on-site visit – to confirm that Pakistan was, indeed, doing what it had promised to⁶¹⁹. The visit was unable to materialise till October 2014 due to security concerns but FATF remained hopeful of visiting Pakistan before the FATF meetings in February 2015⁶²⁰. In its February 2015 statement, FATF finally announced Pakistan had met the legislative and regulatory requirements “for its commitments” and was no longer subject to “ongoing monitoring” under its AML-CTF compliance process although it was expected to continue working with the APG⁶²¹.

However, the honeymoon was short: in February 2018, Pakistan was back on the grey list despite the de facto finance minister’s offer to FATF to fix deficiencies by June that year⁶²². In June 2018, the FATF statement spoke again of Pakistan’s “high-level political commitment” to work with FATF and the APG to address its strategic counter-terrorist financing-related deficiencies. The new action plan, however, was a veritable laundry list of highly subjective, technical

⁶¹⁸ <http://www.fatf-gafi.org/countries/s-t/turkey/documents/public-statement-feb-2014.html>

⁶¹⁹ <http://www.fatf-gafi.org/countries/a-c/argentina/documents/fatf-compliance-june-2014.html>

⁶²⁰ <http://www.fatf-gafi.org/countries/a-c/argentina/documents/fatf-compliance-oct-2014.html>

⁶²¹ <http://www.fatf-gafi.org/countries/j-m/kuwait/documents/fatf-compliance-february-2015.html>

⁶²² Mariana Babar, “Placement on FATF grey list: US wants to see Pakistan suffer, says Miftah”, *The News International* (February 27, 2018); online <https://www.thenews.com.pk/print/286105-placement-on-fatf-grey-list-us-wants-to-see-pakistan-suffer-says-miftah>. Interestingly, the FATF website does not feature the February 2018 statement regarding Pakistan.

prescriptions targeting Pakistan’s potential dangerousness – not its actuality – with regard to terrorism financing. More particularly, Pakistan was to i) demonstrate its ability to “properly” identify and assess terrorism financing *risks* and *guarantee* “risk-sensitive supervision”; ii) “prove” that AML-CTF violations drew remedial actions and sanctions and that these actions had an effect on AML-CTF compliance by financial institutions; iii) take enforcement action against illegal money or value transfer services (MVTs); iv) prove that authorities identify cash couriers and enforce controls on the illicit movement of currency and understand the risk of cash couriers being used for terrorism financing; v) improve inter-agency coordination including between provincial and federal authorities on combating terrorism financing risks; vi) demonstrate that law enforcement agencies (LEAs) identify and investigate the widest range of terrorism financing activity and that investigations and prosecutions target designated persons and entities, and persons and entities acting on behalf or at the direction of the designated persons or entities; vii) demonstrate that terrorism financing prosecutions result in “effective, proportionate and dissuasive sanctions” and enhance the capacity and support for prosecutors and the judiciary; viii) demonstrate “effective” implementation of targeted financial sanctions against all UNSCR 1267- and 1373- designated terrorists and those acting for or on their behalf, including preventing the raising and moving of funds, identifying and freezing assets and prohibiting access to funds and financial services; ix) demonstrate enforcement against terrorism financing sanction violations “including administrative and criminal penalties” and the cooperation of provincial and federal authorities on enforcement cases; and x) demonstrate that designated persons are deprived of access and use of the facilities and services they own or control⁶²³. The same statement was repeated in October 2018⁶²⁴.

In February 2019, FATF noted that Pakistan had operationalised an integrated database for its currency declaration regime and revised its terrorism financing risk assessment. However, these gains were more than offset – for FATF, at least – by Pakistan having missed the January 2019 deadlines for several action items. Accordingly, FATF determined that the jurisdiction did not demonstrate “a proper understanding” of the terrorism financing risks posed by Da’esh, Al Qaeda, Jamaat ud Dawa, Falah-e-Insaniyat Foundation, Lashkar-e-Taiba, Jaish-e-Muhammad,

⁶²³ <http://www.fatf-gafi.org/countries/d-i/iraq/documents/fatf-compliance-june-2018.html>

⁶²⁴ <http://www.fatf-gafi.org/countries/a-c/bahamas/documents/fatf-compliance-october-2018.html>

the Haqqani network and persons affiliated with the Taliban. Again, FATF trotted out the laundry list from the previous two statements, adding a May 2019 deadline⁶²⁵.

In June 2019, FATF commended Pakistan for its recently developed terrorism financing risk assessment addendum but insisted that Pakistan didn't show "a proper understanding of Pakistan's transnational TF risk". Pakistan was accordingly advised to continue work on implementing its action plan to address its strategic deficiencies by adhering to the 10-point agenda outlined in February and October 2018 as well as February 2019 by October 2019 "[o]therwise, the FATF will decide the next step at that time for insufficient progress⁶²⁶". Critically, there is no "spectacular" theatre of punishment, as Foucault would call it, just its *inevitability*: "the sad necessity of a legal vengeance to the people⁶²⁷".

4.2 Geopolitics at play

Even a flat reading of the chronology above indicates a politics that seems to have little to do with either money laundering or terrorism financing. Quite simply, the timing and tone of each FATF statement from the time Pakistan joined the APG in 2000 till 2018 makes little sense until they are situated within contemporaneous geopolitics. However, two points here merit particular mention: first, as discussed in Chapter 2, power is no zero-sum game. While it is tempting to conclude domination in FATF-Pakistan relations or to opt for an oppressor-oppressed binary, such a conclusion ignores the fact that all actors have *some* power in relation to each other and power, in itself, is both imposition and *resistance*. Second, the outcome of every power struggle needs to be viewed with an eye to both the interaction of the sources of power as well as the multiple interests of each source.

Both points are well-reflected by Pakistan's FATF experience. Given the state of hostility with India and the fractious battle over Kashmir since 1947, Pakistan's unofficial foreign policy – as determined by its military establishment – has included support for militant proxies in Kashmir since the early 1990s⁶²⁸. These geostrategic imperatives – as the 'rationale' for both money

⁶²⁵ <http://www.fatf-gafi.org/countries/a-c/bahamas/documents/fatf-compliance-february-2019.html>

⁶²⁶ <http://www.fatf-gafi.org/countries/a-c/bahamas/documents/fatf-compliance-june-2019.html>

⁶²⁷ D&P supra note 23 at 109-111

⁶²⁸ For influential accounts of the politics of the era, see Jalal supra note 15; Rashid 2008 supra note 15; and Hassan Abbas, *Pakistan's drift into extremism: Allah, the Army, and America's War on Terror* (New Delhi, Pentagon Press, 2007). See also Husain Haqqani, *Magnificent delusions: Pakistan, the United States and an epic history of*

laundering and terrorism financing – remain unchanged: Pakistan still faces a hostile India in the east. While Pakistan’s initial desire for militant proxies in Afghanistan was born of its desire for “strategic depth” and the fear of an “Afghan-Indian pincer effect to undo Pakistan⁶²⁹”, the operation of Indian proxies on the western front is now cited as an additional concern. That said, Pakistan’s nurturance of militant groups in Afghanistan *since the late 1970s was at the behest of and with the active complicity of its closest allies, the US and Saudi Arabia*. Both were driven by different – and evolving – compulsions: the US was looking to defeat the march of the USSR; meanwhile, Saudi Arabia had been incubating jihadis in Pakistan to be used elsewhere for a while before the Afghanistan issue flared up. However, after the 1979 siege of Mecca, when armed civilians attempted to overthrow the House of Saud, the Saudi government increased funding for jihadis exponentially. By the mid-1980s, the Saudis found another reason to fund militants in Pakistan: to increase their influence in the region vis-à-vis Iran⁶³⁰. The respective roles of the US, Saudi Arabia and Pakistan in the war in Afghanistan and, by extension, their roles in money laundering and terrorism financing are well documented in both the academic literature and the mainstream media. In their history of AML-CTF regulation, for example, Braithwaite and Drahos note that the CIA “has an interest in being a major launderer of dirty money itself, while making it harder for the competition to do so” and that “drug interdiction was subordinate to the foreign policy goal of the defeat of communism⁶³¹”. Meanwhile, an interesting

misunderstanding (New York, Perseus Group, 2013), for additional details: as Pakistan’s ambassador to the US from 2008 till 2011, not only was Haqqani present at several key meetings, his book also cites official memos exchanged between the two governments.

⁶²⁹ Rashid 2008 supra note 15 at 25; Jaffrelot supra note 14 at 6; Haqqani supra note 628 at 232. In the early 1940s, Kabul had asked the British – at the time of their exit – to let Pakhtun tribes choose between Afghanistan and independence (Pakistan was not an option then). Since Kabul also refused to recognize the Durand Line as the international border, Pakistan came into being in 1947 without a definite border on its western side. This is what created the fear of the pincer effect that would ‘undo’ Pakistan. For a neat read, see Jaffrelot supra note 14 at 7-8.

⁶³⁰ Jalal supra note 15 at 274; H Abbas supra note 628 at 205. While Jalal says that the Pakistani dictator Ziaul Haq’s cooperation with the US was prompted by his desire for legitimacy and the lure of the windfall of US dollars, Haqqani, meanwhile, insists that the war in Afghanistan described by some in the US as “Charlie Wilson’s war” was actually Haq’s initiative, who managed to convince both the US and Saudi Arabia to participate. While the Americans were persuaded by the communist threat, Haqqani does not discuss how precisely Haq managed to convince the Saudis. (supra note 628 at 240-242) The regional influence argument makes sense as do the depth of Pak-Saudi government and military ties. As Abbas argues, the idea of an Iranian revolution was “scary” to the Wahabi monarchy ensconced in Saudi Arabia (supra note 628 at 205). The year 1985 was also when the anti-Shia militant group Sipah-e-Sahaba Pakistan emerged. Besides, Haq also had close personal contacts with the Saudi rulers because of his adherence to the Wahabi strain of Islam.

⁶³¹ Braithwaite and Drahos supra note 147 at 105; 390

example of the politics of the era is offered by a US-funded Urdu primer used in madrassahs during the time, which transliterates as A for Allah, J for jihad, K for kaafir (infidel)⁶³².

However, this is not to imply that Pakistan or even the military's sole interest in money laundering and/or terrorism financing is born solely of regional insecurities: the military is also motivated by its economic as well as institutional interests⁶³³ – the interaction of powers and the multiplicity of interests within a source of power that Mann speaks of. While the US, Saudi Arabia and some European allies funded the effort, Pakistan had the responsibility of training and liaising with the Afghan mujahideen and providing military bases to the US. The money was almost entirely funnelled through the Pakistani Inter Services Intelligence (ISI)⁶³⁴. The involvement of the ISI in the Afghan heroin trade and access to the CIA arms pipeline enriched many ISI generals but also provided covert funds for Pakistan's nuclear programme as well as ISI-backed misadventures in Kashmir⁶³⁵. (The involvement of the CIA in the Afghan heroin trade is said to have financed the CIA's own shenanigans in the-then Soviet Union.) For this 'cooperation' in both laundering and terrorism financing, Pakistan received \$10 billion in military and economic assistance from Washington in five years as well as a studied ignorance about its nuclear programme; the drugs trafficking by the army; the lack of democracy; the public floggings⁶³⁶ as well as its involvement in the Sikh uprising in India⁶³⁷, which was soon to spread to Kashmir⁶³⁸. The economic imperative – the aid from the US, corruption opportunities, the proceeds of the drugs trade – is clear but so are the 'institutional' interests. The nuclear

⁶³² Seen in the personal files of a parliamentarian in Islamabad in September 2018, who said that the syllabus was crafted jointly by the CIA and the ISI. Abbas's meticulously researched account of madrassahs in Pakistan features photographs from similar US-funded Dari textbooks. A Dari primer transliterates D for "deen" (religion); J for jihad; and Z for "zulm" [cruelty/ oppression]. The sentences using "zulm" to explain the concept to students translate to "Cruelty is 'haram' [forbidden by Islam]"; "Russians are cruel" and "We wage jihad against cruelty". A note to the teacher in a smaller font at the bottom of the page exhorts them to speak about the oppressed and their oppressor, according to the cognitive capacity of the students. Interestingly, the indoctrination seeps into the study of all other subjects too. The math textbook for grade 4 students features problems such as, "A group of 24 Mujahideen (jihadists) attack a group of Russians. How many of the Russian invaders would be dead if each Mujahid (jihadist) kills 12 Russians?" A Abbas *supra* note 17 at 76-87

⁶³³ A Shah *supra* note 16 at 26-7. These institutional interests would also include the military's interests as a *political* actor.

⁶³⁴ H Abbas *supra* note 628 at 205; Rashid 2008 *supra* note 15 at 9-10; pp 38-9. According to Jalal, US and British intelligence were also involved in the training effort (Jalal *supra* note 15 at 275).

⁶³⁵ Rashid 2008 *supra* note 15 at 38

⁶³⁶ Rashid 2008 *supra* note 15 at 39

⁶³⁷ The Sikh separatist movement called the Khalistan Movement had its origins in both India and the Sikh diaspora. The movement was most active between 1970 and the 1990s.

⁶³⁸ Haqqani *supra* note 628 at 249, 255, 259, 263-266.

programme, for example, was core to Pakistan and its military's aspirations regarding the future; the studied silence regarding Pakistan's dictatorship as well as its human rights violations helped cement military dictator Ziaul Haq's hold over the country. Meanwhile, journalists who covered the last decade of the Cold War describe the region as awash with petrodollars; about Pakistani military planes "stuffed with dollars" crossing the Durand Line and about gunny sacks full of dollars being distributed among militant groups from the gates of the Saudi embassy in Islamabad⁶³⁹.

Pakistan's role in both money laundering and terrorism financing is thus neither new nor unknown to the world. To presume such a country was ever AML-CTF compliant is disingenuous, bordering on the ridiculous. Yet between the time of its creation (1989) and its first statement regarding Pakistan (2008), FATF had nothing to say about Pakistan's AML-CTF deficiencies. This stance did not change even after 2000, when Pakistan joined the APG. The significance of this silence has not gone unnoticed: the one issue all interviewees agreed on was that the pressure on Pakistan is a consequence of global politics, more particularly Islamabad's currently contentious relationship with the US⁶⁴⁰. This becomes clearer by looking at the evolution of the Pak-US relationship after the end of the war in Afghanistan and the dissolution of the USSR in 1991.

After the Afghan jihad petered out, the ISI redirected the trained fighters to Kashmir⁶⁴¹. The move was significant because it showcased what Mann calls the reflexive, internal transformation of a power source in interaction with other sources of power. The encounter with the US-Saudi combine and the experience in Afghanistan convinced the ISI of the efficacy of proxy warfare; the enfeebled political class that had come into power in 1988 was in no position to dictate otherwise to a military establishment fattened on the military and economic excesses of the previous 11 years under dictatorial rule. Further, by 1990, the ISI had already engineered the fall of Benazir Bhutto, further weakening political challengers to its power in Pakistan⁶⁴².

⁶³⁹ Interview; p 26

⁶⁴⁰ Interview 1; senior banker; Interview 5; fmr fin minister

⁶⁴¹ Jalal supra note 15 at 280

⁶⁴² The then Director General of the ISI submitted an affidavit to this effect in the Supreme Court of Pakistan during a 2012 hearing of the case. Dawn report "[Former bank chief claims being forced in Mehrangate](https://www.dawn.com/news/701078)", *Dawn* (March 8, 2012); online <https://www.dawn.com/news/701078>.

As early as 1992, the US threatened to declare Pakistan a state sponsor of terrorism for its support of Sikh militants; Muslim militant groups active in Indian-administered Kashmir as well as the running of militant training camps in Pakistan and in Kashmir. While Pakistan's official position was that the groups were freelancers, the statement was designed to throw off the US – the resistance – while continuing with proxy warfare. Critically, the US knew of these hidden transcripts: it alleged the complicity of “organs of the Pakistani government controlled by the President, the Prime Minister and the Chief of Army Staff⁶⁴³”. The threat did not materialise, possibly due to subsequent changes in the administration of both countries: Bill Clinton assumed office in November 1992 and Nawaz Sharif was removed from the Prime Minister's office in a coup in 1993. Clinton's penchant for India and the resulting US-India entente blindsided Pakistan⁶⁴⁴ and Pakistan inscribed its resistance by increasing clandestine support for Kashmiri militant groups (although it was forced to move its facilities for Kashmiri militants to Afghanistan)⁶⁴⁵. Interestingly, the US was aware of the developments: besides mainstream media reports about the presence of militant training camps near the Afghan border in Pakistan, a 1995 cable from the US State department to its consulate in Karachi recognised the ties between the (now defunct) Kashmiri militant group Harakat-ul-Ansar⁶⁴⁶ and Afghan militants such as Jalaluddin Haqqani⁶⁴⁷. However, the US chose to ignore these ties and the same memo concluded that neither posed a threat to the US or its interests⁶⁴⁸. Significantly, the period between 1995 and 1996 was also the year the US government had the FATF presidency⁶⁴⁹ and there too, there was a continuing silence about Pakistan.

In 1996, to neutralise the threat of the pincer effect, the ISI helped install the Taliban government in Afghanistan and persuaded Saudi Arabia and the UAE to recognise, support and fund the

⁶⁴³ Haqqani supra note 628 at 271-3.

⁶⁴⁴ Haqqani supra note 628 at 285-6.

⁶⁴⁵ Rashid 2008 supra note 15 at 41; Haqqani supra note 628 at 275, 289.

⁶⁴⁶ The group subsequently split into two factions: the Jaish-e-Muhammad and the Harakat-ul-Mujahideen.

⁶⁴⁷ The founder of the eponymously named militant group the Haqqani network.

<https://www.britannica.com/topic/Haqqani-network>. The US declared it a terrorist group in 2012. Karen DeYoung, “Haqqani network to be designated a terrorist group”, *Washington Post* (September 7, 2012); online https://www.washingtonpost.com/world/national-security/haqqani-network-to-be-designated-a-terrorist-group-obama-officials-say/2012/09/07/e6576ac0-f8f6-11e1-a073-78d05495927c_story.html?noredirect=on&utm_term=.a4ad1c2ab7f4

⁶⁴⁸ As cited in Haqqani supra note 628 at 289.

⁶⁴⁹ <http://www.fatf-gafi.org/pages/fatfpresidentssince1989.html>

Taliban through the ISI⁶⁵⁰. Osama bin Laden moved to Afghanistan under Taliban protection in the summer of 1996 and the following year, the new government of Nawaz Sharif recognised the Taliban government at the behest of the ISI⁶⁵¹. The move shows both the evolving interests of the military – it realised the benefits of a friendly government in Kabul after the US-Saudi ‘creation’ of the Taliban – but also serves as a clear example of how the interaction between military power and political power affects the direction of ‘state’ policy.

By 1997, the US knew that Pakistan was providing Saudi Arabia-subsidised oil as well as wheat to the Taliban; suspected that Pakistani military advisors were training Taliban fighters and estimated that between 20 percent and 40 percent of Taliban fighters were Pakistani⁶⁵². In addition, the US also knew that the Taliban and Al Qaeda were training Kashmiri militants⁶⁵³. The retaliatory nuclear tests by India and Pakistan in 1998 attracted US sanctions but not AML-CTF charges. While the possession of nuclear weapons is thought to have further emboldened the ISI in the conduct of its clandestine operations in both Afghanistan and Kashmir, till 1998, the official position of the US remained that official Pakistani government support for militant groups could not be presumed⁶⁵⁴.

According to some readings, the US resisted criticising Pakistan in line with its other political interests: the US wanted the latter to exercise its influence over the Taliban for the extradition of bin Laden for several acts of terrorism, especially the 1998 attacks on US embassies in Kenya and Tanzania as well as the USS *Cole* in 2000⁶⁵⁵. But Pakistan’s failure to do so did not materialise in public censure nor comment on the fact that when the US eventually lobbed cruise missiles at training camps in eastern Afghanistan, it ended up killing – among others – 21 Pakistani militants and some ISI trainers⁶⁵⁶. Indeed, some commentators attribute the success of the Taliban only partially to the support of Pakistan and Saudi Arabia and primarily to the silence

⁶⁵⁰ Rashid 2008 supra note 15 at 14. As a fascinating example of the depth of the ties between Pakistan and the Taliban, Rashid quotes former Afghan president Hamid Karzai, a close friend who lived in Pakistan from 1983 till 2001, who was called in by the Pakistan Foreign Office to convince him to become the Taliban envoy at the UN. P 13. Meanwhile, the Saudis were easily persuaded due to their anti-Shia leanings as well as the desire to create proxies against a post-Gulf war resurgent Iran.

⁶⁵¹ Haqqani supra note 628 at 291.

⁶⁵² Haqqani supra note 628 at 291, 297.

⁶⁵³ Rashid 2008 supra note 15 at 110-1.

⁶⁵⁴ Haqqani supra note 628 at 297.

⁶⁵⁵ Rashid 2008 supra note 15 at 16; Haqqani supra note 628 at 291.

⁶⁵⁶ Rashid 2008 supra note 15 at 16.

of the US⁶⁵⁷. Abbas, for example, cites the US State Department Patterns of Global Terrorism report for 1999, which pinpointed – for the first time – South Asia as a major centre of international terrorism. Not only did the report speak of Pakistan’s tolerance of “terrorists living and moving freely within its territory”, it also criticised Pakistan’s support of Kashmiri militants as well as the continued operation of certain madrassahs that served as “conduits for terrorism”. Yet Pakistan was not included in the list of seven countries sponsoring terrorism since “it [was] a friendly country [] trying to tackle the problem”⁶⁵⁸. It is unclear whether the declaration was a Gramscian concession to Pakistan’s interests or a representation of reality designed to curry the US favour with the Pakistani establishment. But it is equally clear that for the US, foreign policy considerations triumphed the desire to eliminate terrorism financing. However, as an ostensibly independent organisation devoted to the eradication of money laundering and terrorism financing, FATF’s silence was mystifying. FATF was either living in a media-free bubble or it chose not to act at the behest of the US; circumstances suggest the latter.

The jostling between military and political power was underway within Pakistan too. Early in 1999, premier Nawaz Sharif and Indian premier Atal Bihari Vajpayee moved towards a détente but the Pakistan military-led Kargil misadventure in the spring of the same year undid the gains⁶⁵⁹. In October that year, Musharraf overthrew Sharif in a coup and assumed office as the de facto head of state. In 2000, the US asked for Pakistan’s help in capturing Abu Zubaida, one of bin Laden’s key lieutenants, who was thought to be living in Peshawar. Simultaneously, Pakistan was also told to stop supporting terrorism in India and Kashmir⁶⁶⁰. According to Rashid, the US and some European countries knew that the ISI was helping the Taliban campaign⁶⁶¹. Yet this assessment was not reflected in Pakistan’s first mutual evaluation by FATF at the time it joined

⁶⁵⁷ Rashid 2008 supra note 15 at 15.

⁶⁵⁸ As cited in H Abbas supra note 628 at 193. Interestingly, even the 1997 report by the same name refers to “credible reports” regarding Pakistan’s support of militant groups in Kashmir. US State Department, *Patterns of Global Terrorism* (1997) at 16; online <http://www.higginsctc.org/patternsofglobalterrorism/1997pogt.pdf>.

⁶⁵⁹ Then army chief Pervez Musharraf was the architect of the military operation in Kargil, where a Pakistani force moved over the Line of Control in Kashmir to occupy Indian space. India deployed both its army and its airforce to successfully repel the intruders. The Pakistani provocation won it brickbats from the international community, including the US and China.

⁶⁶⁰ Rashid 2008 supra note 15 at 48; Haqqani supra note 628 at 305.

⁶⁶¹ Rashid 2008 supra note 15 at 17. He says that at that time, some 3,000 Pakistanis were enlisted as Taliban fighters while a 100 Frontier Constabulary corps (a Pakistani paramilitary force) managed artillery and communications for the Taliban.

as a member in 2000⁶⁶². When Russian President Vladimir Putin told US President George Bush about the Pakistan Army and intelligence services links to the Taliban and Al Qaeda at the G8 summit in July 2001, the US officials chose to dismiss it as “Russian bitterness toward Pakistan for supporting the Afghan Mujahideen, who had defeated the Soviet Union in the 1980s⁶⁶³” and chose to believe, instead, Pakistani officials who said that neither the ISI nor the government assisted the Taliban militarily⁶⁶⁴.

While 9/11 forced Musharraf to ostensibly ally with the US⁶⁶⁵, the ISI was not willing to completely abandon its “strategic assets” in Afghanistan⁶⁶⁶ and disguised its insubordination in ‘hidden transcripts’. While Musharraf claimed that he was sacrificing the relations with the Taliban to protect the Kashmir cause⁶⁶⁷, the assertion was not borne out by Pakistan’s conduct. While Pakistan made no effort to impede the US bombing of Afghanistan, it ensured that “hundreds of Pakistani military advisors and ISI operatives assisting the Taliban were evacuated⁶⁶⁸”. Meanwhile, the December 2001 attack by Kashmiri militants on the Indian Parliament showed that Pakistan’s policy on militancy remained essentially the same⁶⁶⁹. The ISI continued to provide fuel, arms and ammunition to the Taliban through 2002, despite its waning influence over the Taliban leadership – as evidenced by the 1999 massacre of Shia Hazaras in Bamiyan⁶⁷⁰ and the destruction of the Bamiyan Buddhas by the Taliban in the spring of 2001⁶⁷¹. Additionally, some 10,000 Pakistani militants also crossed over into Afghanistan to help the Taliban⁶⁷².

⁶⁶² The FATF website does not even have a record of this evaluation.

⁶⁶³ Condoleezza Rice in *No Higher Honor*, cited in Haqqani supra note 628 at 309.

⁶⁶⁴ Haqqani supra note 628 at 310.

⁶⁶⁵ Bob Woodward, *Bush at war* (London, Simon & Schuster, 2002) at 58-9. The terms of the alliance included condemnation of the attacks; the denial of safe havens to Al Qaeda; the sharing of intelligence and immigration information; the grant of overflight rights to the US; access to Pakistan, its naval bases, air bases and borders; and the breaking of diplomatic relations with the Taliban.

⁶⁶⁶ Pakistan has historically used the term “strategic assets” to refer to its favourite militant groups. Jalal supra note 15 at 274; Rashid 2008 supra note 15 at 77-8

⁶⁶⁷ BBC Monitoring Unit, “Musharraf rallies Pakistan”, *BBC* (September 19, 2001); online http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1553542.stm

⁶⁶⁸ Haqqani supra note 628 at 312.

⁶⁶⁹ Haqqani supra note 628 at 312.

⁶⁷⁰ H Abbas supra note 628 at 195

⁶⁷¹ Rashid 2008 supra note 15 at 26

⁶⁷² H Abbas supra note 628 at 223

In May 2002, under US pressure, Musharraf told the ISI to tell the militant groups in Kashmir to desist but by September that year, he allowed the groups limited engagement – which drew a public reprimand from the US in early 2003⁶⁷³. Over the next few years, Pakistan ramped up its covert resistance to the US pressure. The Musharraf regime made a show of very public arrests and detentions of militants, followed by quiet releases⁶⁷⁴; maintained a selective focus on sectarian groups as opposed to jihadist groups⁶⁷⁵; and instituted well-publicised bans on militant groups, which responded by changing their names and continuing with business as usual⁶⁷⁶. Critics, both internal and external, claimed that the regime was “at best, [] warehousing some extremists and leaving others untouched for fear of alienating the religious right⁶⁷⁷”. In response, the military establishment initially argued that they were helpless before the courts, which were releasing the detainees for want of evidence regarding their militant activities *within Pakistan’s territory*⁶⁷⁸. Subsequently, the establishment launched a concerted narrative about ‘good Taliban’ versus ‘bad Taliban’, claiming the former were misguided individuals capable of rehabilitation⁶⁷⁹. By 2005, US intelligence discovered that the activities of the Taliban were still being directed from Pakistan; the Spain and the 7/7 attackers were found to have trained in Pakistan and several countries’ intelligence services found that the country was a principal recruiting ground and logistical centre for global militants⁶⁸⁰. Significantly, the developments were well-documented in the mainstream media, both foreign and local. Yet, if the silence from FATF is any indication, the organisation remained completely oblivious to the situation in Pakistan. Meanwhile, despite knowing about Pakistan’s support for financing terrorism, the US continued providing large amounts of military and economic aid to Pakistan in exchange for militants⁶⁸¹.

⁶⁷³ H Abbas supra note 628 at 226-7

⁶⁷⁴ Rashid 2008 supra note 15 at 118; H Abbas supra note 628 at 224-5

⁶⁷⁵ Jalal supra note 15 at 284. Jalal argues that the sectarian groups were seen as a more of a threat to the Musharraf regime’s domestic economic revival agenda.

⁶⁷⁶ Two prominent examples include the Sipah-e-Sahaba Pakistan, which morphed into the Millat-e-Islamia and then again, into the Ahl-e-Sunnat-wal-Jamaat. Lashkar-e-Taiba, meanwhile, reinvented itself as the Jamaat-ud-Dawa.

⁶⁷⁷ Paul Watson, “A Revolving Door for Pakistan’s Militants”, *LA Times* (November 17, 2002); online <https://www.latimes.com/archives/la-xpm-2002-nov-17-fg-pakterror17-story.html>

⁶⁷⁸ Haqqani supra note 628 at 312; H Abbas supra note 628 at 224

⁶⁷⁹ Rashid 2008 supra note 15 at 72-3; Haqqani supra note 628 at 327.

⁶⁸⁰ Haqqani supra note 628 at 313.

⁶⁸¹ The aid included a batch of F-16 aircraft; some frigates for the navy; updated equipment for the army as well as reimbursement for its spending on fighting militancy (Coalition Support Fund). Between 2002 and 2012, the

The tide turned in 2007, when the US told Pakistan that the tribal areas along the Durand Line had become safe havens for the Al Qaeda and the Taliban. Since Musharraf and the Pakistan Army seemed unable or unwilling to do anything, the US deployed armed drones in the area⁶⁸². The year proved a watershed for Musharraf in many ways: he issued the Anti-Money Laundering Ordinance; deposed the chief justice of Pakistan twice⁶⁸³; faced two concerted campaigns against himself by the Lawyers' Movement; was forced to call for national elections and eventually resigned as army chief. (The significance of the internal developments is discussed below.) The final blow proved to be a December 2007 expose by the *New York Times* (NYT), which spoke of how US funds for the war effort were being siphoned off by Pakistan to help finance “weapons systems designed to counter India, not Al Qaeda or the Taliban”. The Pakistanis were accused of inflating reimbursement claims for fuel, ammunition and other costs⁶⁸⁴. While the *NYT* piece estimated that reimbursement claims were inflated by 30 percent, a *Guardian* article two months later claimed that 70 percent of the \$5.4 billion given to Pakistan had been “misspent”. However, the most sobering aspect of the article was its pragmatic conclusion that recognised the multiple, even conflicting objectives of a state: “analysts and officials say the US is unlikely to turn off the cash tap anytime soon, given Pakistan's importance in the hunt for Osama bin Laden and other foreign fugitives⁶⁸⁵”.

amount came to a total of \$25 billion. Haqqani supra note 628 at 312. According to the *New York Times*, Pakistan used part of the security assistance to buy new radios for troops, night-vision goggles and refurbished Cobra attack helicopters. David Rohde, Carlotta Gall, Eric Schmitt & David E. Sanger, “U.S. Officials See Waste in Billions Sent to Pakistan”, *New York Times* (December 24, 2007); online <https://www.nytimes.com/2007/12/24/world/asia/24military.html>. In his controversial memoir, Musharraf admits to receiving payments from the US for handing over militants arrested in Pakistan. He writes: “We have captured 689 [members of Al Qaeda] and handed over 369 to the United States. We have earned bounties totaling millions of dollars. Those who habitually accuse us of “not doing enough” in the war on terror should simply ask the CIA how much prize money it has given to the government of Pakistan.” Two of the most widely reported cases were of Abu Zubaida and Khalid Shaikh Mohammad. Pervez Musharraf, *In the line of Fire: a memoir* (London, Simon & Schuster, 2006) at 237-240. Interestingly, the aid continued despite the discovery of the involvement of Pakistani scientist Dr A.Q. Khan in a nuclear proliferation scandal between 2003 and 2004.

⁶⁸² Haqqani supra note 628 at 314.

⁶⁸³ In his first attempt, Musharraf sacked the chief justice in March 2007 and subsequently, in November 2007. The second time, he also deposed 60 other judges of the superior courts across Pakistan. Sanaa Ahmed, “Supremely fallible: a debate on judicial restraint and activism in Pakistan” (2015) 9:2 *Vienna J Intl Constitutional L*, *ICL Journal* at 214 [Ahmed 2015a]

⁶⁸⁴ Rohde et al supra note 681.

⁶⁸⁵ Declan Walsh, “Up to 70% of US aid to Pakistan 'misspent'”, *Guardian* (February 27, 2008); online <https://www.theguardian.com/world/2008/feb/27/pakistan.usa>. While Pakistan initially dismissed allegations of misspending, Musharraf confirmed the diversion of funds in a 2009 interview. BBC report, “Musharraf admits US aid diverted”, *BBC* (September 14, 2009); online http://news.bbc.co.uk/2/hi/south_asia/8254360.stm.

Significantly, the year 2007 also marked a profound shift in US-India relations with ramifications for Pakistan-US relations as well as Pakistan's relationship with FATF. The Clinton-era entente had matured into a deeper engagement: the US needed India as a bulwark against Chinese influence in the region and rewarded India with a civil nuclear deal. While India was now considered a responsible nuclear state, Pakistan was still the international pariah and this led to the waning of Pakistani influence over the US⁶⁸⁶. Shortly after, in February 2008, the 19-year-old FATF suddenly 'discovered' that Pakistan's AML-CTF regime had vulnerabilities. The timing of the 'discovery' suggested US influence rather than coincidence – an example of how AML-CTF regulations help reinforce existing power relations. However, till February 2009, FATF did not propose anything more than greater adherence to global standards. Instead, Pakistan was commended for its cooperation with the World Bank and the Asia Pacific Group (APG). Significantly, the February 2009 assessment came shortly after the Mumbai attacks of November 2008, when India accused Pakistan of complicity in the attacks due to its support for Hafiz Saeed, co-founder of the militant group Lashkar-e-Taiba (LeT) and chief of the controversial Islamic charity Jamaatud Dawa (JuD)⁶⁸⁷. After the attacks, India pushed the UN Security Council to declare Hafiz Saeed a terrorist and the JuD a terrorist organisation⁶⁸⁸. In December 2008, the UNSC did so and the Pakistani government moved to place Saeed under house arrest. Significantly, no criminal charges were filed against Saeed since the government argued that he had not conducted any terrorism-related activity on Pakistani soil; consequently,

⁶⁸⁶ Rashid 2008 supra note 15 at 123

⁶⁸⁷ Jamaatud Dawa wal-Irshad was a preaching, publishing and propaganda network set up by Hafiz Saeed for jihad in Afghanistan in 1985. In the early 1990s, when the Soviet Union pulled out of Afghanistan, many militant groups migrated from Afghanistan to Kashmir and Saeed raised the Lashkar-e-Taiba as the militant wing of the Jamaat. The Lashkar's rise as a major Pakistani group operating in Kashmir is widely credited to Saeed's close links with the Pakistani military establishment. The group had access to huge funds from Middle Eastern mosques but also developed a countrywide network to raise donations locally. After 9/11, the group came under international criticism because of its involvement in some high-profile attacks in Indian-administered Kashmir and cities in India. India blames the LeT for attacks in Mumbai and Delhi in 2003, 2005 and 2008 as well as armed raids on Delhi's Red Fort in December 2000 and on the Indian parliament a year later. In 2002, just a day before Musharraf banned the LeT, Saeed changed the name of the organization to a truncated version of the original – Jaamatud Dawa – but this did not impact the activities of the group. M. Ilyas Khan, "Profile: Hafiz Mohammad Saeed", *BBC* (June 2, 2009); online http://news.bbc.co.uk/2/hi/south_asia/6067694.stm [Khan]

⁶⁸⁸ Neil MacFarquhar, "India Wants Pakistani Group Added to U.N.'s Terrorism List", *New York Times* (December 9, 2008); online <https://www.nytimes.com/2008/12/10/world/10nations.html>. According to the article, the note distributed by the sanctions committee to its members said that in May 2007, the US, the UK and France had tried to add Saeed to the list in but were thwarted by China, which is a long-time Pakistan ally. A similar attempt in April 2006 was also said to have been blocked by China.

Saeed was freed by the Lahore High Court after a few months of captivity⁶⁸⁹. The blandness of the FATF February 2009 report is all the more surprising, given that all these developments were public knowledge.

It took FATF another four months to appreciate these developments, which were reflected in its July 2009 damning indictment of Pakistan (see FN 604 above for a synopsis of the evaluation report). But the report itself was riddled with inexplicable inconsistencies – an indication of the unpredictability of outcomes even when big powers are pitched against smaller powers. For one, the so-called “inadequacies” of Pakistan’s AML-CTF regime were now significant enough to merit a dense 262-page report but not important enough to replace the inadequacies/ risks/ vulnerabilities descriptor with a stronger noun. Second, the use of the word “vulnerabilities” suggests the unintended presence of loopholes *within* a system, which are *susceptible* to exploitation. However, the methods detailed in the FATF report – for example, the use of corporate entities or real estate transactions to launder monies; the use of cash couriers or charities for financing terrorism – indicated the existence of *vibrant, flourishing systems designed to effect the same*, not loopholes capable of exploitation. More simply, the defects of the regime were systemic and abuse of the same *was an ongoing reality*, not a remote possibility. Yet FATF chose to maintain the fiction of unrealised risks and unexploited vulnerabilities in Pakistan. Third, the analysis itself suggested influences, if not authorship, independent of FATF. Take the example of the freezing of militants’ assets. Of the 66 key findings about Pakistan, most related to the procedural requirements for the central bank and the securities regulator, the legal framework and other technicalities. However, the report also noted Pakistan’s failure to freeze the assets of militants *when the individuals had not committed acts of terrorism in Pakistan*. A key component of FATF’s methodology for mutual evaluations is the jurisdiction’s own assessment of risks. While assessors are not bound by such assessments, the process specifies a high degree of cooperation and consultation⁶⁹⁰. Even after the UNSC ban, Pakistan chose not to

⁶⁸⁹ Saeed had also been placed under house arrest under the Maintenance of Public Order after India accused him of masterminding the Mumbai train attacks of 2006 but no criminal charges were instituted against him. Khan *supra* note 687.

⁶⁹⁰ Assessors are expected to “consult closely with the national authorities to try to reach a common understanding of what are the key risks within the jurisdiction. If there is no agreement, or if they cannot conclude that the country’s assessment is reasonable, then assessors should clearly explain any differences of understanding, and their reasoning on these, in the Mutual Evaluation Report.” Available at <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf> at 6.

press criminal charges against Hafiz Saeed and argued he had not committed terrorist acts on Pakistani soil; as such, Pakistan was unlikely to have flagged the issue or agreed to such a reading. From a wider terrorism financing perspective too, the role of the ISI or domestic and foreign funding of Islamic charities – for example – ought to have merited greater FATF scrutiny⁶⁹¹. Consequently, FATF’s decision to focus on Hafiz Saeed instead, without naming him, raised eyebrows. This ties in with the perspective of several interviewees who said that the pressure brought to bear on Pakistan by FATF was a consequence of Indian lobbies working on the US government and Pakistan’s inability to defend itself⁶⁹².

Even the linkages between FATF and the UNSC⁶⁹³ are mostly seen as a naked play for ‘borrowed legitimacy’ by a largely illegitimate club led by the G7⁶⁹⁴, which needs the moral authority of a more democratically representative Security Council to justify its calls for greater accountability. Were FATF really convinced of the salubrity of the AML-CTF regulation, contend some, it would have worked harder on raising awareness around the world rather than demanding accountability and conducting summary trials of jurisdictions it deems non-compliant⁶⁹⁵. And FATF would have not needed the endorsement of bodies such as the UN or the IMF or the World Bank. As such, these interlocutors expect the FATF-UNSC nexus to go the way of the Conference of Disarmament; the Decolonisation Committee and the UNSC Counter-Terrorism Committee⁶⁹⁶.

The FATF pronouncements coincided with a period of intense political turmoil in Pakistan. Musharraf’s dismissal of 61 judges of the superior court in November 2007 had triggered a countrywide protest against him by lawyers who were joined by civil society activists, political

⁶⁹¹ For example, the role of the Pakistan-based charity Al Rashid Trust in financing Al Qaeda was well-known and the organisation was listed by the UNSC in October 2001. The associated Al Akhtar Trust was listed by the UN Security Council in August 2005.

https://www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/entity/al-rashid-trust

⁶⁹² Interview 5; former fin minister; interview 12; senior government official; interview 13; lawyer. While these interviewees were specifically referring to the period between 2012 and 2013 as well as the 2018 spell, the reasoning holds valid for 2008 as well.

⁶⁹³ For example, FATF’s adoption of UN Security Council Resolution 1267 and 1373

⁶⁹⁴ The United Nations is among the organisations FATF counts as “observer organisations”, which must, by definition, endorse FATF standards and help expand its reach. <http://www.fatf-gafi.org/about/membersandobservers/fatfpolicyonobservers.html>

⁶⁹⁵ Interview 16; govt official

⁶⁹⁶ Despite promising starts, all three variously fell prey to disagreements over limited membership and among members.

parties as well as ordinary citizens. The December 2007 assassination of the leader of the Pakistan Peoples' Party (PPP) Benazir Bhutto added more heat: over the next 15 months, the country witnessed a series of battles between the lawyers and their allies, the military establishment and mainstream political parties in both courtrooms and on the streets⁶⁹⁷. The February 2008 general elections ushered in the new Pakistan Peoples Party government but the public campaigns against Musharraf, courtroom theatrics and secret negotiations between the Lawyers' Movement leaders, the military establishment and the political parties continued⁶⁹⁸. The military facing the US-FATF combine in the summer of 2008, consequently, was an enfeebled version of itself, diminished by its interaction with a newly resurgent political power and an increasingly emboldened judicial power. The US then demanded that Pakistan act against several militant groups, including the Haqqani network. While the military establishment agreed, it insisted on, first, setting its own pace and taking out the easier targets initially, and second, more equipment and assistance from the Americans. The US continued its policy of conducting drone strikes in Pakistan while the ISI strategically engineered 'public' protests against those targeting 'their' militants – thereby creating the illusion of a political power that supported the actually enfeebled military power – and told the incredulous Americans that the main decision-making body of the Taliban – the Quetta Shura – did not exist⁶⁹⁹. The Pakistani resistance effort was alive; to say that FATF admonitions regarding Pakistan's AML-CTF controls were low priority for Pakistan during this period would not be a stretch.

Soon after came a series of disclosures that threatened to expose Pakistan's resistance effort. At some point after the Mumbai attacks, the CIA discovered that the ISI had been involved in the training for the attacks⁷⁰⁰; the Times Square attacker in 2010 was found to have links with Pakistan; Osama bin Laden was shot dead in Pakistan in May 2011 and a planned operation against a bomb-making factory in North Waziristan was compromised⁷⁰¹. The US kept asking

⁶⁹⁷ For an account of the Lawyers' Movement, see Muneer A. Malik, *The Pakistan Lawyers' Movement: an unfinished agenda* (Karachi, Pakistan Law House, 2008). For an analysis of judicial politics in the context of civil-military relations, see Ahmed 2015a supra note 683.

⁶⁹⁸ The 61 judges were finally restored in March 2009.

⁶⁹⁹ Haqqani supra note 628 at 327-8.

⁷⁰⁰ Woodward supra note 665 at 46-7

⁷⁰¹ The CIA had told the Pakistan army about the factory run by the Haqqani group. While the army planned an operation, the factory was dismantled hours before the raid as a consequence of a tip-off. Haqqani supra note 628 at 347-8

Pakistan to crack down on terrorism financing⁷⁰² and, based on the material found in bin Laden's compound, threatened to go public about Pakistan's role if the Pakistan military continued to stoke anti-American rhetoric within the country⁷⁰³. After the September 2011 attack on the US embassy in Kabul by the Haqqani network, the US told Pakistan it knew about the relationship between the Haqqani network, the Pakistan Army and the ISI and wanted action against the network⁷⁰⁴. Significantly, in October 2011, FATF decided to list Pakistan for not making adequate progress and, in February 2012, greylisted Pakistan for being out of compliance with its action plan. The decision was read as strategic: an interviewee close to the national counter-terrorism effort said that FATF was brought on as a pressure tactic when Pakistan failed to accede to US requests to crack down on terrorism financing. The inclusion of FATF transformed a bilateral engagement to a multilateral one – with the 'common interest' enhancing the legitimacy of US demands – and that too, at an organisation “where Pakistan also ha[d] enemies⁷⁰⁵” who could be reliably be expected to ratchet up the pressure.

For the next three years, FATF and Pakistan played the chicken game. FATF maintained steady pressure with a series of progressive demands designed to inculcate greater compliance; Pakistan continued with its tacit resistance by responding with an equally steady stream of legislative and administrative dribs and drabs that never translated into anything meaningful. The US had recommitted to Afghanistan with a surge in troops and Pakistan was still relevant to the effort – knowledge that probably conditioned the Pakistani resistance. But a low-intensity Pak-US conflict played out in the background: for example, the US attack at the border town of Salala in Pakistan in November 2011 killed 28 Pakistani soldiers and Pakistan responded by shutting down the NATO supply route and withdrawing permission for the US to use the Shamsi airbase in Balochistan⁷⁰⁶. Sporadically, US and NATO forces accused Pakistan of compromising their military operations by leaking information to militant groups; Pakistan responded with suitable

⁷⁰² Haqqani supra note 628 at 344.

⁷⁰³ Haqqani supra note 628 at 318-9.

⁷⁰⁴ Haqqani supra note 628 at 319-22.

⁷⁰⁵ Interview 18; LEA official. He is referring to India, which consistently raised the issue of Pakistani support at FATF meetings. See Dipanjan Roy Chaudhury, “Global watchdog FATF puts Pakistan on notice”, *The Economic Times* (November 5, 2017); online <https://economictimes.indiatimes.com/news/defence/global-watchdog-fatf-puts-pakistan-on-notice/articleshow/61521911.cms>, for example.

⁷⁰⁶ BBC report, “Pakistan outrage after 'Nato attack kills soldiers'”, *BBC* (November 26, 2011); online <https://www.bbc.com/news/world-asia-15901363>

outrage and claimed it was being targeted by jihadi and sectarian groups for its participation in the US-led war on terror⁷⁰⁷ and enumerated the death toll in Pakistan since the launch of the war⁷⁰⁸. NATO supplies were pilfered en route to and from Afghanistan⁷⁰⁹ and the ‘wares’ surfaced in bazaars in Pakistan’s urban centres; Coalition Support Fund payments stuttered and the US Congress pushed to reduce aid to Pakistan⁷¹⁰. Even though Pakistan was removed from the grey list in February 2015, the US kept pushing the government and the military regarding their support to militant groups. In July 2017, for example, US withheld \$350 million in Coalition Support Fund monies since it felt Pakistan was not doing enough to disrupt terrorism financing.

But the 2018 greylisting at the behest of the US was substantially different⁷¹¹. First, Pakistan’s grey listing went against the protocol identified by FATF. ‘Greylisting’ is a naming-and-shaming technique triggered by an evaluation of the ‘errant’ jurisdiction by the relevant regional group and leads to stricter monitoring of the jurisdiction⁷¹². This imposition of an identity – as Foucault would read it – produces its own set of disciplinary effects: as FATF notes, “Public identification, and the prospect of public identification, encourages countries to swiftly make significant improvements⁷¹³”. The Asia Pacific group was scheduled to conduct a mutual

⁷⁰⁷ Jaffrelot supra note 14 at 5.

⁷⁰⁸ Associated Press. “Pakistan army rejects US findings on border attack”, *Guardian* (December 23, 2011); online <https://www.theguardian.com/world/2011/dec/23/pakistan-army-rejects-us-findings>.

⁷⁰⁹ CBC News, “Military gear missing from Afghan mission shipments”, *CBC News* (January 12, 2012); online <https://www.cbc.ca/news/politics/military-gear-missing-from-afghan-mission-shipments-1.1198183>.

⁷¹⁰ Paul McLeary & Dan de Luce, “Trump Administration Threatens to Cut Aid to Pakistan. Does It Matter?”, *Foreign Policy* (August 23, 2017); online <https://foreignpolicy.com/2017/08/23/trump-administration-threatens-to-cut-aid-to-pakistan-does-it-matter/>

⁷¹¹ Interview 5; fmr fin minister

⁷¹² While ‘mutual evaluations’ are routine, other evaluations are triggered by a jurisdiction’s refusal to participate in a FATF-style regional body (FSRB) or the jurisdiction’s refusal to have the results published in a timely manner; a jurisdiction’s nomination by a FATF member; or by a jurisdiction’s poor results in a mutual evaluation. A mutual evaluation process has a technical compliance component to assess whether the necessary laws, regulations or other required measures are in force and effect, and whether the supporting AML-CTF institutional framework is in place. The effectiveness component determines whether the AML-CTF systems are working, and the extent to which the country is achieving the defined set of outcomes. The general principles and objectives of FATF/ FSRB/ IMF/ World Bank mutual evaluations are (among others) to produce timely reports that are clear and transparent, encourage the implementation of higher standards, identify and promote good and effective practices; and alert governments and the private sector to areas that need strengthening. [http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate)); <http://www.fatf-gafi.org/publications/mutualevaluations/documents/4th-round-procedures.html>

⁷¹³ [http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate))

evaluation of Pakistan in June 2019⁷¹⁴. However, in January 2018, the US nominated Pakistan due to its support for the Haqqani network as well as cross-border currency smuggling via exchange companies opened on the border with Afghanistan at Parachinar⁷¹⁵. According to the process detailed by FATF, a nomination by a FATF member triggers an evaluation by the relevant regional group, where the ‘accused’ jurisdiction has a chance to defend itself and is given a year to implement the changes *prior to public listing*⁷¹⁶. In Pakistan’s case, however, the APG did not seek a reply from Pakistan; its financial systems were not evaluated; and it was not offered the one-year reprieve either. Instead, FATF endorsed the US rationale and the nomination led directly to grey listing⁷¹⁷. Since FATF operates as a closed bureaucracy with secretive decision-making, there was no prospect of an appeal to anyone other than FATF itself.

Second, there was a profound change in FATF’s attitude towards Pakistan. After decades of silence and some low-level bickering, FATF abruptly took on a blatantly aggressive stance that showed a cementing of a skewed power dynamic. Alleging neocolonialism, several interviewees point to the fact that Pakistan doesn’t have “a seat at the table where decisions are made about us⁷¹⁸” and that there is little room for negotiation or leeway⁷¹⁹. Several interviewees who attended FATF meetings in the past speak of the “demeaning” treatment of Pakistan by participants at the meetings⁷²⁰. Meanwhile, central bank officials complain that at meetings with the US and FATF, their version is invariably contradicted with supporting evidence⁷²¹. Further, there is also a focus on *potentiality*: FATF’s assessments of Pakistan are based on *perceptions* of high risk without evidence⁷²². For some, this is what makes the current set of FATF demands so

⁷¹⁴ Interview 5; fmr fin minister

⁷¹⁵ Many interviewees interpret the nomination as “punishment” for Pakistan’s support of certain militant groups. Interview 5; fmr fin minister

⁷¹⁶ [http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/more/more-on-high-risk-and-non-cooperative-jurisdictions.html?hf=10&b=0&s=desc(fatf_releasedate))

⁷¹⁷ Interview 5; fmr fin minister. Interestingly, an interviewee from another government department said that not only was the APG involved, it had also cleared Pakistan after hearing out its objections but FATF decided to proceed with the greylisting under US pressure anyway. (Interview 16; bureaucrat) Since the first version of events comes from within the finance ministry, it appears more credible. That said, the seeming contradiction is an example of how even departments within the government do not have the same version of events.

⁷¹⁸ Interview 16; bureaucrat

⁷¹⁹ Interview 16; bureaucrat

⁷²⁰ Interview 20; senior banker; Interview 5; fmr fin minister; Interview 32; banking regulator

⁷²¹ Interview 20; senior banker. The phenomenon also speaks to the disconnect between various arms of the Pakistani state, discussed below.

⁷²² Interview 32; banking regulator

dangerous: the evaluation of Pakistan's risk is entirely subjective and Pakistan is asked to deliver on intangibles⁷²³. For example, while FATF had previously only focused on Pakistan's technical compliance – that is, the laws and institutions required to regulate the phenomenon – there was now a series of demands to *prove efficacy*⁷²⁴. Given Pakistan's history, a graduated transition from technical to effective compliance would have been completely understandable. However, the suddenness of the change suggested that the impetus was more political than regulatory.

Finally, Pakistan was issued a series of extremely tight deadlines to implement changes. Many believe the timeline is a consequence of the adversarial relationship between the US and Pakistan⁷²⁵. Take the example of the call to improve inter-agency coordination between provincial and federal authorities. As discussed below and in Chapter 5, the issue is an enormously complicated political one involving civil-military relations; federation-provincial relations; relations between provinces as well as turf issues among state agencies. To expect that Pakistan could overturn decades of legislative and administrative history to implement meaningful change within a calendar year was akin to tilting at the windmills. Or, look at the curiously-worded call to *demonstrate* that terrorism financing *prosecutions* result in *dissuasive* sanctions. Even if Pakistan successfully prosecuted the Haqqani network, for example, how would it *show* that the prosecution *dissuaded* other militant groups *except by a dramatic fall-off in militant activity*? As discussed in Chapter 3, militant groups are essentially *political* actors, not economic agents who would conduct a cost-benefit analysis of the risk of prosecution against the gains of militant activity. Even if Pakistan were to completely withdraw all state support for militant activity in Kashmir and Afghanistan, *it would still not be able to deliver on a call, which does not recognise the autonomy of militant groups and is based on a fundamental misunderstanding regarding their motivation*.

Unlike the previous grey listing which accommodated Indian influence, the 2018 one is attributed primarily to the US⁷²⁶. Besides its general desire to run the capitalist system, many believe the US pressure stems from a diverse mix of objectives: its desire to 'win' the war in

⁷²³ Interview 12; senior bureaucrat

⁷²⁴ Interview 5; fmr fin minister; Interview 6; LEA official; Interview 8; senior LEA official

⁷²⁵ Interview 5; fmr fin minister; Interview 18; LEA official

⁷²⁶ Interview 1; senior banker; Interview 13; lawyer; Interview 16; bureaucrat; Interview 17; senior parliamentarian

Afghanistan, to justify its \$1 trillion outlay on the war and destroy the Haqqani network⁷²⁷. Despite everything, they say, Pakistan remains central to these ambitions. However, those closer to the national anti-terrorism effort contend that the centrality of Pakistan in the fight against terrorism began shifting between 2011 and 2013 and the current situation is a consequence of apathy towards Pakistan, its domestic imperatives and particularly, the military's narrative⁷²⁸. Simply, the US does not need to keep Pakistan sweet for its Afghanistan effort. However, insist these commentators, Afghanistan isn't the only lens and evolving US interests make the Chinese angle key to a more nuanced understanding of the current relationship between the US and Pakistan⁷²⁹.

While Sino-Pak relations have historically been strong, China began work on the One Belt, One Road initiative in Pakistan in 2013 when most foreign investment was dwindling and/ or confined to portfolio investment. The influx of Chinese monies allowed Pakistan to stay afloat at a time its relationship with the US was fraying and its access to global capital was consequently being choked. Since its 2015 acquisition of a warm water port in Pakistan, China has been busy working on key road, energy and infrastructure projects in Pakistan (and in 60 countries)⁷³⁰. The acquisition of the port sparked US fears regarding militarisation of the port and the expansion of the Chinese naval footprint in the region⁷³¹. The 2018 announcement of Sino-Pak military cooperation added to these fears. According to current plans, the two countries will make a new generation of fighter jets at factories in Pakistan and Pakistan will also host several satellite stations key to the launch of China's Beidou Navigation System⁷³². For Pakistan, the jets will prove a substitute for the US-made F-16s it is finding harder to buy⁷³³. For China, Pakistan is not

⁷²⁷ Interview 16; bureaucrat

⁷²⁸ Interview 9; retd senior LEA official

⁷²⁹ Interview 17; senior parliamentarian

⁷³⁰ See Maria Abi-Habib, "China's 'Belt and Road' plan in Pakistan takes a military turn", *New York Times* (December 19, 2018); online <https://www.nytimes.com/2018/12/19/world/asia/pakistan-china-belt-road-military.html?fbclid=IwAR19neRpOOFzkWBiWzUFd2nSple7sKh4WJmf20dTqMi6CPKUzqu9ZiZiVVU>, for an excellent analysis of the Pakistan-US-China relationship.

⁷³¹ Abi Habib supra note 730. The fears solidified as China acquired ports in Djibouti and Sri Lanka and the US-China conflict in the South China Sea became more pronounced. Arwa Damon & Brent Swails, "China and the United States face off in Djibouti as the world powers fight for influence in Africa", *CNN* (May 27, 2019); online <https://www.cnn.com/2019/05/26/africa/china-belt-road-initiative-djibouti-intl/index.html>.

⁷³² The system is planned as competition for the GPS system run by the American military that China fears is used for spying. See Abi-Habib supra note 730.

⁷³³ As the Pak-US relationship frayed, the US Congress attempted to block sale to Pakistan, which the Senate later overturned. Reuters report, "Bid to block Pakistan F-16 sale fails in U.S. Senate", *Reuters* (March 10, 2016); online

only a large market for arms, it will also serve as a showcase for China's arms and equipment building capacity as well as Beidou⁷³⁴. As such, several interlocutors fear that Pakistan and its economy will become the battleground for the US and China⁷³⁵. Besides this, since the US is also assiduously courting India as a counterfoil to China, the chances of Pakistan being hit harder on AML-CTF issues as a result of Indian influence is virtually a foregone conclusion⁷³⁶.

According to an interviewee who led discussions from the Pakistan side, initially, long-term Pakistan allies China and Turkey (who are FATF members) voted against the move to nominate Pakistan in 2018 as did Saudi Arabia (which is a FATF observer). However, in a telling example of how the interaction of powers in global politics determines regulatory outcomes, two of the three eventually backed down. China was seemingly lured by the prospects of the FATF presidency⁷³⁷ while Saudi Arabia came back to Pakistan with advice to mend relations with the US⁷³⁸.

The causes for the flip in the Saudi position are contested and show just how unpredictable simultaneous power battles at the global and local level can be, especially since outcomes at both often condition each other. Some argue that the kingdom was peeved at Pakistan's refusal to join the Saudi-UAE-Bahrain-Egypt blockade against Qatar in 2017 and/ or Pakistan turning down its request to send troops to Yemen in 2015⁷³⁹. However, others contend that such a reading is simplistic and point to the fact that Pakistan had refused similar requests in both 2002 and even during the 1990s without attracting reprisals from Saudi Arabia⁷⁴⁰. The difference, they say, stems from three factors. First, the decision to send troops was turned over to the Pakistani parliament, which took a very strong and very public position against Saudi Arabia – a reaction that neither the Pakistani government nor the Saudis expected. The departure from the more

<https://www.reuters.com/article/usa-pakistan-fighters/bid-to-block-pakistan-f-16-sale-fails-in-u-s-senate-idUSKCNOWC2L4>

⁷³⁴ Abi-Habib supra note 730.

⁷³⁵ Interview 17; senior parliamentarian; Interview 16; bureaucrat.

⁷³⁶ Interview 17; senior parliamentarian.

⁷³⁷ Interview 6; LEA official. The Chinese president was appointed to FATF in June 2019.

⁷³⁸ Interview 5; fmr fin minister

⁷³⁹ Interview 6; LEA official.

⁷⁴⁰ Interview 10; senior journo. The interviewee pointed to the fact that Pakistan has successfully negotiated its relationship with both Saudi Arabia and Iran for over three decades. The height of Saudi influence in Pakistan was during the Zia era (1977-1988) when Pakistan was awash in petrodollars. However, during the first Persian Gulf war (1980-88), despite militarily supporting Iraq at the request of Saudi Arabia, Pakistan consistently refused to supply Saudi Arabia with a list of Shia officers in the Pakistan Army.

diplomatically finessed decisions of the past is what is said to have turned the Saudis against Pakistan and not just Islamabad. The second reason has to do with Saudi Arabia's desire to reposition itself globally. Fear of being the next Da'esh target is thought to have pushed the kingdom even closer to the US, which seemingly conditioned its support on a changed public policy towards the financing of militancy⁷⁴¹. While the kingdom has been inching towards political and social reform since the beginning of the century⁷⁴², the move gained steam under the present King Salman bin Abdul Aziz and Crown Prince Muhammad bin Salman⁷⁴³. The prince, particularly, is credited with a deepening of relations with India and Saudi Arabia's withdrawal of support for Pakistan at FATF is also partially attributed to India's influence⁷⁴⁴. But in the ultimate analysis, Saudi Arabia is said to have caved in to US pressure⁷⁴⁵.

The move could not have come at a worse time for the embattled PML-N government. In July 2017, it had lost its prime minister and party chief to the scandal erupting from the Panama papers. In a bid to downplay the grey listing, in February 2018, the de facto Pakistani finance minister announced on the floor of the Parliament that Pakistan had successfully emerged from its previous greylisting and that the latest development would have no significant impact on Pakistan's economy. Shortly afterwards, he was publicly upbraided in a meeting by the US Undersecretary of Treasury⁷⁴⁶.

Many interviewees feel that improved relations with the US will resolve many of the FATF-related issues Pakistan is currently facing⁷⁴⁷. Indeed, other interviewees point to that fact that Pakistan seems to be the only one among its peers – India and Sri Lanka, for example – that is being targeted for non-implementation and that too, on very tight deadlines⁷⁴⁸. FATF, they say, is

⁷⁴¹ Interview 18; LEA official.

⁷⁴² Ties between Saudi Arabia and India, for example, had long been frosty due to the former's support for Pakistan. In 2006, the kingdom renewed relations with India by signing agreements regarding bilateral trade, energy cooperation and a crackdown on militancy in the Middle East.

⁷⁴³ The king's decisions to allow women to drive in the kingdom; a public admission of Saudi Arabia's funding of terrorism and even the decision to join FATF as an observer in 2015 can be seen as examples of this repositioning. While the murder of *Washington Post* columnist Jamal Khashoggi suggests that some of the changes are cosmetic in nature, it doesn't detract from the visible effort to change global perceptions about the country.

⁷⁴⁴ Interview 10; senior journo.

⁷⁴⁵ Interview 10; senior journo

⁷⁴⁶ In the former minister's recollection of the meeting, it was "the most difficult meeting of my life. The US Undersecretary of Treasury said 'fuck you' multiple times and then stormed out of the room." Interview 5; fmr fin minister.

⁷⁴⁷ Interview 2; senior banker; Interview 5; fmr finance minister; Interview 13; lawyer.

⁷⁴⁸ Interview 5; fmr fin minister; Interview 18; LEA official.

being used as a political tool by the US – a technique broadly in line with the coercive economic measures that the Trump administration seems to favour as a foreign policy tool⁷⁴⁹. Such a reading is corroborated by other US moves: in September 2018, the US refused to reimburse Pakistan for \$300 million spent under the Coalition Support Fund head and the US secretary of state told the IMF to ensure that its bailout for Pakistan would not be used to repay Chinese loans⁷⁵⁰.

The political imperatives of the US within the AML-CTF effort, argues one interviewee, can be gauged by the money laundering case against Pakistan's largest bank HBL⁷⁵¹. In the summer of 2017, the New York Department of State Financial Services presented HBL's New York branch with a charge sheet listing 53 suspicious transactions and threatened the bank with a penalty of \$630 million⁷⁵². The crux of the problem emerged as the correspondent account maintained by the Saudi bank Al Rajhi⁷⁵³ at HBL. Were the prevention of terrorism financing as critical as it is made out to be, he argues, the case against HBL would have been a federal one and not pursued under state law. Other interviewees – especially those who had worked for global banks in the past – are similarly convinced that FATF is a tool used by the US government against foreign banks⁷⁵⁴.

As the above shows clearly, geopolitics drives the enforcement of AML-CTF regulation, not deviance from FATF policy⁷⁵⁵. That Pakistan was taken to task by FATF for terrorism financing

⁷⁴⁹ For example, Trump's approach with Turkey, Iran and China. Interview 6, LEA official. However, other see this influence on the decline and talk about the US's ability to "bulldoze" other countries compromised by the emergence of a new bloc comprising China, Russia, Pakistan, Qatar, Iran and Turkey. Interview 16, bureaucrat.

⁷⁵⁰ In a press conference after one such meeting, for example, while the US claimed it had told Pakistan to do more, Foreign Minister Shah Mehmood Qureshi insisted the US had acknowledged Pakistan's positive role in the fight against terror. Imtiaz Ahmad, "Successful or not? Pakistan, US media differ in interpretation of Mike Pompeo's visit", *Hindustan Times* (September 8, 2018); online <https://www.hindustantimes.com/world-news/successful-or-not-pakistan-us-media-differ-in-interpretation-of-mike-pompeo-s-visit/story-CXo7IOapMb5h68SOOBQOYI.html>

⁷⁵¹ Interview 5, fmr finance minister.

⁷⁵² Shahid Iqbal, "HBL vows to fight charges levelled by US regulator", *Dawn* (August 30, 2017); online <https://www.dawn.com/news/1354739>

⁷⁵³ The bank was caught in the eye of the 9/11 storm when it was found to have conducted transactions on behalf of three of the 9/11 hijackers. It subsequently faced multiple lawsuits in the US for its involvement.

⁷⁵⁴ Interview 1, senior banker

⁷⁵⁵ As a banker reasoned cynically, even the "anti-boycott compliance" policy (an initiative evolved in response to those Middle Eastern countries that boycotted Israel) pursued by global banks was couched in anti-religious discrimination language while its main rationale was political. Interview 20; senior banker. Many others also spoke

only after its relationship with the US had soured shows that enforcement can be pursued or deferred according to the political exigencies of key actors. However, the critical point worth underscoring here is that of *relational invisibility*: foregrounding one (for example, AML-CTF regulation or FATF) necessarily backgrounds or ‘invisibilises’ others (here, geopolitics or the US). While Pakistan deserves a certain amount of blame for its support of militant activities, the question worth asking is, who does this Pakistan-specific attention render invisible?

The answer becomes clear when one recognises that Pakistan is a *beneficiary* of terrorism financing monies, not a source. Foreign funding is a very significant source, if not the primary one, for most religious groups in Pakistan⁷⁵⁶. While the *government* of Saudi Arabia is no longer directly financing militant groups and Sunni madrassahs in Pakistan, the same are being financed through charities funded by Saudi Arabia and, to a lesser extent, the UAE⁷⁵⁷. While scholars have long contended this⁷⁵⁸, the fact does not receive adequate global attention nor does it trigger calls for greater compliance with global CTF standards. For example, despite having financed terrorism in most Muslim countries *and having confessed to the same*, Saudi Arabia was accepted within the FATF ranks as a member in 2019⁷⁵⁹. The decision makes little logical sense but eminent political, military and economic sense: as a long-term US ally, Saudi Arabia has historically parked its oil wealth in the US and enjoys exceptionally close economic and military ties with the US⁷⁶⁰. Since the US conditioned future support on the cessation of terrorism

of the fact that Pakistan is on the grey list whereas Afghanistan, despite being the theatre of war, isn't. Interview 6, LEA official; Interview 13, lawyer; Interview 16, bureaucrat.

⁷⁵⁶ Interview 30, senior lawyer; Interview 27, aid worker; Interview 6, LEA official; Interview 7, lawyer; Interview 9, retd senior Nacta official. While expats are credited with sizeable amounts, these pale in comparison to those provided by foreign governments.

⁷⁵⁷ Interview 10, senior journo; Interview 18, LEA official; Interview 21, retd senior LEA official; Interview 25, journo; Interview 27, aid worker. In an October 2001 interview, Vali Nasr also credits religious clerics, merchants and expats – in addition to charities – for facilitating such transfers. Frontline, “Interview: Vali Nasr”, *Frontline* (October 25, 2001); online <https://www.pbs.org/wgbh/pages/frontline/shows/saudi/interviews/nasr.html>. Meanwhile, Abbas quotes at length from a US diplomatic communique from November 2008, which estimated Saudi and UAE support to madrassahs *in Southern Punjab alone* was worth \$100 million a year. This money was routed through charities but “ostensibly with the direct support of those governments”. A Abbas supra note 17 at 50-1

⁷⁵⁸ See, for example, Nasr supra note 757.

⁷⁵⁹ <http://www.fatf-gafi.org/countries/#Saudi%20Arabia>. See, for example, Zalmay Khalilzad. “‘We misled you’: How the Saudis are coming clean on funding terrorism”, *Politico* (September 14, 2016); online <https://www.politico.com/magazine/story/2016/09/saudi-arabia-terrorism-funding-214241?fbclid=IwAR0-gyGXH8x0jB-qFrdbBchuKbTdmGc5Mbqbcbgi3UkiRfhPG9zTU511OIO>.

⁷⁶⁰ Pragmatists have long read the US ambivalence regarding Saudi Arabia’s human rights record, for example, as evidence of the closeness of the ties between the two countries.

financing, FATF membership for Saudi Arabia was a useful way of demonstrating the same. (The move has further triggered speculation that the membership was the US quid pro quo for the 2017 US-Saudi deal, which allowed the Saudi company Aramco to buy Liquefied Natural Gas from the US, or for the “\$110 billion arms deal” Trump was eager to claim as his⁷⁶¹.) That said, the US does not seem to expect much AML-CTF compliance from Saudi Arabia other than FATF membership – an illustration of how economic capital can be converted to political capital and how the material often guides ideational power. Similarly, FATF also *chooses* not to enforce invasive AML-CTF regulation against Saudi Arabia. Critically, FATF’s mutual evaluation of Saudi Arabia does not even recognise that the kingdom ever funded terrorism⁷⁶².

In Pakistan too, the specific issue of Saudi funding of terrorism is rarely discussed and Indian aggression is mostly cited as the impetus for financing militancy. After the terrorist attack on the Army Public School in December 2014, for example, the government came up with a National Action Plan against terrorism. However, a journalist who covers parliamentary debates says that while the legislation contained a clause about funding, it was not debated in Parliament. Instead, the interior minister told the Parliament he couldn’t say which madrassahs were financed by Saudi Arabia⁷⁶³. Since the minister was known to be close to the military establishment, the journalist understood the former’s silence as stemming from the establishment’s aversion to discussing the issue. According to the head of the parliamentary committee on national security, the ‘official’ reason given to legislators is that of “maslak” [sect]⁷⁶⁴. While the reason implies an affinity among co-religionists – the majority of Muslims in Pakistan are Sunni – this affinity (imagined or real) is unlikely to be the sole or even the primary reason⁷⁶⁵.

⁷⁶¹ While some argue the deal was originally floated under Obama, after Khashoggi’s death, Trump has faced an uphill task pushing the deal through Congress. Daniel Flatley, Margaret Talev & Nick Wadhams, “Trump Considers Emergency to Bypass Congress on Saudi Arms Deal”, *Bloomberg* (May 23, 2019); online https://news.yahoo.com/trump-considers-emergency-bypass-congress-001623269.html;_ylt=AwrC1C3AR_BcAC8AxAvwFAx.;_ylu=X3oDMTBybGY3bmpvBGNvbG8DYmYxBHBvcwMyBHZ0aWQDBHNIYwNzcg--

⁷⁶² See the FATF Mutual Evaluation Report on Saudi Arabia, available at <https://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER-Saudi-Arabia-2018.pdf>

⁷⁶³ Interview 10, senior journo. Nasr, on the other hand, argues that madrassahs would not have existed in Pakistan and Afghanistan, were it not for Saudi organizational and financial funding. Frontline supra note 757.

⁷⁶⁴ Interview 17, senior parliamentarian.

⁷⁶⁵ This is because even the Sunnis are divided according to the school of Islamic thought they follow. While the rifts within Sunni Islam have profound consequences for the politics of the religious groups, vis-à-vis their foreign patrons as well as their local competitors, a more detailed discussion is beyond the scope of this project.

This is because, first, while the Pakistani state has an unstated orientation towards Sunni Islam, it is officially neither Shia nor Sunni. That said, major Muslim donors such as Saudi Arabia have personal relationships with the ruling elite in Pakistan⁷⁶⁶, a fact that engenders a kind of clientelism that precludes transparency. Second, Pakistan is home to a sizeable number of Shias⁷⁶⁷ and has an inglorious history of violent sectarian conflict. Part of the reason to downplay Saudi funding is likely the fact that the most virulent Sunni militant groups drew their funding from Saudi Arabia⁷⁶⁸ and admission of the same would be a betrayal of the unofficial, unacknowledged sectarian orientation of the state. Third, Pakistan has also become a battleground for the Saudi-Iran feud for supremacy in the region⁷⁶⁹. Since the early 1980s, Iran has also been funnelling money to Shia militant groups and madrassahs in Pakistan⁷⁷⁰, which has generated a relatively new wave of Shia militancy. Disclosing the full extent of Saudi funding could potentially further stoke sectarian conflict in Pakistan. Finally, there is also a political economy angle: the Pak-Saudi relationship has historically allowed Pakistan to avail of significant grants as well as deferred oil payments during times of economic sanctions⁷⁷¹ and Pakistan has cultivated Saudi Arabia as a deep-pocketed, fall-back strategic partner for times its economy or territorial sovereignty are under attack⁷⁷². Besides being a significant trading partner, Saudi Arabia also boasts the largest number of Pakistani workers outside of Pakistan and is, thus, a key source of foreign remittances⁷⁷³. Further, the military establishment has enjoyed close ties with the Saudis, providing both training and personnel for the Saudi armed forces, and has been well-compensated for the same. Finally, Saudi Arabia also happens to have considerable influence over the UAE, which has ripple effects on Pakistan. For example, the UAE provided

⁷⁶⁶ Interview 24, senior journo.

⁷⁶⁷ While accurate figures are not available, in a 2006 interview, Vali Nasr estimated the size of the Shia population in Pakistan at 30 million. Given the growth in population since, this figure is currently likely to have reached 40 million by now. Joanne J. Myers, "Interview: Vali Nasr", *Carnegie Council for Ethics in International Affairs* (October 18, 2006); online

<https://web.archive.org/web/20120914193938/http://www.carnegiecouncil.org/studio/transcripts/5400.html>

⁷⁶⁸ Interview 10, senior journo.

⁷⁶⁹ Interview 10, senior journo.

⁷⁷⁰ Interview 17, senior parliamentarian; Interview 9, retd senior Nacta official.

⁷⁷¹ For example, the US imposed sanctions on Pakistan right after the nuclear tests of 1998.

⁷⁷² Interview 17, senior parliamentarian.

⁷⁷³ Expat workers in Saudi Arabia sent home some \$4.8 billion in fiscal year 2018, retaining the kingdom's position as the largest source of remittances for Pakistan. The UAE comes second, with \$4.3 billion. The Annual Report of the State Bank of Pakistan (2017-18) at 72. Available at <http://www.sbp.org.pk/reports/annual/arFY18/Chapter-06.pdf>

some of the documents for the Panama leaks, which eventually led to the dismissal of premier Nawaz Sharif, a key political opponent of the militant establishment⁷⁷⁴. Besides being a haven for Pakistani wealth, the UAE is also a significant trading partner⁷⁷⁵ and the second largest source of workers' remittances for Pakistan. The mix of political, economic, ideological and military imperatives has ensured that Pakistan has never – as one parliamentarian puts it – had the guts to tell the Saudis to desist from financing terrorism nor has it wanted to talk about the issue⁷⁷⁶.

However, geopolitics and relational invisibility are not just limited to terrorism financing regulation but also feature in money laundering regulation. Some interviewees called FATF “a white man’s club⁷⁷⁷” and voiced resentment of the fact that its regulations seem to benefit only the destination countries, that is, the countries where the illicit funds end up, and that this fact is largely underappreciated. Many alluded to US hypocrisy regarding its own tax havens and the CIA’s money laundering using the BCCI in the past⁷⁷⁸; others pointed to the fact that most tax havens do not follow FATF rules either⁷⁷⁹ and further identified the economic benefits of the AML-CTF regime for these countries. Even those more charitably inclined – or even hopeful – about the positive aspects of the AML-CTF regime confess bewilderment about implementation and enforcement strategies pursued at FATF. One interviewee speaks of a FATF meeting where Brunei was taken to task for its deficiencies, despite its small size and lack of relevance to the world economy. “I didn’t understand the vehemence of the dressing down or why FATF wasn’t considering a differential application of FATF standards, given the negligible amounts of money laundering, crime and terrorism financing in Brunei,” he says. Other participants at the meeting had no explanations and Brunei eventually agreed to both the technical assistance and the FATF plan, leaving the interviewee with the distinct impression that the standards “are not just about financial stability, security, regime strengthening or controls⁷⁸⁰.”

⁷⁷⁴ Interview 6, LEA official.

⁷⁷⁵ This is also because Pakistan and India routinely trade via Dubai, especially during politically turbulent times.

⁷⁷⁶ Interview 17, senior parliamentarian.

⁷⁷⁷ Interview 5, fmr finance minister. Others called it a “US-European club”. Interview 13, lawyer.

⁷⁷⁸ Interview 10, senior journo.

⁷⁷⁹ One prominent example would be that of FATF rules regarding beneficial ownership.

⁷⁸⁰ Interview 13, lawyer.

On the specific charge of terrorism financing, one interviewee, for example, points to the need for greater proportionality in assessing terrorism financing allegations. On the one hand, this is an argument for the problem of Pakistan's support for militant groups to be seen relative to its size on a global scale *and* for a simultaneous investigation of those financing terrorism *within* Pakistan⁷⁸¹. On the other hand, this is an invitation to see Pakistan as a country comprising peoples and businesses, all of whom do not deserve to be labelled as “terror-financing, terrorism-supporting” by FATF. The G7 have political, strategic and vested interests, argues the interlocutor, and the reasons for labelling Pakistan so are also socioeconomic and/or geostrategic. Instead of attacking Pakistan for non-compliance on specific standards, he says, FATF would do better to interrogate the causes of terrorism and the causes behind the causes. The example he chose was of Sri Lanka, which managed to crack down on terrorism without having achieved full compliance with FATF standards. Similarly, he argued, the core Pakistan-India issue needs resolution before the issue of terrorism can be put to bed⁷⁸². However, the more pragmatic lot contends that both India and Sri Lanka are treated better because they have economic clout they convert to political power – something Pakistan lacks⁷⁸³.

However, while politics is key to achieving strategic alliances that help condition power, so are representation and the presenting of a counternarrative to challenge the dominant discourse. An interviewee who represented the Pakistan government at the FATF meeting prior to the grey listing said that he was privately commended for his defence by Greece and the UK. However, he admitted that Pakistan has rarely managed its key international relationships: the negotiators it sends to such meetings are rarely experienced; the country has not hired good lobbyists or publicists in the US; nor has it cultivated relationships in Europe. In his reading, Pakistan's “ridiculous rhetoric about its ‘sacrifices’” at such meetings tends to alienate others who look at Pakistan's previous conduct as well as its broken promises. Instead, he suggests that Pakistan's interlocutors explain *why* so many Taliban live in Pakistan: “Instead of pretending the Taliban

⁷⁸¹ Interview 13, lawyer. He was talking of specifically Balochistan, where the military establishment suspects Indian proxies are fomenting violence, as well as reports that the Indian government funds the political party Muttahida Qaumi Movement, which has a strong militant arm. [Further, since the leader of the MQM is in self-imposed exile in the UK, there is also regular movement of funds from London to Karachi, some of which are thought to be used for militant activities. See also Owen Bennett-Jones, “Pakistan's MQM 'received Indian funding'”, *BBC News* \(June 24, 2015\); online <https://www.bbc.com/news/world-asia-33148880>](#)

⁷⁸² Interview 13, lawyer.

⁷⁸³ Interview 18, LEA official.

don't live here, we need to explain that they have families here; there are tribal links; strong business ties; many come here for medical treatment⁷⁸⁴”.

4.3 Domestic politics

The question of domestic sources or centres of power is important because the enforcement of even global regulation inevitably depends on local histories, laws and institutions. To put it another way, the global is filtered *through the local*, is translated by the local before it is operationalised. While the FATF 40 recommendations are stitched into domestic legislation in toto and are endorsed by Pakistan – Sassen’s “instantiations of the global” – *enforcement* depends on how the domestic centres of power perceive, receive and translate the FATF 40 in line with their own needs and imperatives and how these centres, in turn, influence the development of institutions. For example, while Pakistan has a slew of laws and is signatory to a host of conventions proscribing money laundering, its *countrywide* conviction rate of illegal money changers and hundi/hawala operators is *less than 17 percent*⁷⁸⁵. Eliminating the practice requires sustained cooperation among the domestic sources of power (military; political; judicial etc) as well as state institutions (LEAs; courts etc).

While FATF’s inability to factor in differences in economic systems and business cultures was a recurring motif⁷⁸⁶, interlocutors express greater frustration with FATF not even seeking to understand *why* the AML-CTF regime in Pakistan looks the way it does. As an interviewee argues, Pakistan’s performance on AML-CTF needs to be seen in the broader context of civil-military relations in Pakistan; the peculiarities of Pakistan’s democracy as well as the wave of anti-American sentiment in society in the wake of US strikes in Pakistani territory and military operations in the tribal areas, both of which were later seen as examples of Musharraf’s subordination to the US⁷⁸⁷. More simply, Pakistan’s current resistance to AML-CTF controls is the outcome of older, ossified power contests between *and* within power sources, at a national level, a regional level and a global level.

⁷⁸⁴ Interview 5, fmr finance minister. See Rashid supra note 15, generally, for a detailed and sophisticated analysis of the Pakistan-Taliban relationship.

⁷⁸⁵ Document provided by FIA; on file with author.

⁷⁸⁶ “They pay for a \$2 coffee with a card; we pay cash for deals worth billions!” Interview 16, bureaucrat.

⁷⁸⁷ Interview 16, bureaucrat.

Take, for example, the 2018 national elections. While political parties from the religious right had never secured sizeable electoral gains⁷⁸⁸, the political attractiveness of religious groups for voters changed with the 2018 elections. An unprecedented number of far-right parties (and even militant groups such as Lashkar-e-Taiba and Lashkar-e-Jhangvi) contested the elections and the hardline Tehreek-e-Labbaik Pakistan (TLP) emerged as the third-placed party in several national constituencies, registering over 42,000 votes in some urban constituencies⁷⁸⁹. According to one estimate, each candidate for the 336-seat National Assembly needed a minimum of 200 million rupees (\$1.4 million) in campaign finance⁷⁹⁰. While the estimate is a general comment on electoral expenditure in even developing countries, it also speaks volumes about the amount of funding available to religious parties and militant groups. There are *reasons* these groups draw funding from both domestic and foreign sources; there are reasons these groups are now pulling voters. The charge that the Pakistani ‘state’ wilfully and obdurately supports terrorism financing is based on a concerted refusal to *recognise* these reasons, let alone understand the imperatives of the power centres that guide them.

There are two important caveats here. First, like states, the needs and imperatives of each power centre are complex, multifactorial and formed in interaction with multiple constituencies. Take the military, for example. To conduct its proxy wars in Kashmir and elsewhere, the military needs militant groups to provide fighters as well as religious groups who will indoctrinate them. However, to preserve institutional legitimacy within a civilian population terrorised by militancy, the military also needs to demonstrate the will and capacity to take on militant groups. There are, further, elite constituencies within the military such as the officers’ cadre who draw the lion’s share of the military’s institutionalised corruption and, as such, have an interest in appeasing the US as a key military ally⁷⁹¹. But even the non-elite constituents – the rank-and-file soldiers – require appeasement through the provision of, for example, subsidised food rations; utilities and,

⁷⁸⁸ For the 2018 elections too, the religious right only managed some 13 seats nationwide. Asad Hashim, “Seven things Pakistan’s election results reveal”, *Al Jazeera* (July 28, 2018); online

<https://www.aljazeera.com/news/2018/07/pakistan-election-results-reveal-180728071614110.html>

⁷⁸⁹ Hashim supra note 788. However, both the LeT-backed Milli Muslim Party and the LeJ-backed Ahl-e-Sunnat Wal Jamaat failed to make much of an impact at either the national or provincial level.

⁷⁹⁰ Interview 16, bureaucrat.

⁷⁹¹ These include, for example, allocation of prime state land; cuts from lucrative arms deals and beneficial interests in the military’s corporate holdings.

post-retirement, jobs in the private sector⁷⁹². The needs and imperatives of the military, as a source of power, are necessarily informed by each of these factors – military, political and economic – and the interests of each of these constituencies.

Second, the needs and imperatives of a power centre are also conditioned by its interaction with other centres of power, both in real time and in a historical context. To continue with the above example: since Partition, war with India has been the *raison d'être* of the Pakistan Army and the spectre of war, its justification for predominance. To preserve this dominance and maintain its right to define 'national interest', the military needs to undercut potential challengers such as the political class as well as the judiciary. However, to maintain the illusion of democracy and rule of law for both its Pakistani and foreign publics, it also needs for the political and judicial groups to be perceived as (somewhat) legitimate and independent.

The study of AML-CTF regulation as a technique of power is fascinating precisely because it demonstrates, first, this balancing, rebalancing and repositioning both *within* and *between* the sources of power. Second, it also explains the unpredictability of outcomes in the interaction of powers. Just as the US simultaneously wants and doesn't want AML-CTF regulation on the global stage, the military establishment also wants the regulation to deploy against political opponents while protecting its favoured militant groups from the same. And while the political class may resist the regulation due to its potential for abuse, they can also see its potential as a check on the power of the military to conduct proxy wars and, as a corollary, the righting or rebalancing of the civil-military imbalance.

This section takes up the three main sources of power⁷⁹³ and describes this reflexive interaction.

Military power

The military establishment or the Deep State is, of necessity, a key actor within the Pakistani AML-CTF project. This is because, first, the military establishment has been a key player in the

⁷⁹² Under Ziaul Haq, 'quotas' for retired soldiers and officers were set up in the civil bureaucracy. The former soldiers were said to improve administration and facilitate ease of interaction with the military government. The practice increased under Musharraf, who appointed retired officials to positions meant for civilians and also provided state patronage to their businesses. Jaffrelot *supra* note 14 at 4. Private sector businesses also adopted the practice in order to streamline their interaction with the government.

⁷⁹³ The exclusion of economic power and ideological or religious power is deliberate. While both have skin in the game in the sense that both stand to lose from tighter AML-CTF regulation, neither are capable of independently exerting their influence on AML-CTF regulation except in consonance with the three main sources.

Pakistani polity since 1953⁷⁹⁴ and continues to shape both internal and external policies. While the fact has been more obvious under military rule, even civilian rule has been subject to and conditioned by the military establishment. Second, as the sole driver of the country's foreign policy (especially the use of militant groups as a tool of foreign policy)⁷⁹⁵, the military establishment is completely invested in the implementation – or the lack thereof – of AML-CTF regulation in the country. Third, the military establishment remains the sole arbiter of the country's national security, including conflicts with domestic groups⁷⁹⁶. Since the political fallout from the use of military force in the restive Balochistan province under Musharraf, the military establishment has begun using sectarian militant groups against sub-nationalist militant groups as well as some political adversaries. This strategy further reduces any desire to clamp down on the financing of militant groups⁷⁹⁷.

All interviewees concede that the Deep State is the most significant impediment to the meaningful implementation of AML-CTF regulation in Pakistan. Even as it proceeds with an overenthusiastic anti-money laundering campaign against politicians, the Deep State maintains a cavalier disregard for all other launderers as well as financiers of militancy despite increased pressure from both the US and FATF⁷⁹⁸. The reasons are said to be a mix of political, economic and strategic ones. This is not to suggest that the relationship between militant groups and the military establishment is uncomplicated: since Pakistan's involvement in the war on terrorism and a 2007 military-led operation against a madrassah in Islamabad, even the Deep State has been subjected to several attacks by militant groups in retaliation for its 'betrayal' of the militant cause⁷⁹⁹. While many had hoped that the horrific attack on the Army Public School (APS) in Peshawar in December 2014 that killed more than 150 people, including 132 children, would prove a turning point for the thinking within the Deep State, reports from the field indicate

⁷⁹⁴ While direct military intervention in political matters started with army chief Iskander Mirza's dismissal of the government in 1958, some military analysts attribute the dismissal of six prime ministers between 1951 and 1958 to military support.

⁷⁹⁵ For excellent histories of Pakistan's civil-military relations, see A Shah supra note 16 and Nawaz supra note 16.

⁷⁹⁶ Interview 21, retd senior LEA official.

⁷⁹⁷ Interview 21, retd senior LEA official; Interview 28, senior journo.

⁷⁹⁸ Interview 28, senior journo; Interview 3, LEA official; Interview 24, senior journo; Interview 10, senior journo; Interview 15, senior parliamentarian.

⁷⁹⁹ Musharraf survived two assassination attempts and his prime minister Shaukat Aziz, one. Among the most audacious attacks on military installations are the 2009 one on the military headquarters in Rawalpindi and the four attacks on the naval headquarters in Karachi in 2011. These are, of course, apart from the several-score attacks on civilian targets.

otherwise. Instead, argue many, APS was used to provide political cover for selective operations against only some militant groups active in Pakistan; the ones active in India and elsewhere were left untouched⁸⁰⁰.

Meanwhile, the military establishment continues to deploy its ‘good Taliban’ versus ‘bad Taliban’ and “strategic assets” narrative⁸⁰¹. In 2017, for example, the military brought forward the notorious militant Ehsanullah Ehsan, once the spokesperson for the militant group Tehreek-e-Taliban Pakistan and the man who had confessed to having shot teenager activist Malala Yusufzai in the head in 2012, and presented him to the media as a “misguided youth”. Ehsan, said the military, had been led astray by “the enemies of Pakistan” but had since realised the error of his ways and surrendered to the security forces⁸⁰². The obvious strength of the relationship between the Deep State and militant groups also shows up elsewhere. A journalist who covered the 2005 earthquake relief effort, for example, remembers having travelled in military helicopters with “LeT [Lashkar-e-Taiba] boys”. “They were dropped off at the Pakistan-India border and for days, border security was in the hands of non-state actors because the army was busy helping earthquake survivors,” he says. The story shows a deep institutional dependence on proxies, which is further corroborated by accounts of Pakistani militants from Peshawar fighting International Security Assistance Force (ISAF) troops in Kunduz and Mazar-e-Sharif in Afghanistan. While these militants are called ‘terrorists’ in public, say observers, they are also accorded well-attended public funerals. As such, the militant groups need to be seen for what they are: state-sanctioned, judicial and political groups as well as security agencies⁸⁰³.

⁸⁰⁰ Interview 17, senior parliamentarian; Interview 21, retd senior LEA official; Interview 28, senior journo.

⁸⁰¹ Interview 21, retd senior LEA official.

⁸⁰² Dawn report, “Former TTP spokesman Ehsanullah Ehsan has turned himself in: Pak Army”, *Dawn* (April 17, 2017); online <https://www.dawn.com/news/1327567>. The account was subsequently challenged by Ehsan’s colleagues in the splinter faction of the TTP, Jamaat-ul-Ahrar, who said Ehsan had been captured by the ISI in Afghanistan. Bill Roggio. “Pakistani Taliban faction claims spokesman was captured in Afghanistan”, *Long War Journal* (April 20, 2017); online <https://www.longwarjournal.org/archives/2017/04/pakistani-taliban-faction-claims-spokesman-was-captured-in-afghanistan.php>. Even so, the decision to characterise a notorious, 40-something terrorist as a penitent, ‘misguided youth’ speaks volumes about the depth of the relationship between the militants and the Deep State.

⁸⁰³ Interview 24, senior journo. The TTP uprising in Swat, for example, was largely attributed to the initial popularity of the ‘shariah courts’ run by the Taliban, which were perceived as more efficient than traditional courts. Shamil Shams, Masood Saifullah & Waslat Nazimi, “Taliban courts: When all alternatives fail”, *Deutsche Welle* (February 5, 2015); online <https://www.dw.com/en/taliban-courts-when-all-alternatives-fail/a-18236353>.

Both points – institutional dependence as well as public approval – are key to understanding Pakistan’s resistance. The evolution of the military from benefactor (that is, as one of the ‘creators’ of proxy groups) to beneficiary (that is, in terms of its institutional dependence on them) is an example of how different imperatives cause a reflexive internal transformation within a source of power. More simply, the shift was caused by the tempering of the military’s strategic and economic interests with its *institutional* interests. Meanwhile, the increased influence of these proxies on the decisions of the military shows how even a non-elite group with only a claim to ideological power can find, to paraphrase Sassen, *puissance* in its encounters with power over time. Till 1970, for example, religious parties had never won more than 1/10th of the popular vote. However, they rose in importance as a pressure group as a consequence of the breakup of the country in 1971; prime minister Zulfikar Ali Bhutto’s invocation of “Islamic socialism” as a populist strategy; president Ziaul Haq’s avid courtship of religious parties as political allies⁸⁰⁴ and, finally, the creation of militant groups.

This influence as well as the institutional dependence on proxies – as fighters in Kashmir, as quasi-judicial authorities elsewhere, as aid workers across Pakistan, as political challengers to established political parties (discussed below) – reduces the chances of a crackdown by the Deep State. Meanwhile, the success of these proxies in some roles (for example, in relief efforts in the wake of natural disasters; as quasi-judicial authorities or even as the ‘voice’ for a politically underrepresented group) has also won them considerable *public* approval and, as such, legitimacy. While many of these ‘successes’ rest on the failures of the state – for example, its inability to provide cheap and expeditious justice – the larger point is that many proxies are proving functions and services the state cannot or will not provide.

Significantly, the spokesperson for the Inter Services Public Relations (ISPR) – the public relations arm of the military establishment – refused multiple requests for an interview for the purposes of this project claiming lack of expertise⁸⁰⁵. However, the institutional dependence of the Deep State on militant groups is obvious in how the former interacts with and influences both

⁸⁰⁴ Jaffrelot supra note 14 at 11

⁸⁰⁵ In a September 2018 exchange over Whatsapp, after vetting the detailed questionnaire, the ISPR spokesperson initially suggested contacting the finance minister instead and, 10 days later, “the subject expert in the government”.

state and non-state institutions in order to protect its interests and its proteges. Of necessity, this dependence conditions how AML-CTF regulation is undermined in Pakistan.

According to the constitution of Pakistan, terrorism falls under the remit of both the federation and the provinces⁸⁰⁶. Besides national agencies such as the Federal Investigation Agency and the National Counter Terrorism Authority (Nacta), the provincial police departments are also supposed to investigate terrorism cases. However, in places such as Balochistan, militants are issued ID cards by their ‘handlers’⁸⁰⁷ to ‘protect’ the former from LEAs⁸⁰⁸. FIA officials speak of Intelligence Bureau- and ISI-mandated “restrictions” in investigating terrorism financing cases⁸⁰⁹. Meanwhile, officials at provincial LEAs speak about how terrorism financing investigations instituted by the Counter Terrorism Departments at the provincial level or the local police station are either heavily compromised or run aground by the Deep State. The officers in charge of the cases are either peremptorily instructed to conclude the investigations⁸¹⁰ or handlers arrive to secure the release of those arrested by the police⁸¹¹. Even where the handlers do not compel the release of the militants, police officials say that their presence encourages militants to defy cooperation with the police⁸¹².

In a slightly different variation of this practice of deliberate obfuscation, other issues that *ought* to be investigated rarely are – an example of how state inaction is also a manifestation of power. At the time Afghan Taliban leader Mullah Akhtar Mansoor was killed by a drone in southern Balochistan, for example, he was in possession of a Pakistani passport and ID card. As one interviewee reasons, neither document was likely to be issued by “a senior clerk at Nadra [the National Database and Registration Authority] or an official at the passport office”. Transferring

⁸⁰⁶ Article 141-2 of the Constitution of Pakistan; available at <http://www.pakistani.org/pakistan/constitution/part5.ch1.html>

⁸⁰⁷ The term is used in Pakistan to describe those officials in the military or intelligence services who liaise with or ‘handle’ key militants or militant groups.

⁸⁰⁸ Interview 17, senior parliamentarian.

⁸⁰⁹ Interview 19, LEA official. Interestingly, he also admits to “very high-level pressure” to build and investigate money laundering cases against politicians. When asked for details of how instructions are conveyed to the FIA, he said communication takes place mostly over Whatsapp messages.

⁸¹⁰ Interview 3, LEA official.

⁸¹¹ Interview 21, retd senior LEA official; Interview 3, LEA official; Interview 4, journo; Interview 5, fmr finance minister. The practice of agency handlers interfering with police investigations started at the height of the terror war under Musharraf. Even the civilian Intelligence Bureau was politicised and subject to instructions from the Military Intelligence. Interview 9, retd senior Nacta official.

⁸¹² Interview 3, LEA official. He was talking about specifically certain members of the Jamaatud Dawa.

low-ranking officials as ‘punishment’, he says, is a deliberate tactic to deflect attention from the powers that authorised such issuance in the first place⁸¹³. Similarly, in 2012, a militant group mounted an audacious attack on a heavily guarded Nadra building close to several security checkpoints in Miramshah in the tribal areas of Pakistan. The militants were suspected to belong to either the TTP or Al Qaeda and made off with computers, printers and several blank ID cards⁸¹⁴. The case was little reported in the local media and investigated even less. In another instance, the Sindh government identified between 70 and 80 madrassahs that were receiving foreign funding. Since a ‘foreign’ element was involved, the provincial government could not act on its own and was forced to refer the case to the federal Ministry of Interior, which chose the path of bureaucratic inaction⁸¹⁵. While the presence of ‘rogue officials’ or ‘militant sympathisers’ cannot be completely discounted in any of the above cases, the failure to mount investigation suggests a higher-order complicity.

The Deep State’s influence over other government institutions is as profound but, due to routinised interaction over a longer period of time – the inculcation of a habitus – is more deeply embedded into the latter’s work policies and procedures. The obvious advantage is that of invisibility: the ‘influence’ doesn’t need to be carried through Whatsapp messages or personal visits because it has receded so far into the background of everyday work processes – an illustration of how institutions are internally transformed by the interaction of powers. Take the example of the list of proscribed organisations maintained by the government under the Anti-Terrorism Act of 1997. According to the law, the Ministry of Interior maintains the list on behalf of the federal government; adds names according to a prescribed notification procedure; and offers the right of review to such organisations⁸¹⁶. However, according to a high-level counter-terrorism official, the listing procedure is ignored in practice and section officers and clerks draw up the list as per the instructions of the intelligence agencies⁸¹⁷. A former federal minister confirms that the ISI still authors policy papers on Afghanistan and the Foreign Office has

⁸¹³ Interview 15, senior parliamentarian.

⁸¹⁴ See Hasan supra note 17.

⁸¹⁵ Interview 10, senior journo.

⁸¹⁶ The first review is conducted by the government; appeals are preferred to judicial authorities. ATA 1997, section 11B; available at <https://nacta.gov.pk/wp-content/uploads/2017/08/Anti-Terrorism-Act-1997.pdf>

⁸¹⁷ Interview 9, retd senior Nacta official. Interestingly, he also said he couldn’t remember a single time an organization had been removed from the list, suggesting that the review process is largely cosmetic.

learned not to attempt solo flight⁸¹⁸. A former official key to the counter-terrorism effort says the Foreign Office told him to not cooperate with any jurisdiction that materially disagreed with Pakistan's definition of terrorism, a circumscription he understood as excluding everyone except the Gulf countries, and further instructed him to not to work with the UN Human Rights Council or the UN Office on Drugs and Crime⁸¹⁹.

Given Pakistan is signatory to a host of UN conventions, the advice makes little sense until it is situated in the Deep State's suspicion of INGOs after the bin Laden operation⁸²⁰. Since 2015, Pakistan has been tightening regulations regarding INGOs and between 2017 and 2018, expelled some 45 INGOs for a variety of reasons. These included amorphous charges such as 'working against national interests'; undertaking activities beyond their mandate; working in "unauthorised" areas and wasteful spending on administrative costs⁸²¹. While rights activists protested against the expulsions and the deleterious impact on human rights in the country, successive governments hinted that the aid workers were foreign spies. Since national security remains one of the military establishment's key portfolios, the decision is widely attributed to the Deep State.

In the last five years, even non-state institutions such as the media have increasingly been subjected to greater control in the battle for ideological power and predominance by the military. The country's two largest media groups saw a drastic fall-off in advertising revenues from the government for challenging the military's narrative on militancy and journalists of both groups were harassed by intelligence agencies. The attacks grew more brazen over time: an assassination attempt on a prominent TV host; the abduction of a woman columnist⁸²²; and the levelling of blasphemy allegations against one group by an establishment-backed news

⁸¹⁸ Interview 5, fmr finance minister.

⁸¹⁹ Interview 9, retd senior Nacta official.

⁸²⁰ Pakistani authorities suspected that Shakeel Afridi, the physician who acquired bin Laden's DNA sample before the raid, was working for the CIA while undercover as a doctor for Save the Children. The US has consistently asked Pakistan to hand over Afridi but Pakistan refuses to do so.

⁸²¹ Reuters report, "Foreign NGOs in Pakistan working in 'unauthorised areas': State Minister for Interior Affairs", *Express Tribune* (December 22, 2017); online <https://tribune.com.pk/story/1590449/1-ngos-pakistan-working-unauthorised-areas-state-minster-interior/>

⁸²² While male journalists – especially reporters working on "national security" stories" are often abducted, interrogated and sometimes tortured by intelligence agencies, the abduction of a woman – and that too, a columnist – was a first.

channel⁸²³. This control is not limited to a broader, macro-level engagement over ‘national security concerns’: financial journalists working on the FATF story in Pakistan for mainstream newspapers, for example, also say that their sources within the finance ministry have been placed under gag orders by the intelligence agencies⁸²⁴.

While institutional practices are worthwhile indicators, the establishment’s true intention regarding AML-CTF regulation emerges clearest in its interaction with other power actors. This is because, first, the interaction reveals what Mann calls the functional promiscuity of sources of power – political, ideological, economic etc – *within* the military establishment as a power actor. Second, the interaction captures the *relational* aspect of power, the fact that sources of power develop entwined and in tandem with each other. In its FATF-mandated avatar, AML-CTF regulation would prevent the military from using militant groups as proxies in India and Afghanistan, thereby reducing *one* option for regional dominance in the military playbook. More significant, however, is the fact that the regulation threatens to unravel the enormously complex relationship the military-industrial complex has with illicit flows⁸²⁵ and thereby undermine its *subjective* position in the Pakistani polity. To put it another way: illicit flows *undergird* the Deep State’s power as a predominant actor. They bolster the economic fortunes of the military industrial complex and guarantee financial independence vis-à-vis the civilian government⁸²⁶;

⁸²³ Interview 28, senior journo. With the wave of Islamisation across the country, accusations of blasphemy have frequently led to mob violence and even murder of those accused of blasphemy. As such, the allegations were read as an attempt to intimidate the group as well as incite violence against its journalists and employees.

⁸²⁴ Interview conducted in February 2019.

⁸²⁵ Interview 24, senior journo.

⁸²⁶ Significantly, the military budget has never been laid before the Parliament for debate – the military typically issues an ask and the Parliament signs off on the same. However, after the May 2011 raid in the garrison city of Abbotabad that killed Osama bin Laden, parliamentarians refused to authorize an 18 percent increase in defence spending and capped it at 12 percent. Since the military was on the backfoot, the cap was accepted though details regarding defence spending was still not disclosed to the parliament. Kamran Yousuf, “Budget 2011-2012: Defence spending up by 12%”, *Express Tribune* (June 4, 2011); online <https://tribune.com.pk/story/182147/budget-2010-2011-defence-spending-up-by-12/>. Subsequent attempts by the parliament to force greater transparency and disclosure were blocked, presumably at the behest of the military establishment. For example, when the parliament came back with a draft Right to Information law in 2012, the defence ministry voiced strong objections but stalled on giving feedback for eight months. Qamar Zaman, “Ensuring transparency: Senate panel finalises draft Right to Information Act”, *Express Tribune* (June 14, 2013); online <https://tribune.com.pk/story/563038/ensuring-transparency-senate-panel-finalises-draft-right-to-information-act/>. Despite the fact that freedom of information is a constitutionally guaranteed right, the current right to information law in Pakistan is considered both weak and ineffectual, both vis-à-vis the government and the military establishment. For overviews, see Centre for Law and Democracy, *Note on the Pakistan Right of Access to Information Bill, 2017* (October 2017); online https://www.law-democracy.org/live/wp-content/uploads/2012/08/Pakistan.RTI_Note_Oct17.pdf and Article 19, *Country Report: The Right to Information*

enable the Deep State to forge strategic alliances with sources of ideological power (for example, right-wing religious groups); *and* – most importantly – allow it to conduct expensive political campaigns to undermine potential challengers such as the political class and the judiciary⁸²⁷. More simply: illicit flows inflate military power by increasing its economic power, which helps fund its strategic alliances with economic and ideological power as well as its operations to undermine its opposition (political and judicial power). The loss of this money – as a consequence of AML-CTF checks – threatens to diminish the military vis-à-vis the other sources of power.

Take the drugs trade as an example of illicit flows. Pakistan has long been Afghanistan's conduit for international trade in poppy, opium and heroin. A former police officer who was deployed in the Gwadar port area close to the Iran border in 2004 says the ISI backed the drugs trade and charged smugglers for protecting their routes. This money, he says, was diverted to militant proxies in Kashmir⁸²⁸. Today, Afghanistan is said to be producing far more drugs than ever before and the ISAF and Nato forces are uninterested in curbing smuggling, particularly since CIA proxies are thought to be running 50 percent of the drugs trade in southern Afghanistan⁸²⁹. In the absence of a viable banking system in Afghanistan, the movement of drugs to Pakistan and money to Afghanistan – whether routed through Dubai or the porous Pak-Afghan border – means significant commissions both ways⁸³⁰. Tighter border security and currency controls – as part of the AML-CTF framework – would then jeopardise this revenue stream for the military establishment, thereby weakening its hold over power.

in Pakistan (November 2015); online <https://www.article19.org/resources/country-report-the-right-to-information-in-pakistan/>.

⁸²⁷ Interview 28, senior journo; Interview 30, senior lawyer.

⁸²⁸ Interview 31, retd senior LEA official. As early as 1994, former prime minister Nawaz Sharif had told the *Washington Post* that the-then army chief and ISI chief had approached him with a plan for conducting large-scale heroin deal to fund “covert operations”. John Ward Anderson & Kamran Khan, “Heroin plan by top Pakistanis alleged”, *Washington Post* (September 12, 1994); online https://www.washingtonpost.com/archive/politics/1994/09/12/heroin-plan-by-top-pakistanis-alleged/311942bb-983a-416e-b735-7d71a07ba030/?utm_term=.a6d83f37c04d

⁸²⁹ The rest of the business is controlled by the Taliban. Former Afghan president Hamid Karzai's half-brother Ahmed Wali Karzai was thought to be a kingpin in the illegal opium trade, which helped fund the Taliban insurgency, while being on the CIA payroll. Simon Tisdall, “Ahmed Wali Karzai, the corrupt and lawless face of modern Afghanistan”, *Guardian* (July 12, 2011); online <https://www.theguardian.com/world/2011/jul/12/ahmed-karzai-modern-afghan-warlord>

⁸³⁰ Interview 5, fmr finance minister.

Others point to the fact that corruption – as a source of illicit flows – is institutionally embedded in the military, as evidenced by unexplained accounts of its wealth; its corporate holdings and landholdings⁸³¹. There are also accounts of problematic and/or curious investments by or on behalf of the Deep State. For example, the news broadcast channel Bol is widely believed to have a strong link with the military establishment, including funding⁸³², while the ISI is believed to have funded, partially or completely, two expensive war films in Pakistan as well as a spy thriller out of Bollywood, which featured an ISI operative⁸³³. Both media can be seen as attempts to harness ideological power in service of military power. Significantly, most of the information about this wealth remains beyond public scrutiny. (Even corruption in defence deals rarely comes to the public eye⁸³⁴ and even when it does, the details are never disclosed.) While the fillip to the economic clout of the military – and, as a corollary, its power – is indisputable, the money also reduces the military’s dependence on the state for both funding and the provision of public services. For example, the business conglomerate Fauji Foundation was expressly set up to provide for former servicepersons and runs medical facilities, schools, colleges and training centres⁸³⁵.

⁸³¹ Interview 24, senior journo. The military’s wealth is understood to originally stem from its monopoly over logistics; the construction of large infrastructure projects and state-sanctioned real estate. The military-owned and run Fauji Foundation, for example, is one of the oldest and largest conglomerates in the country and includes businesses as diverse as power, gas, cement, fertilizer, cereals, dairy, banking and seeds. Interestingly, dog-lovers in Pakistan also speak of dog-breeding and training centres at military-owned farms near Kahuta. Amber Arshad, “Interview: Aamir Khawas”, *Aurora* (Nov-Dec 2016); online <https://aurora.dawn.com/news/1141640>. While badly written and analytically unsound, Siddiqa remains a useful overview of the military-industrial complex in Pakistan. Ayesha Siddiqa, *Military Inc.: inside Pakistan’s military economy* (Oxford, Oxford University Press, 2007).

⁸³² See, for example, Editorial, “The War on Jang”, *Newsweek* (November 26, 2014); online <http://newsweekpakistan.com/the-war-on-jang/>. Besides a line-up of pro-establishment journalists and propagating a distinctly pro-establishment narrative, the channel gained additional notoriety in 2017 for levelling blasphemy allegations against competitor Jang Group. Interview 28, senior journo. Earlier, its ostensible owner was convicted for running a business peddling fake degrees from US educational institutions.

⁸³³ Interview 24, senior journo. Interestingly, the interviewee quotes one of Pakistan’s most acclaimed auteurs as having said that the ISPR has the best production facilities in the country. This is especially significant in a country that is home to some 80 news channels of varying sizes.

⁸³⁴ An exception was the case of former navy chief Mansoorul Haq. While he was ostensibly investigated, the investigation was conducted by the navy itself and Haq was allowed a plea bargain. The details of the investigation or the terms of the plea bargain were not made public. Dawn report, “Ex-chief of Navy stripped of rank, benefits”, *Dawn* (January 31, 2002); online <https://www.dawn.com/news/17343>.

⁸³⁵ Arshad supra note 831. Since the facilities also provide services to civilians, there is a significant revenue aspect in addition to the benefits provided to former servicepersons.

However, the most significant advantage of illicit flows is that, first, they enable the funding of what one commentator calls “political-type proxies⁸³⁶” against political power. Since the 1990s, the military establishment has been known to fund the electoral campaigns of politicians running against those perceived as ‘anti-establishment’. In 1990, for example, the ISI raised Rs 140 million to fund the electoral campaigns of Benazir Bhutto’s rival Nawaz Sharif in a bid to prevent her re-election as prime minister⁸³⁷. For the 2018 elections, the ISI and the army are understood as having performed the same role for Imran Khan, this time against Nawaz Sharif. Both the ISI and the army are said to have helped fund Khan’s rallies across the country; persuaded winning candidates from other parties to defect to Khan’s party; bullied the press to positively review Khan’s campaign and attack Sharif; and detained, harassed and disqualified Sharif’s party workers from contesting the elections⁸³⁸. Further, in order to support Khan form a robust coalition in the Parliament, the army also facilitated the meteoric rise of three political parties including Hafiz Saeed’s Milli Muslim League; the Ahl-e-Sunnat-wal-Jamaat, which has ties to the Islamic State; and the Tehreek-e-Labbaik Pakistan⁸³⁹. The choice of these three was particularly interesting: not only religious parties have historically performed poorly at the hustings, the first two have documented links with proscribed militant groups⁸⁴⁰ while the third happens to be a far-religious party⁸⁴¹. However, the choice validates Sassen’s puissance-in-powerlessness thesis in that these non-elite groups have managed to create a new kind of political power. Significantly, FATF is said to have raised the issue in a June 2018 letter, where

⁸³⁶ Interview 28, senior journo. He adds the qualifier “type” to underscore the fact that while they may behave as politicians, such proxies mostly have dubious political credentials.

⁸³⁷ The then Director General of the ISI submitted an affidavit to this effect in the Supreme Court of Pakistan during a 2012 hearing of the case. Dawn report supra note 642.

⁸³⁸ Christine C. Fair, “Pakistan’s sham election: how the army chose Imran Khan”, *Foreign Affairs* (July 27, 2018); online <https://www.foreignaffairs.com/articles/pakistan/2018-07-27/pakistans-sham-election>

⁸³⁹ Fair supra note 838

⁸⁴⁰ According to one estimate, some 452 candidates from banned organisations were allowed to contest the national and provincial elections. Interview 17, senior parliamentarian.

⁸⁴¹ See Fair supra note 838 for an overview of the 2018 elections, focusing specifically on the nexus between the military establishment, militant groups and religious parties. In a particularly trenchant paragraph, Fair, a long-time observer of Pakistani politics writes: “The army was hell-bent upon securing [now prime minister Imran] Khan’s victory and even encouraged political parties with overt ties to terrorist groups to field several hundred candidates, alongside some 1,500 candidates tied to Pakistan’s right-wing Islamist parties. These right-wing groups will help forge Khan’s electoral coalition, underwritten by Pakistan’s army and the powerful Inter-Services Intelligence (ISI), the intelligence agency that does the army’s dirty work at home and abroad.”

it is said to have asked how the Parliament would legislate on AML-CTF issues when proscribed persons or members of proscribed groups were in Parliament⁸⁴².

The 2018 elections also featured a more sophisticated political calculus than the 1990 one: candidates were funded not just on their ability to win outright but also their ability to serve as ‘spoilers’ who would cause the vote to be split between the spoiler and the anti-establishment candidate and thus (indirectly) secure the win of the establishment-backed candidate⁸⁴³.

(Perversely, the calculus bears out the degrees-of-power thesis where one’s power can be increased by strategic alliances with other groups but also, as in this case, by promoting ruptures and cleavages in another’s power and thereby, diminishing their power.) Increasingly of late, such proxies have also been mobilised to pressure sitting governments: for three successive years between 2012 and 2014, for example, Pakistani-Canadian preacher Tahirul Qadri led well-attended anti-corruption protests and sit-ins against two successive governments. The military establishment initially ignored the disruption and subsequently, when the protests turned violent, offered to mediate in response to the government’s call for military reinforcements⁸⁴⁴. In

⁸⁴² Interview 9, retd senior Nacta official.

⁸⁴³ Interview 28, senior journo. He is talking specifically about the propping up of Khadim Hussain Rizvi, the leader of a far-right religious group turned political party (Tehreek-e-Labbaik Pakistan). Rizvi did not win any seat in the legislature; his primary function in the elections, it is said, was to split the religious vote with Nawaz Sharif so that Imran Khan’s party could win.

⁸⁴⁴ Irfan Haider & Matin Haider, “[Battleground Islamabad: Imran vows to advance as clashes continue](https://www.dawn.com/news/1128786/qadri-directs-marchers-to-move-towards-pm-house-peacefully)”, *Dawn* (August 30, 2014); online <https://www.dawn.com/news/1128786/qadri-directs-marchers-to-move-towards-pm-house-peacefully>. The protests and sit-ins demanding the immediate ouster of the governments for corruption were particularly interesting for four reasons. First, the corruption focus in Pakistani politics is mostly associated with pro-establishment parties dating to the narrative established during military dictator Ziaul Haq’s sledgehammering of parliamentary politics. Second, Qadri lacked solid political credentials: after an abortive career as a parliamentarian under Musharraf, Qadri moved to Canada in 2005 where he is thought to have stayed till his abrupt public appearance in Pakistan in 2012. To be able to mobilise sizeable crowds against successive governments led by two of the largest mainstream political parties – Sharif’s Pakistan Muslim League (Nawaz) and Bhutto’s Pakistan Peoples Party – would have required an equally powerful, national-level political opponent. However, Qadri seemed above such considerations and didn’t even bother with alliances with smaller political parties. Third, for a politician with tenuous links to the grassroots, the mobilisation of thousands of supporters at days- and weeks-long protests was remarkable. This is not only in terms of the numbers but also because his supporters – including women – seemed to have no day jobs and seemed perfectly content to camp out in neat rows of non-winterised tents in the Islamabad winters. This led many Pakistani analysts to the conclusion that the ‘supporters’ were, in fact, ‘hired’ from madrassahs surrounding Islamabad. Finally, the ‘campaign’ included an extensive television advertising campaign, the funding for which Qadri did not justify, although he is believed to have the financial support of both Saudi backers as well as the military establishment. For a neat read of the politics surrounding the 2013 campaign, see Declan Walsh, “Internal forces besiege Pakistan ahead of voting”, *New York Times* (January 15, 2013); online <https://www.nytimes.com/2013/01/16/world/asia/pakistan-high-court-orders-arrest-of-prime-minister.html>.

November 2017, TLP leader Khadim Hussain Rizvi also staged a three-week sit-in in Islamabad in protest against the Nawaz Sharif government⁸⁴⁵. The ‘resolution’ of the crisis was also mediated by the army chief and video footage showed the director general of a paramilitary outfit distributing cash to protesters, both events confirming suspicions that the military establishment had encouraged and facilitated the protest against the embattled Sharif government⁸⁴⁶.

This ability to co-opt and mobilise the ideological power of religious groups against political power depends on the military’s *economic* ability to fund these groups but, as significantly, on the its own *ideological* power as well. Given the circumstances at the time of Partition, the Pakistani ‘nation’ required a greater ideology that would justify the division of the subcontinent and distinguish ‘Pakistanis’ from Indians (and, subsequently, from the West). Simply, the new nation needed an identity and the logical one was a ‘Muslim’ identity. Inevitably, Pakistan’s then poorly-resourced military also drew on this collective identity formation exercise to make up for the deficiencies of its troops and arsenal⁸⁴⁷. Pakistan’s current ideology, or what differentiates it from others on the global stage, is predicated on this historically derived Muslim identity as well as its nuclear capability⁸⁴⁸. Since the military establishment retains control over Pakistan’s nuclear weapons and the Muslim identity of the armed forces was reinforced during the 11 years of Ziaul Haq’s rule, the military establishment thus imagines itself to be the *embodiment* of the ideology of Pakistan: beyond challenge or reproach itself but also a logical aggregator for Pakistani ideology⁸⁴⁹.

However, this ideological power needs unpacking. First, the ‘exalted’ status as embodiment-aggregator is a Weberian myth of superiority, assiduously constructed and promoted by the military establishment itself, to secure greater legitimacy for itself as the dominant power in Pakistan. Second, this ideological power also shapes the military’s decision-making. As Mann contends, the calculation of interests is influenced by all entwined sources of power and involves

⁸⁴⁵ Rizvi is known for inflammatory hate speech in support of the controversial blasphemy laws. The protest was triggered by a minor change in the language of electoral laws that Rizvi denounced as blasphemous. The protest was particularly ironic since Sharif’s party subscribes to a conservative, right-wing politics itself.

⁸⁴⁶ Kalbe Ali, “Who is Khadim Hussain Rizvi?”, *Dawn* (December 3, 2017); online <https://www.dawn.com/news/1374182>

⁸⁴⁷ For a neat read, see Jalal supra note 15 and Jaffrelot supra note 14.

⁸⁴⁸ Interview 24, senior journo.

⁸⁴⁹ Interview 24, senior journo.

norms that stem from complex attachments to imagined communities of nation. The embodiment-aggregator myth, as a manifestation of ideological power, is what enables the military to *conflate* ‘Pakistan’ with ‘Pakistan Army’ and *project* the entwined military, political, economic interests of the military establishment *as those of ‘Pakistan’*. The project to undermine political power, for example, is transformed from a for-military project to a for-Pakistan one. Meanwhile, the availability of illicit monies makes it easier to simultaneously exercise ideological as well as economic levers against political power⁸⁵⁰. Tighter AML-CTF controls thus represent a significant threat to the Deep State’s ability to take down challengers to its power and, consequently, its existing predominance.

Political power

As acknowledgement of the relational aspect of power, some contend that the civil-military imbalance and the abiding influence of the Deep State on state policy regarding AML-CTF regulation owes to the inertia of the other sources of power⁸⁵¹. However, in line with Kennedy’s contention that the positions of power actors are ossified remains of previous battles, realists point to the inherently fragile nature of political power as collectively embodied by the parliament. Unless the various arms of the state implement the will of the legislature, they contend, the difference between the AML-CTF regulations Pakistan endorses and the ones on its books will remain intact⁸⁵².

The most significant example of this regulatory schizophrenia is the ‘renaming’ controversy. Following Musharraf’s proscription of UN-sanctioned militant groups in 2002, many simply changed their names and carried on with business as usual. When some parliamentarians raised the issue in Parliament, the military government fobbed them off⁸⁵³. In 2013, the parliament amended the Anti-Terrorism Act to cover the renamed entities but to little effect⁸⁵⁴.

Parliamentarians who questioned the Jamaatud Dawa’s impunity were told that the government was bound by the Lahore High Court verdict in Saeed’s favour. However, the government had

⁸⁵⁰ Interview 24, senior journo.

⁸⁵¹ Interview 6, LEA official; Interview 15, senior parliamentarian.

⁸⁵² Interview 15, senior parliamentarian.

⁸⁵³ Interview 15, senior parliamentarian.

⁸⁵⁴ For example, the LeT/JuD’s welfare arm Falah-e-Insaniyat continued to operate visibly in the relief operations after an attack on the Shia minority in Balochistan and Hafiz Saeed continued to drift in and out of house arrest.

no answers as to why it had not appealed the decision before the Supreme Court and did not provide a copy of the verdict to the house till a Senate chairman ruling to the effect. The court verdict, say parliamentarians, showed that the state never intended the charges to stick since weaknesses were deliberately baked into the case. As per the Anti-terrorism Act, the government is meant to notify a person who is placed on the list of proscribed persons. Since the government had not done so in Saeed's case, the court was forced to release him⁸⁵⁵.

The move, say many, is part of a concerted strategy to enfeeble and delegitimise political representatives and institutions in relation to the military. Historically, moves by civilian governments to improve Pak-India relations have been torpedoed by attacks in India⁸⁵⁶. On the FATF issue specifically, most parliamentarians (and even government officials in key departments) confessed to a stupefying ignorance⁸⁵⁷. Despite requests to the government, the meetings with FATF and the APG are not discussed in the Parliament and most parliamentarians rely on the media for news about developments including the grey listing itself⁸⁵⁸. Critically, even "the government" is often unaware of what is happening: for example, while India was investigating the attack on its Air Force Station at Pathankot in 2016, it provided certain phone numbers to Pakistan for further investigation. Recorded debates in the National Assembly and the Senate show both the Ministry of Interior and the Ministry of Foreign Affairs attempting to shift responsibility onto each other. Eventually, the interior ministry told the houses that the "state agencies" were dealing with the issue. However, the intelligence agencies never came to Parliament to brief the parliamentarians⁸⁵⁹. The point is critical: the legitimacy or validity of parliamentary power too rests on its *recognition* by others; by refusing to submit to parliamentary scrutiny, the military establishment implicitly eroded the parliamentary claim to legitimate power.

⁸⁵⁵ Interview 15, senior parliamentarian.

⁸⁵⁶ Interview 15, senior parliamentarian. The 2016 attack on an Indian Air Force Station at Pathankot happened shortly after Sharif invited Indian PM Narendra Modi to Pakistan; the Mumbai attack in 2008 happened a few days after Zardari committed to a no-first-use policy on nuclear weapons and offered trade talks to India; and Kargil happened after Sharif invited Indian PM Atal Bihari Vajpayee to India.

⁸⁵⁷ Interview 17, senior parliamentarian; Interview 16, bureaucrat; Interview 8, senior LEA official; Interview 15, senior parliamentarian. An official at the FIA endearingly confessed that he and his assistant were both "still learning" about AML-CTF regulation.

⁸⁵⁸ Interview 17, senior parliamentarian.

⁸⁵⁹ Interview 15, senior parliamentarian.

Other than their vulnerability to the machinations and the campaigns of the Deep State, politicians also admit to fear of the militant groups they are expected to legislate against⁸⁶⁰. Further, as money launderers are mostly influential persons – wealthy Pakistanis, big business, politicians, bureaucrats, military officials etc, many of whom also comprise the Deep State – they also have a significant influence on both the legislators and the laws they pass (that is, through state and/or regulatory capture)⁸⁶¹. More simply, there is no real drive to legislate on AML-CTF issues⁸⁶².

The involvement of these powerful vested interests and/ or influential persons also has a bearing on *how* AML-CTF regulation is enforced, thereby re-entrenching established power relations. For example, when the central bank detected money laundering by PPP chief Asif Zardari in 2015, the case was fast-tracked due to the establishment’s desire to bring Zardari down. However, the timing of the case coincided with the Deep State campaign to torpedo Nawaz Sharif’s re-election chances. In exchange for laxity in the money laundering case, the PPP is said to have collaborated with the security establishment in enfeebling Sharif and expediting his fall from power⁸⁶³; to deliver their end of the bargain, the security agencies are said to have deliberately tampered with the evidence and investigations against Zardari⁸⁶⁴.

Judicial power

According to Mann, judicial power belongs with political power. However, in Pakistan, it deserves a category of its own. Following from the reasons Mann chooses to distinguish military power from political power⁸⁶⁵, first, judicial power in Pakistan is both administratively and

⁸⁶⁰ Interview 15, senior parliamentarian; Interview 17, senior parliamentarian. One parliamentarian reports a visit by LeT members to his house while he was raising terrorism related issues in the Parliament. While the parliamentarian was not threatened overtly, the visit was meant to be perceived for the intimidation it was. Another parliamentarian argues persuasively, “Given the current environment in Pakistan, once one has members of proscribed organisations within the Parliament, even people such as me would self-censor their speech for fear of being misunderstood and accused of blasphemy. The entire Parliament would be held hostage.”

⁸⁶¹ Interview 10, senior journo.

⁸⁶² Interview 17, senior parliamentarian.

⁸⁶³ Interview 28, senior journo. He is specifically referring to Sharif’s losing Balochistan as well as his two-thirds majority in the Senate.

⁸⁶⁴ Interview 10, senior journo. In another interview in August 2018, Zardari’s lawyer said that while Zardari’s case was being heard by a banking court, the state had not formulated the specific charge of money laundering till then. Interview 7, lawyer.

⁸⁶⁵ Mann contends that military and political power need to be seen as analytically distinct since a) military and political power are administratively distinct; b) military power has some power autonomy; c) some armed forces

institutionally distinct from political power. Second, the superior judiciary retains significant power autonomy vis-à-vis political power. This is reflected by both its independence in decision-making – especially in cases challenging the government and its administrative apparatuses – and, more crucially, by judicial appointment processes. Historically, the superior courts had retained the right to appoint judges. While the Parliament attempted to wrest control of this process through the eighteenth constitutional amendment, tough opposition by the superior judiciary led to a compromise where there was a role carved out for parliamentarians but the judiciary retained the upper hand⁸⁶⁶. Third, with its *independent* administration of judicial enquiry commissions, the judiciary has also carved out spaces for itself insulated from political power and control. Finally, with the wave of judicial activism seen under former chief justice of Pakistan Iftikhar Muhammad Chaudhry, the judiciary has ventured into what is a no-go area for political power: civil-military relations⁸⁶⁷. As such, judicial power deserves to be recognised as independent of political power.

The role of the judiciary in AML-CTF cases is significant because the doctrine of separation of powers⁸⁶⁸ lies at the heart of the Pakistani constitution. As such, the existing AML-CTF legislation features the judiciary as a key actor. For example, the attachment of property in money laundering cases under the Anti Money Laundering Act of 2010 can only be authorised by the courts; even where an investigation officer finds a property implicated in a case, the court

are not organized by the state; and d) the military can conquer new territory while political power can only rule within its territory. Mann Vol 1; p xiv

⁸⁶⁶ The nineteenth constitutional amendment describes a nine- or 13-member judicial commission that selects candidates for, respectively, the Supreme Court of Pakistan or the provincial high courts. Significantly, the majority in both commissions is commanded by serving and former judges (six and eight, respectively) with two or three seats, respectively, reserved for law ministers (federal and provincial, as the case may be) and the Attorney General of Pakistan. The commission forwards the name of one candidate to an eight-member parliamentary committee, with seats evenly divided between Treasury and Opposition members, that can only reject a nominee with a two-thirds majority, for reasons to be recorded in writing. Upon such rejection, the judicial commission will revert with another candidate. Article 175A, Constitution of Pakistan; available at <http://www.pakistani.org/pakistan/constitution/part7.ch1.html#f407>

⁸⁶⁷ While Mann was referring to *physical* territory in his explication regarding military power, analytically, the analogy holds good for judicial power. With a liberal use of suo moto powers, the Supreme Court challenged the impunity of the Deep State and attempted to hold it to account for its excesses, especially in cases regarding preventive detention; the privatisation of state-owned entities by the military government; and, critically the unconstitutional deposing of judges of the superior courts. For a fuller discussion of judicial politics in the context of civil-military relations, see Ahmed 2015a supra note 683.

⁸⁶⁸ This doctrine of constitutional law separates the three branches of government – the executive, the legislature and the judiciary – so that the power of each functions as a check on the power and excesses of the other branches. https://www.law.cornell.edu/wex/separation_of_powers

still needs to confirm such attachment. Similarly, LEAs are expected to file regular investigation reports to the courts; the accused is afforded a hearing before a judge; and only the court can order the forfeiture of property and prescribe punishment for the crime⁸⁶⁹. Similarly, under the Anti Terrorism Act of 1997, judges are expected to supervise and sign off on various procedural and investigative processes (including detention orders, attachment of property and financial investigations) as well as punishments.

After 9/11, the role of judges in ‘terrorism’ cases became particularly significant. Then Supreme Court Chief Justice Iftikhar Muhammad Chaudhry focused on many cases of preventive detention – more popularly known as ‘missing persons’ cases – and served as a considerable check on military excesses. While independent judges had taken on the state earlier as well⁸⁷⁰, Chaudhry initially became the face of judicial resistance to military excesses due to his single-minded pursuit of such cases as well as his two confrontations with Musharraf⁸⁷¹. After Chaudhry’s retirement, however, the judiciary has not proven such an effective deterrent to military excesses in terrorism cases, both because of its own enfeeblement at the hands of the military and the resurgence of military power (discussed below).

Even so, the verdicts delivered by the superior judiciary in cases involving AML-CTF regulation surprised many. For example, not only did the Lahore High Court twice order the release of LeT/JuD’s Hafiz Saeed, there are also other judgements where the courts disregarded the objections of the Election Commission of Pakistan and allowed the electoral candidature of members of proscribed organisations or of those on the terrorism watchlist. Significantly, the

⁸⁶⁹ Interestingly, the FIA identifies the supervisory role assigned to the courts in investigations to be a major “shortcoming” of the Anti Money Laundering Act. Document given by the FIA; on file with author.

⁸⁷⁰ See, for example, *Mazharuddin vs The State* 1998 P Cr L J 1035, in which the Sindh High Court departed from the British precedent on remedies in preventive detention cases and awarded the detinue compensation for having been deprived of his rights to liberty and human dignity; the view was subsequently ratified by the Supreme Court.

⁸⁷¹ The arc of this resurgent judicial power was eventually arrested by Deep State-mounted smear campaigns against Chaudhry as well as public criticism of his hyper-aggressive brand of judicial activism. The first showcases the transformation of a power source as a consequence of the interaction with the other sources of power; the second shows the reflexive internal transformation within a source of power as a consequence of the interaction. See Ahmed 2015a *supra* note 683 for a more detailed analysis of the power politics of this judicial-military encounter.

judiciary disallowed the candidature of several politicians from the mainstream political party PMLN, including Nawaz Sharif himself⁸⁷².

Some attribute the decisions to a general attrition in the quality of judges. The Iftikhar Chaudhry brand of judicial activism in the noughties, they say, sowed the seeds for the present atmosphere where some judges now feel empowered to wilfully pursue their own “agendas” with a cavalier disregard for law, precedent and convention⁸⁷³. Others, however, point out that the release of the JuD chief had more to do with the government than the judiciary. To authorise Saeed’s detention, they say, the courts needed both for the government to have followed proper notification procedure as well as the presentation of evidence against Saeed. Since the state – whether of its own volition or under pressure from the military – failed to deliver on both counts, the courts were forced to let Saeed go⁸⁷⁴.

Yet others corroborate such a reading and point to the other ways judicial decisions are manipulated by the Deep State in AML-CTF cases. In corruption cases against Politically Exposed Persons, for example, the Deep State uses the judiciary for political victimisation by influencing both outcomes⁸⁷⁵ but also the way the case is conducted in court⁸⁷⁶. In the Nawaz

⁸⁷² Maria Abi-Habib, Shah Meer Baloch & Zia-ur-Rehman, “Violent Extremist or Political Candidate? In Pakistan Election, You Can Be Both”, *New York Times* (July 17, 2018); online <https://www.nytimes.com/2018/07/17/world/asia/pakistan-election-extremists.html>

⁸⁷³ Interview 30, senior lawyer. Another interviewee offers the example of an Islamabad High Court judge who delivered a verdict demanding that all TV channels play the azaan [Muslim call to prayer] during regular transmission as well as that of a ‘raid’ on a hospital by the Chief Justice of Pakistan. Interview 17, senior parliamentarian. In the latter case, the CJP had paid a surprise visit on a politician under trial for corruption who had been transferred to the hospital. The judge was there ostensibly to determine whether the prisoner was faking illness to avoid jail – theoretically a task that belongs to the executive. When the judge discovered three bottles of alcohol in the room, he ordered the removal of the prisoner back to jail. Shafi Baloch, Raza Jafferi & Imtiaz Ali, “[Sharjeel Memon sent back to jail after 'liquor bottles' recovered from hospital room](#)”, *Dawn* (September 1, 2018); online <https://www.dawn.com/news/1430344>

⁸⁷⁴ Interview 15, senior parliamentarian.

⁸⁷⁵ Interview 17, senior parliamentarian; Interview 22, rights activist; Interview 7, lawyer; Interview 30, senior lawyer. Further corroboration of these accounts comes from a judge of the Islamabad High Court Shaukat Iqbal Siddiqui who, in 2018, publicly denounced the ISI for pressuring the courts and tampering with the cause lists to convict Nawaz Sharif and his family ahead of the elections. See also Maria Abi-Habib & Salman Masood, “Military’s Influence Casts a Shadow Over Pakistan’s Election”, *New York Times* (July 21, 2018); online <https://www.nytimes.com/2018/07/21/world/asia/pakistan-election-military.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

⁸⁷⁶ For example, judges can authorise a state-led petition (vide agencies such as the Federal Board of Revenue or the National Accountability Board) to transfer a case from a particular accountability court to another with more establishment-sympathetic judges or by choosing to hear such a transfer petition before hearing an appeal to overturn a conviction by a lower court. Interview 30, senior lawyer.

Sharif case, for example, the establishment is thought to have leaned on NAB to move a petition against the granting of bail on medical grounds to Sharif⁸⁷⁷. The Deep State's influence extends to even the composition of benches hearing particular cases⁸⁷⁸ as well as the transfer of judges⁸⁷⁹.

The reasons for the judges' susceptibility are manifold: some judges are understood as either pro-establishment in their personal orientation or survival oriented in that they have decided not to challenge the army⁸⁸⁰. While some are susceptible to bribery⁸⁸¹, yet others are believed to be vulnerable to reputational risk⁸⁸². For example, in the Siddiqui case, his accusations against the ISI were countered by the institution of corruption charges against him by the Islamabad High Court chief justice⁸⁸³. Similarly, when a judicial commission set up to investigate the role of the state in orchestrating the TLP sit-in against Nawaz Sharif in 2017 criticised the role played by the intelligence agencies in politics and suggested greater accountability for them, the lead author was subjected to a vicious campaign by social media trolls⁸⁸⁴, which was followed by calls for his removal from the Supreme Court⁸⁸⁵.

Others point to a broader ideological shift in the judiciary as a consequence of the Islamisation of Pakistani society. Judges are more likely to be lenient with militant groups such as LeT, they say, because of their own religious affiliations⁸⁸⁶. There is also an increasing sense of fear among

⁸⁷⁷ Omar Farooq Khan, "Pakistan SC grants ex-PM Nawaz Sharif bail on medical grounds", *Times of India* (March 26, 2019); online <https://timesofindia.indiatimes.com/world/pakistan/pakistan-sc-grants-ex-pm-nawaz-sharif-bail-on-medical-grounds/articleshow/68580781.cms>

⁸⁷⁸ Interview 30, senior lawyer. He is specifically referring to the composition of the Supreme Court bench formed to hear the Panama Papers case against Nawaz Sharif and the exclusion of a judge who was thought to be pro-Sharif.

⁸⁷⁹ Interview 15, senior parliamentarian.

⁸⁸⁰ Interview 30, senior lawyer; Interview 15, senior parliamentarian; Interview 7, lawyer.

⁸⁸¹ Interview 7, lawyer.

⁸⁸² Interview 30, senior lawyer.

⁸⁸³ Siddiqui was due to retire late in 2018 and a positive determination in the corruption reference would have affected his pension. The move was seen as a bid to convince Siddiqui to resile from his earlier statement about the role of the ISI in the Sharif conviction. Interview 30, senior lawyer.

⁸⁸⁴ Social media trolls are a relatively new feature in the Deep State arsenal. For the last five years, journalists critical of the military establishment or its narrative report concerted and coordinated attacks by scores of trolls, the identity of whom cannot be verified independently.

⁸⁸⁵ I. A. Rehman, "Justice under attack", *Newsline* (May 2019); online https://newslinemagazine.com/magazine/justice-under-attack/?fbclid=IwAR2Yw42USVPMthfoj_APBdSx6lqqZV15qPXGYeImzJiiEmZIMEoS3JUDUVk

⁸⁸⁶ Interview 22, rights activist. As an example of this shift in ideological moorings, he points to former CJP Iftikhar Chaudhry's decision to preside over his own son's case in a clear conflict of interest, compounded by a bizarre twist whereby Chaudhry swore on the Quran that he had no knowledge of his son's shady business activities. Chaudhry later recused himself from the case after the conflict-of-interest issue played out further. See also Jon

judges while adjudicating cases against militants. In 2011, the governor of Punjab Salmaan Taseer was assassinated by one of his own bodyguards Mumtaz Qadri, who interpreted Taseer's show of support for a Christian woman accused of blasphemy as blasphemous conduct in itself. At each court appearance, throngs of religious groups would shower the convicted bodyguard with rose petals. When the high court eventually convicted Qadri, it chose to do so under the criminal code, instead of the Anti-Terrorism Act, a decision attributed to the judges' fear of Qadri's supporters as well as pressure from the Deep State⁸⁸⁷. According to several senior lawyers, judges typically 'sit' on such cases till they find a technicality to exonerate the accused⁸⁸⁸. Till the Musharraf era, say these lawyers, the judges in the trial courts would cede to personal threats by militant groups and convict those accused of blasphemy. While the superior courts would reverse the convictions, now the fear is said to have moved up into the superior judiciary too⁸⁸⁹.

The foregoing would suggest that the judiciary no longer deserves the label of an independent power source and that it is – whether due to the machinations of the Deep State or its self-interest – essentially speaking for the Deep State. However, this would be an unkind and flawed assessment. The strategy pursued by the Deep State serves as a particularly interesting example of how the military, as a source of power, develops *entwined* with political and judicial power. Post Musharraf, the political climate in Pakistan became inhospitable for overt military domination. As such, the military establishment *needed* the judiciary to both serve as a fig leaf and to legitimate its witch hunt against political power. By deploying military power against the judiciary, the Deep State effectively mobilises judicial power to undermine political power. Not only does the strategy enfeeble both judicial and political power by attacking their independence and damaging their claims to legitimacy, it also pre-empts a strategic alliance between the two that could target military power. That said, the point that deserves underscoring is this: as Mann

Boone, "Pakistani chief justice's son accused of taking gifts to influence father", *Guardian* (June 12, 2012); online <https://www.theguardian.com/world/2012/jun/12/pakistan-chief-justice-son-gifts>.

⁸⁸⁷ Interview 30, senior lawyer. Under the Pakistan Penal Code, the victim's family can choose to pardon the murderer in exchange for diyat [blood money]. At that point, the state drops its charges against the convict too. While Taseer's family was also pressured to accept diyat, they refused to do so and Qadri was eventually hanged.

⁸⁸⁸ Interview 30, senior lawyer. As evidence, he points to fact that no senior leader of the notorious militant group Sipah-e-Sahaba Pakistan has ever been convicted.

⁸⁸⁹ Interview 30, senior lawyer.

contends, there is no primacy among powers; there are only multiple, overlapping and intersecting networks of power. Accordingly, even a puissant military still needs judicial power to legitimate and buttress its hold over power and still needs political power to serve as its face. Were either judicial power or political power dependent on or subordinate to military power, they would not be capable of performing either function.

4.4 Conclusion

Despite FATF's insistence on the inherent salubriousness of its 40 recommendations, the trajectory of AML-CTF regulation in Pakistan is a clear indication of the centrality of politics to the entire exercise. The US (and FATF, by extension) continued to ignore Pakistan's transgressions while it suited them and chose to enforce implementation only after the Pak-US relationship had soured. The depth of the enforcement effort obviously underscores the fiction of sovereignty at international law: despite being a sovereign country, Pakistan is clearly not free to decide whether or how to implement AML-CTF controls. More problematically, however, it shows the present AML-CTF regime's failure to appreciate both history and politics and its ham-handed approach to resolving complex issues, which ends up pushing them further under the carpet. In Pakistan, for example, unless the Deep State's motivations for financing militant groups are recognised and addressed, 'global crackdowns' on terrorism financing will result in cosmetic changes that will do little to root out terrorism. Further, this regulatory myopia will only succeed in facilitating selective crackdowns on some militant groups while perversely enfeebling the military establishment's opponents, be they political or judicial. That is, the enforcement of *global* regulation is inadvertently strengthening the existing hegemon in Pakistan by allowing it to cripple other sources of power. This will have profound consequences in the long-term for both Pakistan as well as the region; many of these are manifesting themselves already.

But the other argument for a reassessment of the current AML-CTF regulation is a careful consideration of its perverse effects. There are obvious compliance costs; costs for the political economy and enhanced regulatory burdens for underfunded government institutions and LEAs. But there are also less tangible costs: in a 'broken' democracy such as Pakistan's, can citizens afford the consequent alienation from politics and political power that AML-CTF regulation represents? Where the Deep State has long monitored the lives of citizens, can a polity afford

deeper intrusions and invasive surveillance of their financial dealings? In the absence of a viable, workable social contract, can citizens survive a FATF-mandated policing *of all by all*. The next chapter speaks to these issues.

CHAPTER 5: Looking backward to look forward: assessing the consequences of the AML-CTF regime in Pakistan

A persistent feature of the global anti-money laundering and counter terrorism financing regime is the Armageddon-like imagery deployed by its supporters. Failure to implement appropriate controls, it is said, will result in a veritable tsunami of criminal activity that will drown the global financial system. However, the collective hysteria engendered and perpetuated by this discourse pre-empts a more sober calculation of the problems or consequences associated with the implementation of AML-CTF controls. This chapter looks to supply that deficit.

Following from the categorisation of harms perpetrated by the global AML-CTF regime in Chapter 3, this chapter also segregates the consequences or effects of global regulation into three sets based on their point of origination. The first are the consequences stemming from the flaws in the AML-CTF *conceptual* framework. For example, as discussed in Chapter 3, terrorism financing regulations don't work because they are predicated on a misunderstanding of the *nature* and the *processes of financing* militancy. The second set are the problems specific to the *structure* of an economy and its polity. These include, obviously, the economic costs of compliance as well as non-compliance. The third set of effects are what may be euphemistically called 'collateral damage'. These are the inadvertent, perverse, *political* costs imposed on a polity by the interplay of global and local forces on the terrain of AML-CTF regulation. The chapter discusses the ordinary activity that triggers each of these sets.

This chapter uses the fieldwork conducted in Pakistan to illustrate the problems identified in the secondary literature. Significantly, many of the illustrations throw up additional layers of complexity not captured by the secondary literature but which have critical and far-reaching implications for the study of the global AML-CTF regime. This is because, first, the fundamental conceptual issues that plague the global AML-CTF regime or the inadvertent political costs of implementation apply in Pakistan *as they do elsewhere too*. For example, the inadequacy of global AML-CTF regulation in arresting terrorism (or even the financing thereof) is a global problem⁸⁹⁰. While there are some cultural and country-specific differences – for example, a militant group in Karachi runs banquet halls and restaurants⁸⁹¹ – these are often the manifestation

⁸⁹⁰ See, generally, Biersteker & Eckert supra note 365.

⁸⁹¹ Interview 25, journo.

or localisation of a *global* trend (such as the running of legitimate businesses by militant groups) that global AML-CTF regulation is *incapable* of addressing. To put it another way: the failure to shut down the banquet halls as a source of terrorism financing is not a *jurisdictional law enforcement* failure per se but an example of how global regulators *set up this failure* with their original sin of mischaracterising militancy and its funding as a criminal or a regulatory problem – not a *political* problem – and layering a series of regulatory initiatives on this broken edifice⁸⁹². More simply, AML-CTF regulation fails to check this source of financing because it is not designed to pick up such issues. Pakistan merely exemplifies these *global* problems; it is not the *exemplar*.

Second, even the consequences specific to Pakistan need to be situated in a wider context. While it is tempting to conclude Pakistan's inability to implement AML-CTF regulation owes to the size of its informal economy, the cash-intensive business culture, political corruption or even unregulated madrassahs, the more important point is that Pakistan isn't the only jurisdiction with such issues. The larger point is that the existing AML-CTF regulation, like global economic regulation, does not *accommodate* these differences; instead, it actively seeks to *minimise* and *ignore* difference by foisting regulation that makes little sense in a particular context. For example, the demand for even tighter controls on bank transfers seems excessive in a country where only 21 percent of the population owns an account at a financial institution; half the population is unbanked⁸⁹³; and militancy is financed primarily through cash donations⁸⁹⁴. To flip this: does 21 percent of the population merit such regulatory zealotry when militants are known to avoid the formal banking system altogether?

⁸⁹² FATF encourages countries to evaluate businesses that they suspect of being abused by terrorist organisations using a risk-based assessment and, subsequently, apply AML-CTF controls on the same. FATF recommendations, p 29; available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>. To have identified and applied controls on the said banquet hall, the Pakistani authorities would have needed to conduct an assessment of the entire hospitality industry!

⁸⁹³ Alsi Demirgüç-Kunt, Leora Klapper, Dorothe Singer, Saniya Ansar & Jake Hess, *The global Findex database 2017: measuring financial inclusion and the fintech revolution*. (Washington DC, The World Bank, 2017); online https://globalfindex.worldbank.org/node?field_databank_country_target_id=7 at 35, 125 [Findex]. According to the World Bank, the term “unbanked” refers to people who have neither an account at a financial institution nor through a mobile money provider (p 35). Critically, these unbanked are not just the poor: 60 percent of the unbanked are from the richest households in the country and just 40 percent are from the poorest (p 37).

⁸⁹⁴ Interview 3, LEA official.

The disconnect between global regulation and ground realities is not new: much of the critical literature regarding the Washington Consensus, for example, made a powerful case for nuanced policy prescriptions that accommodated the differences inherent between jurisdictions⁸⁹⁵. That said, this literature was predicated on the considered and considerable *documentation* of what Halliday et al refer to as the public or private “bads” or adverse consequences of a regime. As they rightly note, the FATF regime has proceeded as if it does not produce any bads⁸⁹⁶. While the critical AML-CTF literature features some assessments regarding harms⁸⁹⁷, these are mostly framed as generic issues or ‘developing world’ issues and remain peppered over the literature. Critically, these assessments are never mounted as a systematic critique of the AML-CTF regime. This haphazard focus on the harms – both real and potential – precludes serious policy prescriptions regarding AML-CTF regulations (such as the ones made regarding economic regulations)⁸⁹⁸. While there is a strong general argument to be made for more nuanced financial regulation, a discussion about ‘Pakistan-specific problems’ is interesting because it shows how financial regulation – through AML-CTF controls – is replicating the mistakes of economic regulation.

Finally, Pakistan’s resistance to AML-CTF regulation – or what Sharman & Mistry call lack of “local ownership⁸⁹⁹” – needs to be viewed in light of these very significant economic, political, ideological and even sociological challenges. The representation as Pakistan as a ‘deviant’ needs to be recognised as an attempt to diminish the import and validity of its domestic imperatives.

⁸⁹⁵ See, for example, Stiglitz supra note 3, Amy Chua.

⁸⁹⁶ Halliday et al supra note 412 at 7.

⁸⁹⁷ See, generally, Tsingou supra note 101, Woodiwiss supra note 222, Levi, Sharman & Mistry supra note 18, Halliday et al supra note 412.

⁸⁹⁸ For example, while Halliday et al foresee donations to Islamic charities falling off as a consequence of AML-CTF regulations and argue that this will have a negative impact on societies that depend on these charities for essential social services, they stop short of advocating for regulations that take this considerable harm into account. (Halliday et al supra note 412 at 51) Similarly, while Sharman and Mistry attempt a serious evaluation of the consequences of AML-CTF regulation for small developing countries, their findings are restricted to the impact on the financial services industry and, as a corollary, the economy. Accordingly, their conclusion that AML-CTF regulation needs to be customised at the national level is limited to ensuring “a more equitable sharing of the burden without producing further risks”. Unfairness, to Sharman & Mistry, is the fact that smaller jurisdictions shoulder significant regulatory burdens, not that the current AML-CTF regime ignores the domestic imperatives of these countries. To rephrase: they want regulations customised to deliver a formalistic equality between different states (that is, all states should share the burden alike), *not* a substantive equality that recognises that differently-situated states have different regulatory *needs* and treats them accordingly. Sharman & Mistry supra note 18.

⁸⁹⁹ Sharman & Mistry supra note 18 at 166.

5.1 Conceptual problems

All interviewees who have studied money laundering and terrorism financing during the course of their work agree that the existing regulations are entirely inadequate to impeding, let alone arresting either phenomenon. The core issue, as ever, is the global regulator's fundamental misunderstanding of the issues involved.

Take, for example, the centrality of banks to the AML-CTF effort. Given FATF's emphasis on the collection of copious amounts of data regarding clients, the responses of bankers are particularly instructive. Significantly, none of the bankers see the greylisting as anything other than a political move by the US; the primary problem, all agree, is the transshipment of drugs from Afghanistan and the Pakistani state's policy regarding militants⁹⁰⁰. More interesting, however, is how many see their own role: as one former compliance head for the Middle East and North Africa region for a global bank remarks cynically, given the volume of illicit funds circling the globe, the banking industry is better equipped to deal with the problem than any other⁹⁰¹. The observation makes intuitive sense: banks represent an easier regulatory target in that the enhancement of regulation has not required a widespread political consensus. Further, and perhaps more significantly, the regulation has been successfully operationalised without having a completely chilling effect on money laundering activity – an objective dear to some regulators⁹⁰². Indeed, as some point out, the existing AML-CTF regime is completely slanted towards rich countries in the West in that the point of *origination* of money laundering is being targeted as opposed to the *destination* jurisdictions⁹⁰³.

The argument is an indication of the material aspects of power as compared to its ideational aspects and cuts to the heart of matter identified by several AML-CTF critics: the lack of corporate (and political) will in impeding money laundering and the regulator's failure to admit this. Banks make money from money; more is more. Like their counterparts all over the world, bankers in Pakistan look to meet performance targets that are linked to deposits⁹⁰⁴. While

⁹⁰⁰ Interview 1, senior banker; Interview 2, senior banker; Interview 20, senior banker.

⁹⁰¹ Interview 20, senior banker.

⁹⁰² For a discussion of the conflicting objectives of the regulators, see Chapter 3.

⁹⁰³ Interview 5, fmr finance minister.

⁹⁰⁴ Interview 20, senior banker.

compliance heads may wish them to focus on target markets with clean sources of funds⁹⁰⁵, most bankers end up chasing fund volumes irrespective of the source of funds. Even the stringent complexity of AML-CTF reporting regulations is largely ineffective: the bank account opening form in Pakistan, for example, is a dense 16-page document that relationship managers usually end up filling out themselves instead of asking the clients to do so. As a consequence, the bank knows even less about the client than it claims to⁹⁰⁶. Further, there is institutional segregation of the boots-on-ground bankers and those responsible for effecting AML-CTF compliance, with the former often pushing the latter for quick approvals without meaningful evaluations⁹⁰⁷. As one banker argues, since the compliance people mostly shuffle paperwork and rarely meet clients, they don't learn to mine inconsistencies between the client's profile and their paperwork⁹⁰⁸.

There is also widespread resentment over the AML-CTF push from the State Bank of Pakistan (SBP). Bankers say that the banking regulator is focused on 'proving' to FATF that the sector is AML-CTF compliant and chooses to ignore the fact that capacity constraints make achieving compliance extraordinarily difficult for most banks⁹⁰⁹. These constraints travel upwards to the regulator too: in 2017, when a US regulator detected money laundering by HBL, Pakistan's largest bank, Pakistani politicians placed the onus on the SBP for not knowing about HBL's activities. However, bankers point to the fact that SBP was largely uninterested in knowing⁹¹⁰. Even the LEAs, they say, mostly collect evidence for political leverage, not prosecution; one banker confided that the earliest request for information from an LEA to his bank was made in 2004 – much before Pakistan was greylisted⁹¹¹. The anecdote further confirms how AML-CTF

⁹⁰⁵ Interview 2, senior banker.

⁹⁰⁶ Interview 2, senior banker.

⁹⁰⁷ Interview 20, senior banker. He uses the specific example of Citibank, saying the problem was endemic in the US as compared to Europe.

⁹⁰⁸ Interview 2, senior banker. An example of the sort of inconsistencies a compliance officer is meant to focus on is when a company reports 20 percent export growth at a time when most exports from Pakistan are recording negative growth. The discrepancy, says the interviewee, needs to be mined further to discover whether the export figures are accurate or the business is a front for money laundering.

⁹⁰⁹ According to the interviewee, three of the largest banks in Pakistan by market share (the three account for 60 percent of the total market) have received letters from the US regarding their compliance efforts and all three are "struggling" to improve compliance. He estimates the cost of effecting compliance as roughly the same as the cost of fines for non-compliance: the equivalent of one year's earnings to effect an initial compliance and two percent of the bottomline for on-going compliance. Interview 2, senior banker. The figures provide an insight into the string of money laundering fines for banks: if the cost of compliance is roughly the same as the fine, there would be little incentive for the banks to pay in advance.

⁹¹⁰ Interview 2, senior banker; Interview 20, senior banker.

⁹¹¹ Interview 2, senior banker.

regulation exacerbates skewed power dynamics in a polity by privileging those who hold power already.

For their part, SBP officials worry that the “mindboggling level of scrutiny” is increasing compliance costs besides causing overregulation and micromanagement that will hurt their financial inclusion targets and, consequently, the growth of the economy⁹¹². There is both significant resentment and exasperation about the fact that FATF and the US, while understanding that many of the regulations don’t fit in a developing country context, continue to push for “overregulation”⁹¹³. For example, while a crackdown on the “460 illegal hundi operators”⁹¹⁴ may be desirable from FATF’s perspective, Pakistan’s economy relies on the annual remittances worth some \$20 billion⁹¹⁵ and the central bank needs to balance FATF’s desires with its own needs.

Critically, argue some interviewees, FATF regulations do not acknowledge either real-world processes or the evolution of laundering typologies – a point often raised in the secondary literature. Even the FIA – with its limited abilities – readily concedes that it has had to shift its “traditional focus” from cash smuggling/ hundi/ hawalah/ foreign exchange traders to trade malpractices (which form the bulk of laundering in Pakistan); commercial bank fraud; cybercrimes and gifts⁹¹⁶. However, they say, FATF *still* fails to recognise that most of the money from laundered from Pakistan *does not cross borders* due to hundi/ hawala, which save transaction costs, and this fact renders AML-CTF controls redundant⁹¹⁷. (While some hundi

⁹¹² This is because, with banks as intermediaries, household savings help finance the activities in an economy. Lower savings rates typically increase the dependence of a country on external flows such as debt, foreign aid, remittances etc. The banking sector in Pakistan serves only six million borrowers (3.6 percent of its population) while the 25 million depositors account for just 15 percent of its population.

<http://www.sbp.org.pk/MFD/FIP/index.htm#why>.

⁹¹³ Among plans to increase financial inclusion from the current SBP-generated figure of 27 percent (Findex supra note 893 pegs inclusion at 21 percent for 2017) are the expansion of branchless banking and the provision of mobile wallets, both of which are threatened by tighter AML-CTF regulation. The SBP frustration stems from the fact that FATF does not seem to appreciate either that mobile wallets etc are linked to biometrics or the lack of empirical evidence proving that the wallets are being used for terrorism financing. Interview 32, banking regulator.

⁹¹⁴ Interview 32, banking regulator.

⁹¹⁵ <http://www.sbp.org.pk/ecodata/index2.asp>. Significantly, most of the amounts involved – more than 90 percent – are said to be worth a few thousand dollars. Interview 5, fmr finance minister.

⁹¹⁶ Interview 19, LEA official.

⁹¹⁷ Interview 5, fmr finance minister; Interview 19, LEA official.

operators in Pakistan use banks for settlement, there are enough creative ways around this problem too: in the UK, for example, air tickets are frequently used for settlement⁹¹⁸.)

The inadequacies of the AML-CTF regime as applicable to banks are far sharper when it comes to terrorism financing. Many point to the fact that data analysis at banks – as distinct from data collection – requires the development of typologies predicated on patterns. Since militants and militant groups do not follow patterns – there are no monthly withdrawals or weekly payments, for example – identifying suspicious clients becomes that much more difficult⁹¹⁹. Further, even data analysis depends on the quality of the data analyst. The AML-CTF compliance head for a large bank in Pakistan gave the example of the mandated scrutiny of government-issued ID documents prior to the opening of an account. A recent case involved accounts where the accountholder's 'residential address' was a mailing box and their mailing address was a madrassah. The fact that the accountholder provided a NICOP issued in Saudi Arabia⁹²⁰ as his ID document rang alarm bells for the compliance chief; however, his data analyst and the banker who opened the account both failed to appreciate the significance⁹²¹.

That said, the banks are the least of the problem. Terrorism financing regulation *does not* work, say LEAs, because FATF doesn't understand how the terrorism funding *model* works. For one, religiously-motivated terrorism is a cash-intensive business and is not usually conducted via banks⁹²². Second, terrorism financing draws on multiple sources of funding simultaneously – some legitimate; others, less so. While crackdowns on the illegitimate activities are possible, hitting legitimate activities is far harder. Finally, the regulation doesn't account for reflexive, internal transformation: how militant groups resist the power of the AML-CTF regime by devising new financing strategies⁹²³.

⁹¹⁸ Interview 29, academic.

⁹¹⁹ Interview 20, senior banker; Interview 2, senior banker.

⁹²⁰ Citizens resident in Pakistan are issued Computerised National Identity Cards (CNICs) by the National Database and Registration Authority while citizens resident abroad are issued National Identity Cards for Overseas Pakistanis (NICOPs) by the Pakistani embassies or foreign missions in such countries.

⁹²¹ Interview 2, senior banker. The Saudi connection is relevant because one wave of the Islamisation evidenced in contemporary Pakistani society is attributed to expat workers resident in the Middle East. In either visits or upon their return to Pakistan, these workers are seen as bringing a distinctly Wahabi, ultra conservative interpretation of Islam to Pakistan.

⁹²² Interview 3, LEA official.

⁹²³ See, generally, the essays by Biersteker & Eckert, Stern & Modi and Gunaratna in Biersteker & Eckert *supra* note 365.

Consider all the legitimate ways militancy is financed. After 9/11, al Qaeda spearheaded a shift towards legitimate businesses that would generate constant income streams⁹²⁴. This was to reduce the dependence on unreliable funding streams (whether from rich donors or crime), which were further affected by regulatory crackdowns. In Peshawar, a hotel was said to be a front⁹²⁵; elsewhere, trading companies were set up to trade commodities including sugar. Some militant groups set up for-profit schools and hospitals⁹²⁶; one group is said to run 40 textile companies with multiple contracts from foreign universities for supplying monogrammed T-shirts and caps⁹²⁷. A militant group in Karachi owns a banquet hall, a restaurant as well as rental properties. On the side, they also steal water from government hydrants to supply to corporations in an industrial zone at subsidised rates⁹²⁸. These are in addition to membership fees (especially for religious groups) and the militant ‘lecture circuit’⁹²⁹. While the sale of jihadi literature was once a prominent source of funding, technology has been a significant disruptor: militant groups are increasingly publishing material online. The Hizb-ut-Tahrir, for example, which famously set up a publishing house in Peshawar in the early noughties⁹³⁰, now sends messages to supporters in Pakistan via Whatsapp⁹³¹.

The other major source of legitimate financing is private philanthropy. Pakistan is home to a multibillion-dollar philanthropic regime – among the largest in the world⁹³². Since this

⁹²⁴ Rohan Gunaratna, “The evolution of al Qaeda” in Biersteker & Eckert supra note 365 at 48, 57; interview 9, retd senior Nacta official.

⁹²⁵ Interview 9, retd senior Nacta official.

⁹²⁶ Interview 11, security expert.

⁹²⁷ Interview 27, aid worker.

⁹²⁸ Interview 25, journo.

⁹²⁹ Ahmed and Beare supra note 485.

⁹³⁰ Zeyno Baran, *Hizb-ut-Tahrir: Islam’s political insurgency* (Washington DC, The Nixon Centre, 2004); online http://www.bits.de/public/documents/US_Terrorist_Attacks/Hizbut-ahrirIslam'sPoliticalInsurgency.pdf at 42.

⁹³¹ Interview 4, journo. While the Whatsapp model is free, an interesting innovation could be the monetization of the service by the institution of a small charge for sending messages to cell phones.

⁹³² Interview 24, senior journo. This philanthropy has enabled welfare organisations to supply even the deficits of the state: the Edhi Foundation, Pakistan’s oldest and largest welfare organization, for example, runs hospitals and clinics; ambulances; morgues; orphanages; shelters for women, the elderly, and the mentally impaired; animal shelters; soup kitchens besides providing educational services; employment schemes as well as services to help locate missing persons and assist refugees. Across Pakistan, ambulances are run by welfare organisations.

philanthropy is rooted in community and religion⁹³³, it is relatively difficult to dislodge⁹³⁴. This philanthropy taps into marginal political groups – ethnic, religious and small nationalist groups. Some of these groups are neutral in terms of their impact on the state but the largest group comprise the religious parties (including militant groups) used by the state as an instrument of foreign policy⁹³⁵. Of the total amount of philanthropy in Pakistan, estimate aid workers, between one and three percent goes to welfare organisations that are secular in their orientation while more than 90 percent is diverted to madrassahs, mosques and a few large charities associated with certain militant groups⁹³⁶. (Sectarian groups are also significant beneficiaries⁹³⁷ as are other charitable causes⁹³⁸.)

Most of the donations are made in cash, both because of the prevalent cash-intensive culture in Pakistan as well as the fact that cheques draw a withholding tax surcharge⁹³⁹. As such, many of the mosques, madrassahs and charities end up ‘laundering’ the private donations – in the sense of anonymising the origins of the money – before diverting them to terrorism financing⁹⁴⁰. (Significantly, none of this money shows up in any trails: even charities that are meant to maintain financial records are widely known to keep two sets of books: one, for the regulators and auditors; the other for themselves⁹⁴¹.) An interviewee gave the example of a mosque in downtown Karachi he frequents that has been ‘rebuilt’ three or four times in the last five

⁹³³ Zakat is one of the five pillars of Islam and Muslims are expected to donate 2.5 percent of their wealth to charity each year. Additionally, Muslims are also encouraged to donate under the head of sadqa, which is not limited by time or by amount. Significantly, aid workers say, most of the payments are made in cash. Interview 27, aid worker.

⁹³⁴ Interview 24, senior journo.

⁹³⁵ Interview 24, senior journo.

⁹³⁶ Interview 27, aid worker. The Jamaatud Dawa’s welfare arm Falah-e-Insaaniyat, for example, used to run over 300 ambulances in the Punjab as well as scores of madrassahs. Interview 5, fmr finance minister. Similarly, the welfare organisation Saylani Foundation is the welfare arm of Tehreek-e-Labbaik Pakistan. Interview 28, senior journo.

⁹³⁷ Interview 27, aid worker.

⁹³⁸ The question of what constitutes a charitable cause depends on the interpretation of the donor. For example, since the Quranic verse describing the purposes zakat may be used for mentions the “freeing of captives”, some people donate money to pay bails for the indigent. However, the practice is known to sometimes take an ugly turn: in the early noughties, a local pharmaceutical corporation ended up paying the bail of a man who had burned his young wife’s genitals; more recently, a welfare organization paid bail for people responsible for making accusations of blasphemy and perpetrating violence on the accused blasphemers. The organization is also known to support the far-right ‘blasphemy activist’ Khadim Rizvi. Interview 24, senior journo; Interview 27, aid worker.

⁹³⁹ Interview 27, aid worker.

⁹⁴⁰ Interview 24, senior journo.

⁹⁴¹ Interview 27, aid worker.

years⁹⁴². Donations are made by salaried citizens; business owners; expats who send “guilt money” in sums ranging from \$10 to \$100 for installing, for example, potable water pumps and ask for no accounts; and charities⁹⁴³. The Jamaatud Dawa (JuD), for example, maintains donation boxes on a major road artery in the Punjab, which is thought to yield “millions⁹⁴⁴”; at mosques and at shops⁹⁴⁵. Similarly, a wealthy Karachi businessman ‘donated’ his farmhouse to a militant group, which ended up becoming a financial asset for the group⁹⁴⁶. Large businesses are also known to patronise the militant group Sunni Tehreek (ST); an aid worker who frequents the area close to the ST madrassah speaks of its “very high, fortress-like walls” and regular visits by people “in Land Cruisers⁹⁴⁷”.

Added to these amounts is the politically- and strategically-driven funding from private donors and charities in Saudi Arabia and, more recently, Iran and the UAE. Through the 1980s and the 1990s, madrassahs were known to supply a steady stream of indoctrinated students for the jihad in Afghanistan⁹⁴⁸ but their role in financing terrorism itself was little studied. In 2007, after Musharraf launched a military operation on a madrassah complex in Islamabad, the true contribution of madrassahs became obvious⁹⁴⁹. The amount of money available to madrassahs becomes apparent by looking at the scale of their operations. According to Abbas, there are between 30,000 and 32,000 madrassahs across Pakistan, which house, feed and educate over 2.5 million students⁹⁵⁰. The JuD-operated madrassah at Muridke, a small city in northern Punjab, for

⁹⁴² Appeals to donate for the construction of mosques are common in Pakistan. Given the location of the mosque in a right-leaning area of Karachi, the mosque administration’s open affiliation with a notorious militant group as well as the proximity of the mosque to business centres, the interviewee estimates that an appeal would have easily netted the mosque administration close to Rs 1.5 million each time. Of this, he estimates only Rs 0.5 million were spent on ‘renovation’ each time – given that the mosque was never rundown in the first place – and the rest was diverted to the less savory activities of the militant group. Interview 27, aid worker.

⁹⁴³ Interview 9, retd senior Nacta official.

⁹⁴⁴ Interview 11, security expert. His conservative calculation is based on the existence of 500 boxes, which collect Rs 2,000 each per day. A day’s ‘earnings’ would then be Rs 1 million.

⁹⁴⁵ Interview 5, fmr finance minister.

⁹⁴⁶ Interview 3, LEA official. The businessman Saud Memon was known to be an Al Qaeda sympathizer; American journalist Daniel Pearl’s body was found at this farmhouse.

⁹⁴⁷ Interview 27, aid worker.

⁹⁴⁸ A Abbas supra note 17 at xix

⁹⁴⁹ The nine-day operation saw a violent clash between special commandos of the military and the heavily armed – and clearly well-trained – students of the madrassah. The death toll from the operation was close to 150 and a sweep of the madrassah complex after the operation revealed a formidable cache of light and heavy arms and ammunition.

⁹⁵⁰ While he stresses the fact that reliable data is not available, he points out the interesting discrepancy between the government-provided figure (32,000) and the one provided by the federation of madrassahs (30,000). While

example, is said to house between 3,000 and 4,000 students⁹⁵¹. The Sunni Tehreek madrassah in Karachi, meanwhile, is estimated to house between 15,000 and 20,000 students⁹⁵². Ironically, the most rapid growth of philanthropy-financed madrassahs has been around Islamabad, the federal capital⁹⁵³. However, this is not to suggest that only private monies fund madrassahs: both the federal government and the government of the province of Khyber Pakhtunkhwa have been known to provide financing for madrassahs, including from the education budget⁹⁵⁴.

A regulatory crackdown on terrorism financing would, as discussed in Chapter 4, require the military establishment to surrender its policy of using proxies in India and Afghanistan and a ban on foreign funding. But the more problematic from an implementation perspective would be crackdowns on legitimate businesses and private philanthropy. First, the range of businesses operated by militants do not seem to follow any patterns that would suggest a preference for certain kinds of industries. How then is the state to practically monitor *all* businesses across *all* industries; weed out the ones that are fronts for militant organisations; and *conclusively establish* the same for the purposes of law enforcement⁹⁵⁵?

Second, notwithstanding the inherent difficulties of preventing philanthropically-minded people from donating, a crackdown on philanthropy would entail severe social repercussions that the state is unable to mitigate⁹⁵⁶. Further, in the last 15 years, Pakistan has witnessed frequent natural disasters such as earthquakes, floods and heatwaves. In the wake of the 2005 earthquake; the 2008 floods; and even a sectarian attack on a minority community in Balochistan in 2013, for example, the JuD was very visible – alongside the army – in effecting relief operations⁹⁵⁷. The madrassahs, too, feed, clothe and educate millions of children across Pakistan; for many parents,

the madrassahs would have an incentive to overstate their numbers and impact, their estimate is lower than the one provided by the government. A Abbas supra note 17 at xix, xx

⁹⁵¹ Interview 30, senior lawyer.

⁹⁵² Interview 27, aid worker.

⁹⁵³ Interview 24, senior journo.

⁹⁵⁴ Naya Daur report, “KP Govt Transfers Rs30 Million School Funds To Samiul Haq’s Seminary”, *Naya Daur* (April 10, 2019); online <https://nayadaur.tv/2019/04/kp-govt-transfers-rs30-million-school-funds-to-samiul-hags-seminary/?fbclid=IwAR2Ov3V7PCUc2EkNhROxnxxppvX9ORRi3eSRtndU3LPzSj0drhZdal350Hw>.

⁹⁵⁵ While the issues regarding the state’s investigation and prosecution capabilities is addressed below, even here, there is an interesting question about what the funds from the legitimate businesses are being used for. While the provision of arms and ammunition, for example, is a clear-cut case, provision for ‘war widows’ or maintaining the families of ‘martyrs’ would involve more complex issues of law and morality.

⁹⁵⁶ See FN 932

⁹⁵⁷ Interview 24, senior journo; Interview 15, senior parliamentarian.

the madrassah is a lifeline preventing the death of their children from malnutrition and starvation⁹⁵⁸. Even if it were possible to separate the welfare activities of militant groups from their terrorism activities, given the dependence of the state as well as citizens on the philanthropic regime, a crackdown is both impracticable and improbable⁹⁵⁹. This introduces a political and economic imperative to Pakistan's resistance to the AML-CTF effort. Given Pakistan's persistent current account deficits, the state is both unable and unlikely to commit to the additional responsibility of, for example, running ambulances or housing madrassah students⁹⁶⁰. Even after a February 2019 ban on JuD's Falah-e-Insaaniyat Foundation, for example, the welfare organisation continues to function as before⁹⁶¹. However, the current AML-CTF regime does not speak to the political and economic consequences of its regulation.

Even the AML-CTF regulations ostensibly targeting illegitimate or criminal activities are disconnected from ground realities and, equally problematically, ignorant of both spending patterns as well as the evolution of funding practices. There are two aspects of terrorism financing: the financing of militant activities (arms, ammunition, suicide jackets etc) and the sustenance of the militant network (boarding, lodging etc)⁹⁶². The volume of money involved becomes significant when it is the primary motive; as discussed in Chapter 3, militant activities are mostly cost-effective in terms of outlay. While the former category of expense suggests a significant, trackable amount, many point to the fact that many militant groups draw on "official supplies⁹⁶³" by raiding army check posts or Nato supplies for arms and ammunition, for example. Suicide jackets, too, are mostly homemade, with the most expensive element being the steel ball bearings, which can be purchased for a few hundred rupees in most hardware stores. Meanwhile, the network outlay is similarly unremarkable for most militant groups⁹⁶⁴: since many larger

⁹⁵⁸ Interview 24, senior journo; Interview 12, senior bureaucrat.

⁹⁵⁹ Interview 24, senior journo; Interview 27, aid worker.

⁹⁶⁰ An interviewee who was a federal minister when the JuD/ FIF ambulances were confiscated by the government spoke of how the provincial government told them it didn't have the money for petrol to run the ambulances on its own. Interview 5, fmr finance minister.

⁹⁶¹ The only concession appears to be a change in nomenclature: in some places, the FIF billboards and signage have been changed to "Al Medina" and "Aisar Foundation". An investigative report in a Pakistani paper spoke of how workers at these FIF centres believe the state and its agencies support them and they are being forced to change their name only due to international pressure. Daily Times report, "Ban not fully enforced", *Daily Times* (February 24, 2019); online <https://dailytimes.com.pk/357982/ban-not-fully-enforced/>

⁹⁶² Interview 6, LEA official.

⁹⁶³ Interview 6, LEA official.

⁹⁶⁴ The exception are larger groups such as Al Qaeda, which sometimes fund small groups within the larger network. Interview 6, LEA official; Interview 11, security expert.

groups splintered and shifted to a self-financing model to evade detection, costs have fallen further⁹⁶⁵. The theft of two cars, contends one interviewee, is sufficient to sustain a typical group of seven to eight Lashkar-e-Jhangvi militants for a year⁹⁶⁶. As an LEA official candidly confesses, the motivation to crackdown on terrorism financing is low because militants generally live spartan, subsistence existences. How, he asks, can anyone investigate every amount that ranges from \$200 to \$400⁹⁶⁷?

The FATF understanding of funding models is similarly criticised. While kidnapping, robberies, protection rackets, extortion, and the gems and jewellery black markets are well recognised as terrorism financing avenues⁹⁶⁸, none of these involve the use of bank cheques or any financial instruments capable of being traced via AML-CTF regulations⁹⁶⁹. While FATF mandates that gems and jewellery traders report suspicious transactions, it doesn't seem to appreciate the profit imperative that undergirds black markets: neither party has incentive to report the transaction⁹⁷⁰. Similarly, where the Taliban charge protection money from the US convoys headed from Pakistan to Afghanistan⁹⁷¹, there is neither reporting incentive nor desire to disrupt the arrangement. Further, funding activities continue to evolve over time: at the height of the war in Afghanistan, for example, extortion demands made in Peshawar were payable in Afghanistan; now cryptocurrencies are increasingly being used to pay both extortion demands⁹⁷² as well as

⁹⁶⁵ Stern & Modi in Biersteker & Eckert supra note 365.

⁹⁶⁶ Interview 11, security expert.

⁹⁶⁷ Interview 6, LEA official.

⁹⁶⁸ See Ahmed & Beare supra note 485.

⁹⁶⁹ Interview 4, journo. This is not to say that the monies are completely untraceable. A remarkable exception was a recent case of a foreign currency dealer in the city of Bannu, who was robbed of an amount between Rs 20 million and Rs 30 million by the Taliban. The dealer was a proselytiser himself and used his connections with the local MNA to 'negotiate' with the Taliban. According to those familiar with the case, the proselytiser leveraged his religious credentials and told the Taliban that his money had been earned through "truth" and was halal and, as such, was haram [forbidden] for them. The Taliban subsequently returned a chunk of his money. Interview 6, LEA official. In another extortion case in Karachi, the Taliban were given Rs 250 million. However, the right-wing politician Maulana Fazalur Rehman is said to have negotiated with the Taliban on behalf of the victims and managed to get a 'refund' worth Rs 50 million! Interview 25, journo. Both serve as examples of the fungible nature of the various sources of power.

⁹⁷⁰ See Naylor supra note 221.

⁹⁷¹ Interview 9, retd senior Nacta official. Ironically, the group is known as the 'US Taliban' because of this relationship.

⁹⁷² Interview 9, retd senior Nacta official. See also FATF, *Virtual currencies: Key definitions and potential AML/CTF risks* (2017); online <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf>.

ransom, even though there has been a decline in kidnapping as a source⁹⁷³. Meanwhile, a relatively new trend is the collection of agricultural ‘tax’ by militant groups: the JuD and the Jaish-e-Mohammad collect the tax in southern Punjab, the JuD and Hizbul Mujahideen in northern Punjab⁹⁷⁴. Compounding these problems is the size of the informal economy in Pakistan⁹⁷⁵ -- a fact recognised by most interviewees, including government officials⁹⁷⁶. In the tribal areas and the province of Khyber Pakhtunkhwa, for example, the Tehreek-e-Taliban Pakistan and Da’esh are increasingly turning to saraafs [literally: gold traders] in the informal economy who trade in gold, operate as money lenders and also hundi/hawala operators⁹⁷⁷.

While FATF is alive to the issue of virtual currencies, it seems equally resigned to its inability to nullify the threat they pose. In its 2014 report on virtual currencies, for example, it mentions three cases that were prosecuted but significantly, omits to mention how the three were detected or even how future regulation could prevent their reoccurrence⁹⁷⁸. However, when it comes to issues such as the informal economy; the emergence of ‘new’ actors such as saraafs; or innovations such as agricultural ‘tax’, even FATF seems to have no answers.

5.2 Structural problems

The issue of structural problems – or challenges associated with the peculiar structure of Pakistan’s economy and polity – is interesting because it exposes the futility of pursuing regulatory harmonisation across differently-situated jurisdictions. Like economic regulation, financial regulation too needs to be designed with an eye to the existing structure and sophistication of the financial services industry within the larger political economy. Likewise, global law enforcement initiatives divorced from local realities such as public funding or

⁹⁷³ Interview 6, LEA official.

⁹⁷⁴ Interview 5, fmr finance minister; Interview 11, security expert.

⁹⁷⁵ A 2012 study estimated the size of the informal economy at 91 percent of the formal economy in 2007-08 but suggested that this, too, was a conservative estimate since it did not reflect investment, particularly in land. See Kemal & Qasim *supra* note 19.

⁹⁷⁶ Interview 32, banking regulator; Interview 8, senior LEA official.

⁹⁷⁷ The advantage of saraafs over other hundi/hawala operators is said to be the fact that they are “less visible” than other conduits. Since they work with counterparts in Malaysia and Dubai, the trail of foreign funds transferred to the militant groups gets partially blurred. Further, since saraafs use codes to conduct financial transactions, often not even asking for ID documents, there are less fears of identification. Interview 11, security expert.

⁹⁷⁸ See the FATF report on cryptocurrencies *supra* note 972, for example.

prosecutorial capacity are inevitably doomed. The current AML-CTF regime makes both these mistakes in Pakistan.

Economic issues

While the link between money laundering and criminal activities is played up, most interviewees argue that the bulk of laundering in Pakistan takes place in the informal economy⁹⁷⁹. Also referred to as the underground/ shadow/ grey economy, the informal economy refers to those activities in an economy that are not captured by the GDP of the country. These include illegal activities (for example, sex work; illegal arms trade etc) but, more importantly, also those legal businesses that either don't report or underreport their activities⁹⁸⁰. In Pakistan, the latter comprise a much larger proportion of the informal economy than the former. Meanwhile, estimates regarding the size of the informal economy vary wildly: once understood as half the size of the formal economy, current estimates range between 91 percent⁹⁸¹ and double the size of the formal economy⁹⁸².

The centrality of the informal economy represents, at once, both the greatest challenge and impediment to the implementation of AML-CTF regulation in Pakistan⁹⁸³. Partially informed by culture⁹⁸⁴ and partially induced by fear of the tax authorities⁹⁸⁵, cash transactions underpin this informal economy for the most part. The primary problem with the AML-CTF regulatory system, argue some, is its patronage of the western banking system through its focus on *formalising* existing economic and business arrangements instead of dealing with their informal nature⁹⁸⁶. That is, instead of understanding how local systems serve the needs of the population – in some case, better than Western systems – the regulators would prefer to flatten the distinction into a 'universal' model. To comply with AML-CTF regulation, Pakistan would not only have to *completely overhaul* the way its economy works, it would also need to effect cultural changes

⁹⁷⁹ Interview 32, banking regulator; Interview 8, senior LEA official.

⁹⁸⁰ Kemal and Qasim supra note 19.

⁹⁸¹ Kemal and Qasim supra note 19.

⁹⁸² Interview 20, senior banker.

⁹⁸³ Interview 11, security expert; Interview 14, economist; Interview 18, LEA official.

⁹⁸⁴ Interview 13, lawyer; Interview 15, senior parliamentarian; Interview 16, bureaucrat. Traditionally, South Asian economies were characterized by an overreliance on cash, land and gold as stores of value.

⁹⁸⁵ Interview 14, economist; Interview 20, senior banker; Interview 32, banking regulator; Interview 7, lawyer; Interview 9, retd senior Nacta official.

⁹⁸⁶ Interview 29, academic.

regarding cash transactions as well as tax compliance *and* rejig its tax and customs machinery *overnight*. In many cases, these systems are designed in response to local conditions and supported by domestic power networks. For example, the city of Faisalabad, a major hub for textile manufacturing, is also home to the largest yarn market in Asia where goods worth millions of rupees are routinely bought, sold and traded using chits instead of certified financial instruments⁹⁸⁷. Obviously, chits leave neither paper trails nor trigger taxes. In a recent case pursued by the tax authorities, a business owner was found to be stashing money in lockers: the man had been in business for 30 years and had been making profits in excess of Rs 3 billion per annum. According to the official in charge of the investigation, at the time of discovery, the business owner owned 100 lockers full of cash⁹⁸⁸. Meanwhile, bankers point to the fact that since business is routinely conducted on the basis of pre-existing social and professional relationships, the ‘guardians’ of the system facilitate clients by bending rules⁹⁸⁹.

As elsewhere, trade-related malpractices are a prominent feature of the informal economy and a conduit for money laundering, both inside Pakistan and abroad⁹⁹⁰. Trade over- and under-invoicing are popular, both as a means of avoiding taxes and duties but also for capital flight and reverse capital flight⁹⁹¹. An FIA raid on a foreign exchange company, for example, found that their clients included fish exporters to China whose payments were cleared through Dubai⁹⁹². This was because the exporters were routing consignments to China via Vietnam due to the

⁹⁸⁷ Personally witnessed by researcher in 2013. The chits are instantly redeemable for cash on demand by the bearer and are used as negotiable instruments. Interestingly, none of the chits have identifying marks: one chit worth Rs 5 million was scribbled on the back of the foil wrapping of a pack of cigarettes.

⁹⁸⁸ Interview 26, bureaucrat.

⁹⁸⁹ Interview 2, senior banker.

⁹⁹⁰ See, generally, Passas *supra* notes 7 and 106.

⁹⁹¹ Interview 5, fmr finance minister. While capital flight is primarily channeled through hundi/ hawala; export under-invoicing; import over-invoicing and smuggling (of precious metals, gems and antiques etc), reverse capital flight occurs through either export over-invoicing or the under-invoicing of imports with high customs duties. Since Pakistan’s tax laws provide foreign remittances immunity from scrutiny, theoretically, reverse capital flight could also be routed through formal banking channels. However, the advantage of import under-invoicing is, first, the avoidance of import duties; and second, the ability to conceal the illegal capital from tax authorities by investing it in either the real estate market or the informal economy. Typically, the importer pays for the goods with either monies stashed abroad or foreign exchange bought from Pakistan-based hundi/ hawala dealers and either buys land or deploys the goods in businesses in the informal sector. For a valuable overview, see Zafar Mahmood, “Reverse capital flight to Pakistan: analysis of evidence” (2013) Volume 52; Number 1. Spring Pakistan Development Rev.

⁹⁹² Interview 6, LEA official. The use of a foreign exchange company for exports is significant because exporters are allowed export subsidies and guaranteed better rates of exchange by the State Bank of Pakistan.

restrictions posed by the Free Trade Agreement with China. Similarly, most of the \$200 million trade with India is routed through Dubai⁹⁹³.

Significantly, property transactions worth billions of rupees are also routinely conducted on the basis of cash payments to avoid property taxes⁹⁹⁴. In the province of Sindh, for example, the provincial government values properties at one rate while the tax authorities issue a separate, higher valuation. The market value of the property, meanwhile, is significantly higher than both since a lower, Federal Board of Revenue-notified rate reduces the tax bill and thereby inflates the market value of the property⁹⁹⁵. (Since elected politicians and bureaucrats also benefit from the arbitrage in terms of kickbacks and commissions, there is little inducement to change the rules of the game. Further, the nexus between the political and the economic elite also precludes such change.) In a process that some ironically refer to as the ‘blackening of white money’, a buyer typically pays the notified rate using financial instruments; the outstanding amount is paid in cash⁹⁹⁶. Ironically enough, sellers who insist on payment via registered financial instruments have a hard time finding buyers for their properties or end up selling it for much less than the market price⁹⁹⁷.

Property is also the preferred investment choice of domestic launderers: those looking to launder the proceeds of crime (corruption; illegal trade etc); those looking to conceal from the tax authorities money from legitimate sources (whether derived through regular practices such as business profits or irregular practices such as trade malpractices); and those bringing their monies back to Pakistan (through reverse capital flight schemes as well as regular banking channels). This is because the real estate sector is unregulated despite its size – current estimates range between Rs 6 trillion and Rs 7 trillion – and investment in property is rarely, if ever, scrutinised. Ironically, enhanced global AML-CTF regulations around the world in the last 15 years have increased the volume of laundering in the real estate sector in Pakistan, accompanied by a meteoric rise in real estate prices. This is because the tightening of AML-CTF regulations

⁹⁹³ Interview 6, LEA official.

⁹⁹⁴ Interview 24, senior journo; Interview 30, senior lawyer. Since the buyer pays the property tax, most buyers are unwilling to pay the market price for a property via registered instruments.

⁹⁹⁵ Interview 30, senior lawyer.

⁹⁹⁶ Buyers withdrawing cash from banks for property transactions typically state they intend to buy either lottery bonds or foreign currency, which instantly causes the money to ‘disappear’ from view. Interview 30, senior lawyer.

⁹⁹⁷ Interview 30, senior lawyer. He shared an anecdote about a friend who sold his Karachi home for 40 percent of the market value.

abroad convinced many Pakistanis to bring their money back to Pakistan⁹⁹⁸ and the 2009 real estate crash in Dubai – a favoured investment destination for many wealthy Pakistanis – further deepened the trend. Much of this money is now thought to be parked in property schemes across the country⁹⁹⁹.

While government officials insist they are working towards greater AML-CTF compliance by bringing the informal economy within the documented sector¹⁰⁰⁰, these claims are contradicted by others. The culture of cash is so firmly entrenched, they argue, the market adapts itself to working around FATF-inspired regulatory crackdowns – an illustration of how the imposition of power inevitably meets with resistance. For example, the rate charged by hundi operators in Karachi’s Bolton Market is said to have increased from two percent to between six and seven percent to absorb the higher payoffs to government investigators and monitors charged with enforcing AML-CTF regulations¹⁰⁰¹. Similarly, after the institution of FATF-mandated scrutiny of foreign exchange companies, many such companies have set up shadow companies and agents to do the same work but for a slightly higher premium¹⁰⁰². Both examples illustrate how the regime itself generates a new economic formation of avoidance – like tax regimes everywhere but also like the evolution of terrorism financing strategies. Since the existing system works to the benefit of all – the ISI, big business and the ruling elite, for example – there is little incentive to change¹⁰⁰³. To eliminate hundi, for example, not only would the government initially need to offer a better exchange rate than the hundi operators, banks would need to dramatically improve both their efficiency in terms of costs and transmission times (that is, the time between remittance and receipt of monies) but also their outreach in rural areas. Since there is neither political will nor corporate, this never happens¹⁰⁰⁴. Others hold up the example of the property market to show how a crackdown on laundering is *politically* untenable. This is because property developers in the country – including the two largest: the private-sector Bahria Enterprises and the military-run Defence Housing Authority – continue to benefit enormously from the differential rates. Not only would the immensely influential developers – including the military

⁹⁹⁸ Mamood supra note 991 at 3

⁹⁹⁹ Interview 14, economist.

¹⁰⁰⁰ Interview 32, banking regulator.

¹⁰⁰¹ Interview 27, aid worker.

¹⁰⁰² Interview 6, LEA official.

¹⁰⁰³ Interview 29, academic.

¹⁰⁰⁴ Interview 15, senior parliamentarian.

establishment – lean or prevail upon lawmakers, government officials and LEAs to either dilute the regulatory initiative or its enforcement, a crackdown would also squeeze the developers’ profits and, correspondingly, challenge the livelihoods of the hundreds of thousands who rely on these enterprises for their livelihoods. As such, a crackdown would be politically difficult for any government to effect¹⁰⁰⁵.

The madrassahs and charities aren’t easy game either. As discussed above, many of them provide public services the state and citizens have come to depend upon. Compounding this dependence is the fact that even though religious groups and parties qualify as a non-elite group¹⁰⁰⁶, they still exercise a preponderant influence on the state. First, close contacts with powerful foreign allies such as Saudi Arabia protect these religious parties and their leaders from the vagaries of the state. Second, besides their role in indoctrinating soldiers for jihad, religious parties and groups have frequently lent their services to the military establishment as political actors to be pitted against the opposition. In the 2002 elections, for example, Musharraf was able to mobilise a six-party alliance of religious parties in support of the establishment-backed political party PMLQ. More recently, clerics such as Tahirul Qadri and Khadim Rizvi have proven key disruptors in the political arena. In light of these services, madrassahs and militant group-backed charities have consequently been able to successfully resist all efforts towards mandatory registration¹⁰⁰⁷; documentation of their finances¹⁰⁰⁸; and even curbs on their activities.

Interestingly, even the drugs trade is mostly beyond the pale of AML-CTF regulation. This is because the material often trumps the ideational aspect of power. The war-ravaged Afghan economy is producing far more drugs than ever before¹⁰⁰⁹ and given its lack of a viable banking system, Pakistan remains its conduit to the international market¹⁰¹⁰. According to an LEA official who has worked in Peshawar, the drugs trade in the city alone is worth \$2 billion per annum and

¹⁰⁰⁵ Interview 24, senior journo.

¹⁰⁰⁶ Unlike Iran, for example, religious groups in Pakistan do not have an institutionalized role in the politics of the country. As such, their influence is exercised primarily through personal contacts *within* other sources of power such as key figures within the military establishment or right-leaning business leaders and/ or politicians.

¹⁰⁰⁷ In October 2015, the Nacta chief made some progress in getting two prominent clerics agree to registration but before the agreement could be finalized, a media leak about its details scared the two off. Interview 9, retd senior Nacta official.

¹⁰⁰⁸ This is because madrassahs get funding based on the specific sectarian orientation. Revealing their sources of funding would expose them to the sectarian orientation of the state. Interview 24, senior journo.

¹⁰⁰⁹ Interview 31, retd senior LEA official; Interview 5, fmr finance minister.

¹⁰¹⁰ Interview 9, retd senior Nacta official.

close to \$1.5 billion are laundered in the city annually¹⁰¹¹. Further, the drugs trade is governed by multiple power centres spanning both the global and the local. And so, while FATF may agitate the issue of cash smuggling, interviewees recount anecdotes of cash being smuggled across the border in cars and planes¹⁰¹² or being routed via Dubai¹⁰¹³. In January 2019, a cash courier was discovered to have been provided the cash by LEAs personnel in the departure lounge of an airport, *after* he had crossed the security checkpoints¹⁰¹⁴. Even senior officials of LEAs admit to helplessness when it comes to sealing the porous Pak-Afghan border, particularly when the military establishment is also known to protect smugglers¹⁰¹⁵.

Political issues

There are also structural problems specific to the polity that hamper the implementation of AML-CTF regulation, the most important being the federal-provincial divide on the issue of terrorism. Since the constitution assigns responsibility to both the centre and the provinces, there are invariably differences in relative priorities and implementation. For example, the Khyber Pakhtunkhwa government is seen as sympathetic to militants¹⁰¹⁶ and the Punjab government is also generally perceived as being soft on militants¹⁰¹⁷. Similarly, when the Sindh police identified foreign funding of 70-80 madrassahs, foreign policy exigencies forced the province to defer to the federal government, which chose to sit on the issue till it went away¹⁰¹⁸. The devolution of power onto the provinces is cited as a key reason for Nacta's ineffectiveness¹⁰¹⁹: instead of developing a coordinated, *national* strategy to combat terrorism, Nacta ends up liaising and negotiating between the provinces and the centre.

The divide has a significant bearing on interprovincial relations. Police officers in Sindh, for example, complain that sectarian militants from the Punjab are dispatched to Karachi in Sindh to commit crimes and flee back to the Punjab. While relations between the two provinces have

¹⁰¹¹ Interview 6, LEA official. He insists these are conservative estimates.

¹⁰¹² 'Khepias' [smugglers] typically buy two plane tickets: one for themselves and one for a gunny sack full of cash. Interview 9, retd senior Nacta official; Interview 29, academic.

¹⁰¹³ Interview 5, fmr finance minister.

¹⁰¹⁴ Mehtab Haider, "Pakistan submits terrorism financing report to FATF", *The News International* (January 5, 2019); online <https://www.thenews.com.pk/print/414797-pakistan-submits-terror-financing-report-to-fatf>

¹⁰¹⁵ Interview 31, retd senior LEA official.

¹⁰¹⁶ The provincial government is known to routinely fund madrassahs, for example.

¹⁰¹⁷ Interview 10, senior journo.

¹⁰¹⁸ Interview 10, senior journo.

¹⁰¹⁹ Interview 10, senior journo; Interview 11, security expert; Interview 21, retd senior LEA official.

always been tense due to fights over water and federal revenue allocations, the core disagreement regarding terrorism further reduces the possibility of coordination between the police departments of both. Consequently, the sectarian militants would easily evade the Sindh police at the Sindh-Punjab border¹⁰²⁰.

There is a similar constitutional divide operative even when it comes to money laundering. While money laundering is a federal subject, crimes – including corruption and terrorism – are a provincial subject. As a result, the provincial government needs to conclusively establish the crime and identify the proceeds of crime *before* the institution of the federal process for prosecution for the offence of money laundering. Complicating matters, say lawyers, is the fact that the criminal law system in Pakistan first looks for the crime and then for the evidence to make the charges stick. For example, they say, the FIA catches money laundering but then contends it is not supposed to prove the crime. As a result, the defence lawyer is able to make a strong case of defamation against their client, who walks¹⁰²¹.

Compounding this error is the fact that many of the agencies tasked with investigation into such offences – the corruption watchdog National Accountability Bureau or the Federal Investigation Agency, for example – come under the remit of the federal government. Structured coordination between the provincial and federal governments could potentially resolve this issue.

Operationally, however, the provincial governments end up foregoing the support of well-resourced federal institutions when they most need it and resorting to either poorer provincial cousins who are less adequate to the task or to their already overburdened police departments¹⁰²².

Operational issues

Even the federal institutions are only in relatively better shape and capacity constraints are frequently cited as a serious challenge to the enforcement of AML-CTF regulation. Lawyers and public prosecutors, for example, complain about the LEAs' inability to investigate and collect

¹⁰²⁰ Interview 10, senior journo.

¹⁰²¹ Interview 7, lawyer. In the Asif Zardari case, for example, he argues, the FIA seized 29 bank accounts with huge amounts of money in them. When the listed accountholders denied ownership, the FIA started looking for the beneficial owner and an explanation for the monies. The case, he maintains, is bound to fail in court.

¹⁰²² Interview 7, lawyer.

evidence in terrorism and money laundering cases¹⁰²³. This inability stems from both lack of expertise and training – especially regarding the laws and procedures governing the collection of evidence¹⁰²⁴ – but equally, manpower and funding¹⁰²⁵. The patchy investigation, argue lawyers, compromises their ability to secure convictions for such crimes¹⁰²⁶. Meanwhile, the government’s lack of faith in its agencies is reflected by the fact that the Nawaz Sharif government, which was investigating 53 AML-CTF cases, chose to share the details of only one with FATF¹⁰²⁷.

For their part, the LEAs freely admit that financial investigations aren’t their strongest suit but insist that their performance is pegged to how much the government chooses to allocate to preventing AML-CTF offences, based on its own priorities¹⁰²⁸. The implementation of AML-CTF regulation, they argue, has increased the volume of their work without having affected the size of staff available to do the work¹⁰²⁹. Meanwhile, lower down the totem pole, junior officers privately admit that the regulation reinforces established power centres and concede to inordinate amounts of “political influence” in cases involving white collar crime – one even spoke of having received death threats – as well as the abuse of authority by investigating officials¹⁰³⁰. Further marring the record of LEAs is the internecine warfare: every agency characterised the others as incompetent¹⁰³¹.

(This patchy investigation-low conviction rate loop creates its own set of problems. At the height of the Taliban uprising in Karachi, for example, alleged militants were frequently killed by the police in staged encounters¹⁰³². Senior police officials professed attacks on security personnel while some government officials believed the encounters were a way of disguising the police’s

¹⁰²³ Interview 9, retd senior Nacta official; Interview 11, security expert. The problem is said to be particularly rife within the police who are not trained to investigate terrorism financing cases. According to one former police official, the police were never interested in pursuing terrorism financing cases anyway. Interview 21, retd senior LEA official.

¹⁰²⁴ Interview 5, fmr finance minister; Interview 7, lawyer.

¹⁰²⁵ Interview 8, senior LEA official.

¹⁰²⁶ Interview 7, lawyer.

¹⁰²⁷ Interview 5, fmr finance minister.

¹⁰²⁸ Interview 8, senior LEA official.

¹⁰²⁹ Interview 19, LEA official. This is reflected in the phenomenon of ‘double designations’: the FIA official in charge of the money laundering portfolio, for example, also handles the larger “economic crimes” portfolio.

¹⁰³⁰ Interview 19, LEA official.

¹⁰³¹ Interview 19, LEA official.

¹⁰³² Interview 5, fmr finance minister.

inability to investigate terrorism financing¹⁰³³. However, many police officers privately confessed to extreme frustration with the role of investigative agencies, prosecution lawyers, the judiciary as well as the military establishment in helping secure the release of militants arrested by the police. The extrajudicial killings, they reasoned, cut through the bureaucratic red tape.)

As problematic as the issue of capacity is that of coordination. According to the existing structure for the enforcement of AML-CTF regulation in Pakistan, 27 federal and provincial agencies are involved in the effort. The most prominent among these are Nacta, the FIA, the Federal Board of Revenue, Customs, the Anti-Narcotics Force, the corruption watchdog National Accountability Bureau, the central bank, the securities regulator, Customs and the four provincial Counter Terrorism Departments. The original plan was for a taskforce modelled on the UK Financial Intelligence Unit, comprising public officials as well as private sector professionals (bankers, chartered accountants, prosecutors, investigators etc), all housed in the FIA¹⁰³⁴. Since the then interior minister wanted to retain control of the taskforce, he insisted on having Nacta as the lead agency. Since July 2017, Nacta has supposedly been working in close coordination with the other 26 as well as the provincial governments; non-profit organisations; the judiciary and the intelligence agencies¹⁰³⁵.

On the ground, however, many deny such reports of cooperation. A police official involved with the counter-terrorism effort says that while there is some cooperation between the military establishment and the police – especially since the quantum of work has increased – the implementation of FATF standards is essentially eyewash that makes everyone “feel better about themselves¹⁰³⁶”. On a more fundamental level, however, the police and agencies don’t really listen to each other and personality-driven clashes drive deeper wedges between the two¹⁰³⁷. Others corroborate such an account: in July 2017, the paramilitary, the police and the ISI jointly conducted a raid on Central Jail in Karachi and recovered cell phones and a pile of cash. While

¹⁰³³ Interview 5, fmr finance minister.

¹⁰³⁴ Interview 9, retd senior Nacta official.

¹⁰³⁵ Interview 9, retd senior Nacta official.

¹⁰³⁶ Interview 3, LEA official.

¹⁰³⁷ Interview 3, LEA official; Interview 4, journo.

the Counter Terrorism Department attempted to pursue the investigation by filing an official First Information Report, nothing came of it¹⁰³⁸.

The key problem, agree most, is that the investigation and enforcement arms of the AML-CTF regime are perennially locked in a lock step. For example, while the police can seize the assets of proscribed groups, they have little to no input into the list itself, which is drawn up by the federal interior ministry¹⁰³⁹. And even though the police are heavily involved with the counter-terrorism effort and its 425,000 officers across the country would further expand outreach¹⁰⁴⁰, the police lack the training that would allow them to investigate terrorism financing cases¹⁰⁴¹. Logically then, the police ought to refer these cases to the FIA: in practice, however, only the central bank and the intelligence agencies refer cases to the FIA¹⁰⁴² while the police generally pass on the case to their Counter Terrorism Department. Even the link between the Financial Monitoring Unit at the central bank and the FIA is of dubious utility: the FMU flags financial transactions over \$10,000 and enforcement is turned over to the FBR or the FIA, which determines how to proceed with the case¹⁰⁴³. Not only does this process reduce conscientiousness and critical thinking at the FMU, it further renders the FIA dependent on evidence collected by a non-specialist, non-investigative agency. One such example is a 2014-15 case, which surfaced in the small city of Dera Ismail Khan, close to the Punjab-Khyber Pakhtunkhwa provincial border. Militant groups were found to be involved in illegal banking transactions from Karachi worth several million rupees. However, neither the FIA nor the SBP thought to check on why ‘trade’ between the two cities was so vibrant¹⁰⁴⁴.

These problems are compounded in complex cases, which involve more agencies. FIA officials say there is no legal framework to mandate joint investigations and joint teams are only ever made by agency heads or when the government or the courts order the same¹⁰⁴⁵. While there are obvious data sharing benefits to the setting up of such teams, the involvement of multiple agencies and the failure to clearly divide responsibilities often degenerates into a chaotic,

¹⁰³⁸ Interview 4, journo.

¹⁰³⁹ Interview 9, retd senior Nacta official.

¹⁰⁴⁰ Interview 9, retd senior Nacta official.

¹⁰⁴¹ Interview 5, fmr finance minister.

¹⁰⁴² Interview 19, LEA official.

¹⁰⁴³ Interview 8, senior LEA official.

¹⁰⁴⁴ Interview 11, security expert.

¹⁰⁴⁵ Interview 19, LEA official.

uncoordinated mess¹⁰⁴⁶. This view is corroborated by the numbers: between 2015 and 2018, 312 Suspicious Transaction Reports were filed, 50 cases went for trial and only two convictions were secured¹⁰⁴⁷.

Further undermining this sketchy performance is the absence of data. While the absence itself is unsurprising – if the global AML-CTF regime cannot come up with reliable numbers, how can a Third World country? – the responses of government officials administering the AML-CTF regime in Pakistan are perhaps more revealing. Most readily confessed they had no idea about the composition and/ or volume of outflows from Pakistan comprising trade, proceeds of crime and/ or capital flight¹⁰⁴⁸. Some suggested the construction of estimates using State Bank figures provided to the Supreme Court regarding properties owned abroad by Pakistanis abroad or by the figures given to the courts and/ or FATF regarding corruption¹⁰⁴⁹. LEAs were even more categorical in their assertion that there is no way to prove or estimate figures regarding terrorism financing¹⁰⁵⁰, not even about the volumes choked by the counter terrorism effort¹⁰⁵¹. Academics, too, confessed ignorance: when *public funding* for counterterrorism wings of agencies such as the Intelligence Bureau and the Counter-Terrorism Departments – let alone military budgets – are under wraps, they argue, how is one to determine funding for militant groups? As a former Nacta chief sardonically phrases it, “If we cannot give the exact numbers where tangible, dead bodies are concerned, how can we put numbers to [intangible flows from] money laundering and terrorism financing? If you guess at a number in your dissertation, people will begin quoting you¹⁰⁵².”

Meanwhile, one interviewee cited a series of figures: between \$7 billion and \$9 billion a year (according to a US State Department figure derived from the international narcotics control strategy report); \$7 billion a year (from an article in the Journal for Forensic Research and

¹⁰⁴⁶ Interview 19, LEA official.

¹⁰⁴⁷ Interview 8, senior LEA official.

¹⁰⁴⁸ Interview 6, LEA official; Interview 19, LEA official

¹⁰⁴⁹ Interview 6, LEA official.

¹⁰⁵⁰ Interview 3, LEA official.

¹⁰⁵¹ Interview 9, retd senior Nacta official.

¹⁰⁵² Interview 9, retd senior Nacta official. He is referring to Pakistan’s estimates regarding the number of people it’s lost to the war on terrorism. While current government estimates are about 70,000 people, he claims to have worked out a number that comes to slightly over 18,000 people.

Criminology Journal¹⁰⁵³) and another “US estimate” for the period between January 2015 and October 2015 worth \$16 billion, “which also includes money coming in through remittances”. His conclusion was that there are no real estimates¹⁰⁵⁴. However, a prominent economist pegs outflows from Pakistan at more than \$10 billion a year¹⁰⁵⁵.

5.3 Collateral damage

Derisking

Despite all the problems associated with compliance, the specific costs of non-compliance are seen as even more damaging for Pakistan. Having experienced pariah status in 1998, when the US imposed economic sanctions on the country for conducting nuclear tests, most Pakistanis voiced fears regarding potential derisking. As defined by the World Bank, derisking refers to the unwillingness of global financial institutions to work with banks and remittance countries in certain areas of the world due to a mix of cost/benefit considerations and AML-CTF concerns. The problem ends up being particularly acute for those countries that generate low volumes and present significant AML-CTF risks¹⁰⁵⁶. The global reputation of the country, contend Pakistani interlocutors, determines commercial relations with the world. If Pakistan is found wanting on the AML-CTF compliance front, most global financial institutions will reduce or terminate correspondent banking arrangements with Pakistani financial institutions¹⁰⁵⁷. Not only will this increase the cost of doing business for Pakistani companies and banks¹⁰⁵⁸, the enhanced exposure

¹⁰⁵³ Available at <https://medcraveonline.com/FRCIJ/FRCIJ-05-00167.php>

¹⁰⁵⁴ Interview 19, LEA official.

¹⁰⁵⁵ Interview 23, economist. The figure is based off calculations using the Pakistan Integrated Household Survey, World Bank estimates regarding the per capita income of the top five percent of population, FBR figures regarding tax evasion, a 2018 statement from a member of the board of directors of a Swiss bank who said their bank had deposits between \$200 billion and \$250 billion of money owned by Pakistanis and evidence of property ownership by Pakistanis in the UK, Spain, Dubai and the US. Taking a 10- to 20-year horizon, he estimates there’s a lot more than \$10 billion a year that has gone out of Pakistan.

¹⁰⁵⁶ <http://www.worldbank.org/en/topic/financialsector/brief/de-risking-in-the-financial-sector>

¹⁰⁵⁷ A correspondent bank provides services on behalf of another, equal or unequal, financial institution. These services include the facilitation of wire transfers, the conduct of business transactions, acceptance of deposits as well as the gathering of documents on behalf of another financial institution. Correspondent banks act as a domestic bank’s agent abroad and are mostly used by domestic banks to service transactions that either originate or are completed in foreign countries. Generally, domestic banks employ correspondent banks due to their own limited access to foreign financial markets as well as their inability to service client accounts without opening branches abroad. <https://www.investopedia.com/terms/c/correspondent-bank.asp>

¹⁰⁵⁸ This is because a bank not authorized to perform dollar clearance is forced to use other banks, thereby adding a layer of intermediation costs.

of foreign banks to their Pakistani counterparts (due to the increased dollar clearance business) will increase the compliance costs of the foreign banks doing business with Pakistani banks¹⁰⁵⁹. Not only will this have severe repercussions for trade – commercial transactions will be delayed, excessively scrutinized and carry long implementation wait times – it will also strain Pakistan’s relationships across the world as the trading relationships become more difficult. Further, Pakistan will also find it difficult to raise money from the international capital markets – through government bonds, loans or even aid – if the world thinks it can be used for financing terrorism¹⁰⁶⁰. North Korea and Iran have survived the FATF blacklisting so far, argue some, because both are largely self-reliant as compared to Pakistan. With annual exports and imports worth \$30 billion and \$68 billion respectively and remittances at \$19.9 billion¹⁰⁶¹, Pakistan desperately needs the infusion of aid, loans, remittances and trade. Unlike Iran or Iraq, it can’t even swap oil for food¹⁰⁶².

These problems will be compounded by the levy of potential sanctions. Not only do most international banks comply with UN and US sanctions in order to mitigate their own risk¹⁰⁶³, trade, Foreign Direct Investment, portfolio investment¹⁰⁶⁴ and grants will be further affected. While trade sanctions would potentially lower the current account deficit since Pakistan will not be importing as much as it does, these ‘gains’ will be more than offset by lower exports, higher unemployment as export industries shut down and consequent inflation¹⁰⁶⁵.

However, others are more worried about what AML-CTF non-compliance represents in a *domestic* context, both politically and economically. In Pakistan’s case, they contend, the biggest losses are those of capital flight and of potential tax revenues¹⁰⁶⁶. Tax revenue losses translate into lesser investment in health, education and social security, which lowers the Human Development Index and, correspondingly, the long-term growth prospects of the economy. (While some of these losses can be – initially, at least – partially made up by a greater reliance

¹⁰⁵⁹ Interview 2, senior banker.

¹⁰⁶⁰ Interview 12, senior bureaucrat.

¹⁰⁶¹ The figures are culled from the Economic Survey of Pakistan for the fiscal year 2018; available at http://finance.gov.pk/survey/chapters_19/1-Growth.pdf; p 6

¹⁰⁶² Interview 18, LEA official.

¹⁰⁶³ Interview 20, senior banker.

¹⁰⁶⁴ Interview 14, economist; Interview 16, bureaucrat.

¹⁰⁶⁵ Interview 6, LEA official; Interview 12, senior bureaucrat; Interview 14, economist.

¹⁰⁶⁶ Interview 23, economist.

on indirect taxes, these will disproportionately burden the poor and further exacerbate the tensions in society.) The reduced prospects, they say, causes underdevelopment but, as problematically, the breakdown of the social contract: lesser social cohesion and more violence and militancy in the country¹⁰⁶⁷.

The economic consequences of capital flight and lost tax revenues are budget deficits, which create the need for loans and a corresponding build-up of debt. Since significant debt overhangs preclude the floatation of government bonds, the country is forced to either borrow more expensive money to service debt or deplete its reserves¹⁰⁶⁸. With the demand for dollars higher than the supply, the exchange rate collapses and triggers hyperinflation, both feeding off each other in a vicious cycle¹⁰⁶⁹. The consequent collapse of the economy devastates the population and leads to widespread rioting. Even the military will not be able to handle such an outcome, they caution, since not only will it be rendered immobile, even the soldiers will be rioting as basic necessities become unaffordable¹⁰⁷⁰.

Surveillance

Most interviewees agree that the current AML-CTF regime feeds into financial sector surveillance by the Deep State and will be used to strengthen its position respective to the other sources of power such as the political, economic and judicial elites. Many fear that data generated by AML-CTF controls will be used as leverage for the political victimisation of politicians by the Deep State. Several interviewees pointed to the multitude of money laundering cases against Asif Zardari, Nawaz Sharif and other politicians as evidence of the same¹⁰⁷¹; meanwhile a judge of the Supreme Court of Pakistan is also being investigated for judicial

¹⁰⁶⁷ Interview 23, economist.

¹⁰⁶⁸ Interview 23, economist. At present, roughly 60 percent of Pakistan's annual budget is consumed by defence and debt servicing. Even the borrowed monies, he argues, often end up with the political and economic elites who make the laws and skim money to take abroad. The example he gives is of infrastructure projects, where an estimated 30 percent of project costs are skimmed off in corruption. The skimming cuts into the income stream of the project, which further reduces the ability of the project to pay for itself.

¹⁰⁶⁹ Interview 23, economist. This is because the collapse of the exchange rate makes imports progressively expensive till they come to a standstill because the country can no longer afford to pay for them. In a country such as Pakistan, which relies heavily on imported furnace oil to meet its energy needs (70 percent of Pakistan's electricity comes from oil), higher oil prices roil through the economy making everything, including basic necessities, progressively more expensive and, finally, unaffordable.

¹⁰⁷⁰ Interview 23, economist. Some of these effects are already in place: the dollar is at a historic high in Pakistan (around Rs 150 to the dollar) and according to some projections, is expected to hit Rs 200 by the end of the year.

¹⁰⁷¹ Interview 7, lawyer; Interview 10, senior journo; Interview 22, rights activist; Interview 24, senior journo.

misconduct for failure to declare the properties owned by his spouse as well as his adult children abroad¹⁰⁷². Further, argue some, this data is also likely to be used against the opponents and detractors of the Deep State, including civil society organisations, NGOs and INGOs working in the areas of fundamental rights and democracy, that challenge the established state narrative on national security. Challenges to this narrative, they maintain, is inevitably accompanied by attempts to impose greater control over people. An example of how the military establishment has previously misused global regulations to impose its own agenda is the law regarding employees at nuclear facilities. According to UN Security Council Resolution 1540, Pakistan is committed to non-proliferation. However, the Deep State chose to interpret the commitment to mean that surveillance of employees – in derogation of their fundamental rights, including the right to privacy – was essential to preventing and curbing proliferation¹⁰⁷³. A feature of AML-CTF regulation that exacerbates these worries is the lack of an end-date for prosecution: as a former attorney general argues, while the Income Tax ordinance has cut-off date of five years and the Companies ordinance, 10 years, AML-CTF regulation has no cut-off date¹⁰⁷⁴.

However, others also refer to the susceptibility of AML-CTF regulation to abuse by political governments. The 1990s, for example, saw several successive governments institute corruption cases against political opponents and a measure of the accountability measures currently being pursued against Zardari and Sharif are attributed to Prime Minister Imran Khan¹⁰⁷⁵. That said, Politically Exposed Persons (PEPs) are not the only potential targets: a former minister, for example, speaks of how his government told banks that the tighter controls on bank transfers were part of the AML-CTF initiative whereas the real objective was to curb tax evasion and

¹⁰⁷² According to Pakistani tax laws, citizens (including judges) are not bound to declare the wealth of their financially independent spouses or adult children unless the tax body specifically asks for the same. The real reason for the establishment's displeasure is said to be a judgement authored by the judge that directed intelligence agencies to investigate whether the doling out of cash by military officials to supporters at a 2017 sit-in against the Nawaz Sharif government constituted meddling in politics. For incisive critiques, see Salahuddin Ahmed, "Scrap reference against Justice Isa", *Dawn* (June 9, 2019); online https://www.dawn.com/news/1487022?fbclid=IwAR0Y-apX2irecFZHyaYhz2wnBc-JRLxGA0U-izr4eRt0tuzWhhTiDw_Mm6w and Faisal Siddiqi, "2007 déjà vu", *Dawn* (June 10, 2019); online https://www.dawn.com/news/1487244?fbclid=IwAR1jIPPt1CV-kyLGSujFghpB46muJwaq8VfPA24WE7O4cY_RWjFAf3yhmyo

¹⁰⁷³ Interview 15, senior parliamentarian.

¹⁰⁷⁴ Interview 30, senior lawyer.

¹⁰⁷⁵ Interview 24, senior journo. He cites the "symbolic value" of a slogan such as "looted monies" in providing political mileage to Imran Khan.

capital flight¹⁰⁷⁶. Better surveillance, contends a banker, makes for better prosecutions. As such, he locates the government's rationale for AML-CTF regulation in a mix of surveillance, political or economic motives. Even so, he points to the fact that intelligence agencies collect information for political leverage, not for prosecutions¹⁰⁷⁷.

While optimists believe enhanced surveillance will only affect PEPs or benefit the friends and business associates of the ruling elite¹⁰⁷⁸, others point to the latent *potential* for abuse contained in the regulation. For example, the Supreme Court's demand for a list of those Pakistanis who own property abroad yielded a list of 100 Pakistanis including businesspersons, doctors, soldiers and lawyers. While there are currently no reports of the 100 being 'targeted' further, the information in itself is both key to constructing detailed financial profiles of wealthy Pakistanis and can further be leveraged for political and/ or economic gains. As discussed above, information about the properties owned by the spouse and children of a Supreme Court judge is being mobilised to bring pressure to bear on the judge for his *professional* decisions. Similarly, the money laundering references against Asif Zardari were leveraged to secure his support against Nawaz Sharif. A logical next step could potentially include more invasive tax investigations against higher net worth individuals, both to bolster tax revenues but also as a means of securing greater payoffs and kickbacks for government officials within the tax machinery. Indeed, an interviewee fears the imposition of travel controls and the legitimate transfer of money as a prelude to increasing micromanagement of the population by the Deep State¹⁰⁷⁹.

That said, there is an understudied aspect to surveillance: responsabilisation. The existing AML-CTF regime forces individuals and institutions such as accountants, auditors, jewellers, lawyers, non-profit organisations, real estate brokers, banks and designated non-banking financial institutions to report suspicions regarding money laundering and terrorism financing to state authorities. While the stipulation is meant to communicate the seriousness of the effort to combat both phenomena, it institutes a wider culture of problematic surveillance. First, the process 'normalises' a pervasive, enduring surveillance reminiscent of Foucault's variation on Bentham

¹⁰⁷⁶ Interview 5, fmr finance minister.

¹⁰⁷⁷ Interview 2, senior banker; Interview 1, senior banker.

¹⁰⁷⁸ Interview 17, senior parliamentarian.

¹⁰⁷⁹ Interview 22, rights activist.

Panopticon, where everyone is accustomed to the idea of constant scrutiny. Second, more problematically, surveillance leads to the breakdown of societal bonds in the wake of ‘civilian policing’. The divisive power Foucault speaks of – that is the ability to segregate certain individuals from others – reduces the potential for what Arendt sees as concerted political action against a regime by those most affected by it. For example, many of the above individuals and institutions owe a duty of care to their clients – most prominently, lawyers, accountants, banks. By forcing them to report on clients, the state systematically destroys all other relationships and bonds holding people together and *recasts the primary relationship of the citizen with the state alone*. While a discussion of the sociological, psychological and political implications of the situation is beyond the scope of this project, the situation befits a dystopian fiction, where every citizen is deemed to owe their primary loyalty to the state only; to faithfully execute the agenda of the state; with the added responsibility of being their brother’s keeper.

There is also an interesting foreign angle to this data mining and surveillance, which shows how AML-CTF regulation further re-entrenches established power relations in networks that span borders. While Tsingou makes a significant point about banks surveilling clients to help design better financial products, the issue is of far wider applicability than Tsingou envisages. The political risk industry, for example, has grown exponentially since 9/11¹⁰⁸⁰. Once seen as the poor cousin to the security risk and due diligence industries, political risk has since matured into a growth industry in its own right¹⁰⁸¹. Companies such as Control Risks Group and IHS-Jane’s, for example, offer tailored reports and analyses to their clients about the political threats and potential disruptions they face in many countries around the world. These reports then form the basis of business decision-making on a variety of subjects including ground operations, supply chains, investments, regulation, contract negotiation and tax¹⁰⁸². Critically, these reports are generated using detailed information about countries and their citizens.

In Pakistan, for example, both Controlled Risks and IHS Jane’s have hired journalists and police officers, among others, to help write reports, conduct background checks and due diligence for

¹⁰⁸⁰ Interview 3, LEA official.

¹⁰⁸¹ Barney Thompson, “Political risk is now a growth industry in its own right”, *Financial Times* (September 28, 2014); online <https://www.ft.com/content/c1b94922-3765-11e4-8472-00144feabdc0>

¹⁰⁸² The most exhaustive (read: expensive) reports come complete with colour-coded maps, complex scoring systems and lists of top-level government contacts. Thompson supra note 1081.

corporations and serve as consultants on key projects¹⁰⁸³. At the time the industry was in its nascent stage, reports regarding industries and key political and economic actors were based on unproven, subjective data – as one consultant puts it, “what we’ve heard from people in the industry, gossip – generally, information that would be highly libellous, were it to be published” – and studded with caveats and qualifiers. However, these consultants say there is now an increasing shift towards verifiable, big data: public records, for example. Since public records in Pakistan are maintained in English, there are significant amounts of data available (as compared to, say, China or Myanmar) but, argue these interlocutors, the data is mostly unfiltered and unverifiable against other sources¹⁰⁸⁴. In such a situation, information culled from AML-CTF controls can help develop richer data sets by, for example, mapping land registry records against records of financial transactions.

While most consultants are reluctant to theorise about potential uses of this consolidated data or the AML-CTF data alone, they do concede that foreign security agencies –particularly the Five Eyes¹⁰⁸⁵ – would be interested in the same, sometimes to verify their own data and at others, as a gratis substitute. These consultants say that some of the data generated by the political risk industry is already being shared with agencies on an informal basis since many of those working in the political risk business are either drawn from the MI5 or MI6 or have close contacts within the agencies. The informality of the arrangements, they say, owes to the need to walk the tightrope between legal and illegal sharing of data¹⁰⁸⁶. However, the arrangement can be seen as additionally advantageous in that it helps establish multiple sources of information while maintaining plausible deniability regarding work processes. For example, several consultants are known to “share” fees with “informants” in sensitive government departments – a revelation that could be embarrassing for foreign governments, should their agents – as opposed to third-party consultants – be discovered to be doing so.

Political alienation

¹⁰⁸³ One of the interviewees says he makes between 8,000 and 10,000 pounds as an external consultant per project. Interview 3, LEA official. Several journalists in Pakistan have also contributed reports for both groups.

¹⁰⁸⁴ Interview 3, LEA official.

¹⁰⁸⁵ The term refers to an anglophone intelligence alliance between the US, UK, Canada, Australia and New Zealand.

¹⁰⁸⁶ Interview 3, LEA official.

The issue of political alienation in the wake of AML-CTF regulation can be sliced two ways. In the first, political alienation speaks to what is known as the democratic deficit in the literature regarding global economic regulation. Given the preponderant influence of the G7 countries in setting up the AML-CTF regime, AML-CTF regulation can also be seen as further skewing the North-South power dynamic. As seen in the discussion regarding the evolution of AML-CTF regulation in Chapter 3 and further corroborated by Pakistani interlocutors, Pakistan lacks a seat at the table where these regulations are made. As such, it has no input into the content of the global regulations; little autonomy regarding the processes of their implementation or enforcement; and negligible ability to mitigate the deleterious impact of the regulations on its economy and polity. The similarities of the AML-CTF regime to the neoliberal regime are striking and, significantly, many of the governance-related charges laid at neoliberalism's door apply here too: the lack of legitimacy, accountability and transparency, coupled with bias and opportunism. More simply: the distance from the sources of global power render Pakistan, despite its ostensible sovereignty, incapable of opting out of the AML-CTF regime.

That said, the issue of political alienation becomes even more compelling in light of existing democratic processes in Pakistan. First, the question of holding an elected government accountable for transgressing the defined limits of delegated power does not arise when global regulations are *foisted* on the government and the Parliament as a *fait accompli*. That is, the inability to opt-out and the lack of any alternatives *precludes* meaningful democratic participation. Political alienation – or the growing estrangement between the people and political power – is a natural corollary to a situation where citizens and their elected representatives lack the power to affect the laws they are governed by. As such, the institution of AML-CTF regulation is a direct attack on both democracy and parliamentary processes.

Second, the imposition of AML-CTF regulations further sharpens the civil-military divide by empowering the Deep State at the cost of other power centres such as the political and the judicial. It also enables the military establishment to tighten its hold over civil society by using AML-CTF controls as a means of institutionalising political victimisation as well as an intrusive surveillance of citizens and rights groups; some fear micromanagement including travel controls

as well as controls on the legal transfer of money¹⁰⁸⁷. The more authoritarian avatar of the Deep State naturally further erodes any democratic pretensions.

There is a credible argument to be made regarding the general weakness of parliamentary processes in Pakistan, including the lack of meaningful legislative debates. For example, an interviewee spoke about having discussed an amnesty scheme with private-sector professionals instead of parliamentarians¹⁰⁸⁸; another voiced frustration at his inability to get the parliament to agree to a law that would mandate parliamentary scrutiny of agreements with foreign governments¹⁰⁸⁹; yet another mentioned the strategic sidestepping of parliamentary processes by even elected governments¹⁰⁹⁰. However, as discussed in Chapter 4, these developments occurred as a result of a skewed power dynamic in a particular historical context. The critical takeaway is recognition of the fact that AML-CTF regulations exacerbate these power imbalances and bludgeon a weak democracy.

5.4 Conclusion

While the critical literature documents some of the problems associated with the implementation of AML-CTF regulations, these remain mostly confined to specifics such as derisking or enhanced compliance costs. As such, there is a need to re-examine the other, incidental issues that stem from the conceptual flaws of the regime; the structural exigencies of economies and politics; as well as the political costs imposed by the interplay of global and local forces on the terrain of AML-CTF regulation. As the foregoing shows, some jurisdictions clearly suffer more than others and some benefit more than most.

The question implicit in this line of enquiry is simply this: given the severity of the consequences associated with implementation, do AML-CTF regulations merit such an exhaustive globalisation campaign? The final chapter offers some thoughts.

¹⁰⁸⁷ Interview 22, rights activist. See also Hayes supra note 500, which focuses on particularly the consequences for civil society organisations.

¹⁰⁸⁸ Interview 5, fmr finance minister.

¹⁰⁸⁹ Interview 17, senior parliamentarian.

¹⁰⁹⁰ Interview 15, senior parliamentarian; Interview 17, senior parliamentarian.

CHAPTER 6: Conclusion

This project began with a simple question: why is anti-money laundering and counter terrorism financing regulation important despite its impotence? The quest for answers has involved several detours (productive and non-productive!) through theories of power, global governance, the weeds of Pakistan's internal and external politics as well as its economy. As expected in a project of this nature, there are few definitive answers and mostly a jumble of ideas for subsequent projects.

6.1 Why AML-CTF?

Simply, AML-CTF regulation is important both for what it *delivers* and what it *represents*. Since 9/11, surveillance has emerged as possibly the most divisive political issue of our times. While the frequency of 'scandals' such as the Snowden disclosures or Cambridge Analytica have trained public attention on surveillance and privacy concerns, this focus remains locked within a national security paradigm for the most part – the hacked emails, the phone taps. There is less scrutiny of the other pillars of a rapidly expanding surveillance apparatus, the most glaring omission perhaps being financial sector surveillance. As discussed in Chapters 2, 4 and 5, the global AML-CTF regime is part of this surveillance apparatus, delivering to regulators masses of information and knowledge about the financial dealings of citizens everywhere.

Two features of the AML-CTF regime are particularly noteworthy. The first is the inexorable nature of financial-sector surveillance; the second is that it guarantees a role for the security state in perpetuity. Both are problematic. First, financial sector surveillance is the most dangerous form of surveillance because it does not allow for even self-censorship. Where we shop, the magazines we read, our duty-free purchases – they say things about us, our habits and our political views. We leave digital trails to even our secret vices and personal struggles – gambling receipts, tax claims and psychiatrists' bills. Much of this information is, indeed, banal. But bit by bit, a composite emerges: who we are, what we value and even what we aspire to.

Second, AML-CTF regulation enhances the ability of states to monitor and control the financial dealings, and so the lives, of their citizens. Significantly, the regulation comes without even a statute of limitations. At a basic level, for example, AML-CTF safeguards around the world discourage citizens from financial transactions with Iran, even when these citizens are of Iranian

origin . At an advanced level, however, AML-CTF regulations enable states to construct detailed profiles – financial and otherwise – of their citizens, including corporations. These profiles are based on disclosures by citizens, coupled with mandatory reporting by their banks, their accountants, insurance companies, realtors, jewellers and even casinos. This data enables both the commodification and the governability of citizens¹⁰⁹¹ by creating an informational asymmetry that skews the balance of power between the consumer and the producer, the citizen and the state. Critically, this ‘security state’ does not only operate within individual jurisdictions: AML-CTF regulation also enhances the ability of *global* regulators as well as the intelligence agencies in a few powerful jurisdictions to monitor and control less powerful states and, through them, the lives of citizens *who are not their own*. For example, Pakistan is pushed to crack down on the Jamaatud Dawa, despite the fact that the group does not engage in militant activities within Pakistan and many Pakistani citizens benefit from its charity and relief work in the country.

As such, the AML-CTF regime – as an example of a surveillance apparatus – *represents* something infinitely more dangerous: the belief that constant surveillance is the right of the state/global regulator and consent to surveillance is the obligation of a citizen/ weaker state¹⁰⁹². To evoke Black again, the process of “giving account” in a relationship both constitutes the relationship and is shaped by the relationship. AML-CTF regulation feeds into and amplifies this fundamental power imbalance, both between the state and citizen as well as at an inter-state level.

For many, the idea of the state/ global regulators knowing details about their wire transfers, for example, is unremarkable. Most buy into the regulator’s argument that those who have nothing to hide have nothing to fear¹⁰⁹³. However, there is little attention paid to the fact that the ‘nothing to hide’ argument is *structured* to facilitate ‘suspicion-in-the-making’ and inspire defensiveness in those objecting to surveillance¹⁰⁹⁴. More simply, surveillance *normalises* a culture of

¹⁰⁹¹ See David Lyon, *The Culture of Surveillance* (Cambridge, Polity Press, 2018).

¹⁰⁹² While Eggers’ 2013 formulation speaks of only the state-citizen binary, the insight is relevant at even the global scale. David Eggers, *The Circle* (Toronto, Knopf Canada, 2013).

¹⁰⁹³ See, for example, Daniel Solove, “‘I’ve Got Nothing to Hide’ and Other Misunderstandings of Privacy” (2007) 44 [San Diego L Rev 745](#).

¹⁰⁹⁴ For a thoughtful take, see Amicelle and Iofollo *supra* note 451.

suspicion¹⁰⁹⁵ and the nothing-to-hide argument *justifies* surveillance. The core issue is how surveillance and restrictions – as well as the reflexive interplay between them – affects lives lived outside the security sphere. The broader issue is of understanding the surveillance-industrial complex – how global capital, state agencies and local political economies collude to effect surveillance¹⁰⁹⁶ – and how it operates through mechanics and processes such as AML-CTF regulation.

6.2 Revisiting power and the global AML-CTF architecture

The ubiquity of AML-CTF regulation can only be explained by an understanding of the power that undergirds it. By teasing out similarities and differences in influential theories of power, Chapter 2 attempted an outline of the conditions essential for exercising power as well as a sketch of the modalities of its operation. Two key points bear repetition here: first, while the *exercise* of power requires the complicity of the subjugated as well as the perception regarding the legitimacy of power, the *operationalization* of power depends on a series of practices such as the inculcation of group think; bureaucratic power; scientification; crisis discourse; divisive power; and dressage. Simply this: AML-CTF regulation would not work unless, for example, swathes of the global population were persuaded that money laundering and terrorism financing is an imminent crisis that will destroy all they hold dear in life and that the world needs to thus be divided into the AML-CTF-compliant and the non-compliant. Second, the interaction of powers, whether at a global level or at a domestic level, generates a reflexive, *internal* transformation within each source of power. Power struggles do not produce orderly, predictable results since size doesn't always matter: smaller powers – such as militant groups in Pakistan – can also have outsized effects on regulatory outcomes, depending on their imbrication within a society and a polity.

By deconstructing the AML-CTF regulatory architecture as well as the processes of its evolution, Chapter 3 showed how regulation emerges from the dynamic interaction between multiple sets of actors, institutions and networks, each with their individual interests and sources of power. Two points are particularly significant here. First, given the multiplicity of interests and influences at

¹⁰⁹⁵ See, generally, David Lyon.

¹⁰⁹⁶ See, for example, the collection of essays in Kirstie Ball & Laureen Snider (eds), *The Surveillance-Industrial Complex: a political economy of surveillance* (New York, Routledge, 2013).

play, no one actor/ institution/ network – not even a state – can be seen as unidimensional, monolithic singularity with clearly defined and impregnable interests. This inherent *fluidity*, in reflexive interaction with *other, similarly fluid* actors/ institutions/ networks, makes it impossible to identify a singular author or driver for AML-CTF regulation. Second, the seeming *anonymity* of ‘the global regulator’ is compounded by the invisibility of certain key actors/ institutions/ networks such as global capital. An account of AML-CTF regulation that characterizes the US as the central ordering force, for example, neglects the fact that a) the US state is also subject to the pressures of capital (among others), and b) the invisibility of global capital is no guarantee of its being *uninvolved* in shaping AML-CTF regulation to its benefit through, for example, a focus on corruption or criminal activities rather than trade malpractices.

6.3 Revisiting the AML-CTF rubric in Pakistan

Pakistan’s AML-CTF problems are intimately entwined with both its foreign policy and domestic politics. The Pakistani state has become fairly dependent on militant groups as a tool of foreign policy and an AML-CTF crackdown threatens this. Had the Pak-US relationship not soured so or were the US less suspicious of China’s motives in the region, the issue of Pakistan’s AML-CTF compliance would have probably been brushed under the carpet as it was for several decades. But things being as they are, Pakistan is inexorably being pushed into a corner. Simultaneously, *global* AML-CTF regulation helps the powerful military establishment effect a selective, *domestic* crackdown on its political and judicial adversaries, thereby shoring itself up as the pre-eminent power in Pakistan.

However, foreign and domestic political exigencies aside, Pakistan also faces grave challenges to implementation that have little to do with its manifest sins. These problems have everything to do with the conceptual flaws in the AML-CTF framework; the peculiar structure of Pakistan’s economy and polity; as well as the political harms triggered by the operation of AML-CTF regulation. While the state’s inability/ unwillingness to crack down on militant groups is frequently criticized, for example, there is less discussion of the problems Pakistan faces in *transforming its economy to resemble those in developed countries* or the longer-term problems posed by the political alienation that AML-CTF regulation engenders.

6.4 Contributions

This project advances three modest theses regarding the global AML-CTF regime.

The interaction of powers thesis

This thesis explains AML-CTF regulation as the outcome of the interaction of powers, both at the global level and within polities. It does so by making three, interrelated arguments. First, contrary to mainstream and critical interpretations available in the existing literature, this thesis contends that the creation, implementation and enforcement of global AML-CTF regulation depends on a *coordinated* hegemony effected by *multiple* powerful authors/ implementers/ enforcers (individual state actors such as the US, institutions such as FATF or the IMF and even networks such as the G7) in derogation of the interests of other actors. The key point is that no singular state or institution is *solely* responsible for the way the regulation is designed or how it works. This strategic alliance between certain groups enables each actor/institution/network to use their *independent* power and legitimacy to forge a common ideology or dominant discourse regarding AML-CTF regulation. This discourse feeds into and *amplifies* the power and the legitimacy of the larger AML-CTF project, which secures the complicity or even the (grudging) consent of the subordinate groups (here, those actors whose interests are adversely affected). More simply, the prevalent discourse co-opts the regulated or the subordinated groups as *participants* in their own governance, either by convincing them of the salubrity of the regulation or through the prospect of ‘punishments’ for non-compliance – derisking, for example. Both the multiplicity of regulators as well as the complicity of the governed are critical to forestalling accountability for global AML-CTF regulation: not only do the governed sign up for the regulations themselves, the fact that no singular actor or entity can be identified as the primary mover of the regulation generally precludes accountability-related challenges.

However, this is not to suggest that the trajectory of global regulatory harmonization follows a linear path. As Chapters 4 and 5 show, the imposition of this power is countered by considerable resistance and pushback from smaller powers such as Pakistan that successfully resist implementing AML-CTF regulation by deploying a series of ‘hidden’ or subterranean strategies. This allows for greater plausible deniability: to resist or defy the regulations without seeming to do either. As such, the outcome of power struggles is rarely predictable, even when the balance of power is firmly in favour of one party.

Second, the thesis contends that regulation the interests of actors/ institutions/ networks are constantly evolving, both as a consequence of pressures mounted by the sources of power within a polity (that is, military, judicial, economic, political and ideological power) or the various constituencies of these actors etc. This ‘evolution’ challenges both the notion of static interests on part of these actors/ institutions/ networks as well as the notion of their independent, unfettered autonomy. States, for example, respond to the pressure of their military as well as their economic actors just as FATF responds to the pressure of the US, its most powerful G7 members, as well as the pressure of India, a relatively less powerful G77 member. Critically, these interests also evolve due to the engagement of these actors with other actors. The interaction between FATF and the G7, for example, transforms both and results in regulation that looks materially different to what it would have, *had either FATF or G7 been operating on their own*. Further, these interests are also influenced by the non-elite constituencies of these actors etc: for example, Pakistan’s resistance to AML-CTF regulation is conditioned by its religious groups as well as its military. Similarly, the interests of the UK also evolve as a consequence of the pressure from its islands as well as the US, a key ally.

Third, this thesis argues that even the military, judicial, economic, political and ideological sources of power evolve as a consequence of their interaction with each other. This evolution further conditions their interests and, as a corollary, the operationalization of the regulation both at a global level and within a jurisdiction. For example, after 9/11, even though the US had both a political and an economic interest in arresting money laundering and terrorism financing in Pakistan, its military interests in Afghanistan precluded the strict enforcement of AML-CTF regulation in Pakistan. That is, its political and economic power was tempered by the interaction with military power. Similarly, while military power in Pakistan has an interest in protecting its favoured militant groups from CTF regulation, it simultaneously has an interest in ratcheting up implementation of AML regulation against political and judicial power.

Political economy versus criminological approach thesis

This thesis challenges the flawed identification of AML-CTF regulation as a criminological exercise and advocates greater recognition of the global political economy of money laundering. While Tsingou has made a similar claim previously, her approach is hobbled by the fact that she reads states and networks such as the OECD as the fulcrum of the AML-CTF regime. While

states and networks matter, they are significant primarily because they advance *the material interests of power sources* within a polity. That is, the position assumed by a state on the global stage is mostly conditioned and determined by domestic sources of power: military, economic, political etc. Even where states respond to pressures mounted by other states, the response too is conditioned by what its local constituencies want. The *autonomy* of decision-making Tsingou attributes to states and networks *does not* exist. The failure to investigate the triggers operating on states/ networks creates a blind spot of sorts: even as an ardent critic of the global AML-CTF regime, Tsingou is unable to see beneficiaries of the regulation *other than the state*.

The thesis advances the proposition that the ‘other beneficiaries’ of money laundering include capital: financial institutions that charge commissions on laundering transactions; service industries (such as lawyers who set up shell companies) and property markets. Obviously, the fortunes of the state are tied to these economic actors too: for example, the state benefits from higher tax revenues as well as improved data regarding economic activities and employment generation. However, the advantages to capital cannot be underestimated, *particularly when more than trade-related malpractices account for over two-thirds of illicit financial flows around the world*. To put it another way: the focus on criminal activities as the source of illicit flows or the role of the state in effecting AML-CTF regulation *detracts from the centrality of capital* to the laundering business. This sleight of hand, this misplaced attention ‘*invisibilises*’ capital by directing regulatory attention towards the small fish (the drug dealers etc), thereby allowing capital to operate with greater impunity.

This thesis argues that the current regulatory focus on the detritus of society – drugs dealers, human traffickers, corrupt politicians etc – replicates deviancy theories of crime control by labelling ‘bad’ individuals “launders”, *with a view to willfully obscuring the systemic aspects of laundering*. To rephrase: the attention paid to deviants allows systemic actors to escape scrutiny. Accordingly, this thesis makes a case for – to borrow a cliché from corporate criminology literature – rending that veil. *If* laundering is as terrible for the global economy *as it is purported to be*, there’s every reason to nab the biggest money launderers, those that account for the bulk of laundering.

Political fallout thesis

The thesis examines the negative effects of the global AML-CTF regime on established power hierarchies, both globally and locally. It argues that AML-CTF regulation feeds into skewed power dynamics at both the global and local levels and re-entrenches the dominant powers at the expense of weaker powers. The delicate balance of power in the both political ecosystems (the global and the local) is thus upended with the FATF-mandated calls for greater financial sector surveillance, accountability and mandatory ‘civilian policing’ and this re-entrenchment paves the way for more exploitative relationships at every level.

As demonstrated in Chapter 3, the global AML-CTF regime mobilises the power of the global ‘ruling elite’ (that is, the powerful actors) on the world stage to construct a regulatory enterprise that delivers financial and surveillance gains to them while reinforcing their dominant position. Chapter 4, meanwhile, showed that geopolitics is the primary driver behind AML-CTF regulation (and not concerns about the health of the global financial system) and pressure to comply with the regulations is mostly a reflection of a jurisdiction’s foreign politics. That is, a country’s relationships with its key allies and adversaries as well as its appeasement or frustration of their political and/ or geostrategic objectives determines how the country will be treated at the FATF forum and the amount of pressure it will be subjected to.

This thesis also contends that the imperatives of domestic sources of power (military, economic, political, ideological and judicial) as well as the interaction between these sources plays a critical role in affecting the implementation of AML-CTF regulation in a jurisdiction. Further, in countries with fragile political systems, global AML-CTF regulation feeds into domestic power centres and, again, re-entrenches the ruling elite at the expense of smaller, more marginalized players with severe consequences for domestic politics. Finally, global AML-CTF regulation also produces several unintended but perverse consequences such as surveillance.

Critically, in the local context, the power imbalance is exacerbated, both *between sources of power in a polity* as well as *between states and their citizens*. On the one hand, there is the enhancement of powers available to the state – lower bars to conviction or surveillance, for example – that derogate from the political rights of the citizen (for example, the right to be presumed innocent in criminal proceedings or the right to privacy). On the other hand, there are the longer-terms costs to societies and communities that accrue from the gradual distancing of citizens from the affairs of the state. For example, the erosion of sovereignty at international law

– as represented by the global AML-CTF regulation – renders political governments in Pakistan unable to respond to the legitimate fears of their citizens regarding derisking or the FATF-mandated structural overhaul of the economy. Meanwhile, the consolidation of power available to the military establishment that occurs through AML-CTF regulation further reduces the ability of political or judicial actors to serve as checks on the Deep State. With all other systems and institutions thus compromised and crippled, is the future of global and local politics a series of authoritarian regimes? How are citizens to feel relevant to their state or to hold it accountable for its excesses? Why vote or even bother?

6.5 Conclusion

As mentioned above, there are no simple answers to questions regarding the global AML-CTF regime – just a series of questions fit for further interrogation and research. However, the demonstrable downsides – the enhanced ‘governability’ and commodification of citizens everywhere – are significant enough to embark on an immediate reassessment of the drivers and aims of the global regulatory regime. This project is one such attempt.

Bibliography

Interviews¹⁰⁹⁷

- Interviewee # 1 Senior banker [Interview 1; banker]
- Interviewee # 2 Senior banker [Interview 2; banker]
- Interviewee # 3 Policeman [Interview 3; LEA official]
- Interviewee # 4 Reporter covering crime and militancy for a mainstream newspaper [Interview 4; journo]
- Interviewee # 5 Former federal finance minister [Interview 5; fmr fin minister]
- Interviewee # 6 Public investigator [Interview 6; LEA official]
- Interviewee # 7 Former public prosecutor [Interview 7; lawyer]
- Interviewee # 8 Senior public investigator [Interview 8; senior LEA official]
- Interviewee # 9 Retired senior NACTA official [Interview 9; retd senior Nacta official]
- Interviewee # 10 Senior journalist [Interview 10; senior journo]
- Interviewee # 11 Security analyst/ researcher [Interview 11; security expert]
- Interviewee # 12 Senior finance ministry bureaucrat [Interview 12; senior bureaucrat]
- Interviewee # 13 Lawyer [Interview 13; lawyer]
- Interviewee # 14 Economist [Interview 14; economist]
- Interviewee # 15 Senior parliamentarian [Interview 15; senior parliamentarian]
- Interviewee # 16 Government official [Interview 16; bureaucrat]
- Interviewee # 17 Senior parliamentarian [Interview 17; senior parliamentarian]
- Interviewee # 18 Policeman/ counter-terrorism researcher [Interview 18; LEA official]
- Interviewee # 19 Public investigator [Interview 19; LEA official]
- Interviewee # 20 Senior banker [Interview 20; banker]
- Interviewee # 21 Retired senior police official [Interview 21; retd senior LEA official]
- Interviewee # 22 Human rights activist [Interview 22; rights activist]
- Interviewee # 23 Economist [Interview 23; economist]
- Interviewee # 24 Senior journalist [Interview 24; senior journo]
- Interviewee # 25 Reporter covering crime and militancy for a mainstream newspaper [Interview 25; journo]

¹⁰⁹⁷ The interviews were conducted in Karachi, Lahore and Islamabad between August 2018 and September 2018. The exact dates of the interviews have been withheld to guarantee the anonymity of those who wished not to be identified. The descriptions in the square parentheses are the ones used in the footnotes.

Interviewee # 26 Government official [Interview 26; bureaucrat]

Interviewee # 27 Aid worker [Interview 27; aid worker]

Interviewee # 28 Senior journalist [Interview 28; senior journo]

Interviewee # 29 Academic [Interview 29; academic]

Interviewee # 30 Former Attorney General of Pakistan [Interview 30; senior lawyer]

Interviewee # 31 Retired senior police official [Interview 31; retd senior LEA official]

Interviewee # 32 Senior SBP official [Interview 32; banking regulator]

Legislation

Anti-Terrorism Act of 1997

Anti-Money Laundering Act of 2010

Arms Act of 1879

Banking Companies Ordinance of 1962

Chemical Weapons Convention Implementation Ordinance of 2000

Companies Act of 2017

Control of Narcotics Substances Act 1997

Customs Act of 1969

Foreign Exchange Regulation Act of 1947

Income Tax Ordinance of 2001

Investigation for Fair Trial Act of 2013

National Counter Terrorism Authority (Nacta) Act of 2013

Pakistan Penal Code of 1860

Prevention of Electronic Crimes Act of 2016

Secondary Material

Journal articles

Abdullah, Aminah & Iqbal Khadaroo, "Addressing the financial crisis: perceived effectiveness of Basel III" (2014) 29:3 J Intl Banking L & Reg 135-148

- Ahmed, Sanaa, "Supremely fallible: a debate on judicial restraint and activism in Pakistan" (2015) 9:2 Vienna J Intl Constitutional L, ICL Journal [Ahmed 2015 a]
- Ahmed, Sanaa, "The politics of financial regulation" (2015) 11:1 Socio-Leg Rev [Ahmed 2015 b]
- Alldridge, Peter, "Money laundering and globalization" (2008) 35:4 JL & Soc'y
- Amicelle, Anthony, & Vanessa Iofolla, "Suspicion-in-the-making: surveillance and denunciation in financial policing" (2018) 58 Brit J Crim 845–863
- Anghie, Antony, "Time present and time past: globalisation, International Financial Institutions and the Third World" (2000) 32 NYUJ Intl Law & Pol 243
- Avgouleas, Emiliós, "Governance of Global Financial Markets: the Law, the Economics, the Politics" (2013) 28:2 J Intl Banking L & Reg 96-97
- Beare, Margaret E., "Entitled Ease: Social Milieu of Corporate Criminals" (2018) Crit Criminol (Special issue "Crimes of the Powerful: The Canadian Context") 509-526
- Bertezzo, Giulia, "The European Union facing the global arena: standard-setting bodies and financial regulation" (2007) Eur L Rev 257
- Black, Julia, "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes" (2008) *Regulation and Governance*, 2: 137-164
- Bollen, Rhys, "The international financial system and future global regulation" (2008) 23: 9 J Intl Banking L & Reg 458-473
- Brummer, Chris, "Why soft law dominates international finance – and not trade" (2010) 13 J Intl Econ L 623
- Chiu, Iris H-Y, "Legislative, regulatory and governance reforms in financial regulation: reflections on the global financial crisis" (2010) 31:6 Company Lawyer 165-166
- Ciro, Tony & Michael Longo, "The global financial crisis: causes and implications for future regulation: Part 1" (2009) 24: 12 J Intl Banking L & Reg 599-605
- Ciro, Tony & Michael Longo, "The global financial crisis: causes and implications for future regulation: Part 2" (2010) 25: 1 J Intl Banking L & Reg 9-18
- Cuellar, Mariano-Florentino, "The tenuous relationship between the fight against money laundering and the disruption of criminal finance" (2003) 93 J Crim L & Criminology 312–466.
- Davis, Aeron & Karel Williams, "Introduction: Elites and Power after Financialization" (2017) 34(5-6) Theory, Culture & Society 3–26.
- Delonis, Robert P., "International financial standards and codes: mandatory regulation without representation" (2004) 36 NYUJ Intl L & Pol 563
- Dupont, Danica & Frank Pearce, "Foucault contra Foucault: Rereading the 'Governmentality' papers" (2001) 5:2 Theoretical Criminology 123-158
- Engle, Eric Allen, "The transformation of the international legal system: the post-Westphalian legal order" (2004) 23 Quinnipiac L Rev 23

- Favarel-Garrigues, Giles, Thierry Godefroy & Pierre Lascoumes, "Sentinels in the banking industry: private actors and the fight against money laundering in France" (2007) 48 *Brit J Crim* 1-19
- Frantianni, Michele & John Pattison, "International financial architecture and international financial standards" (2002) 579 *Annals of the American Academy of Political and Social Science* 183
- Garland, David, "The limits of the sovereign state" (1996) 36:4 *Brit J Crim* 445–471.
- Grant, Ruth W., & Robert O. Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 *American Political Science Review* 1
- Griffiths, Robert, "*Was Gramsci a Eurocommunist? - A Reply to Roger Simon*" (2011) Communist Party of Britain; online <https://www.marxists.org/history/international/comintern/sections/britain/pamphlets/1985/gramsci.htm#e26>).
- Haldane, Andy & Mark Kruger, "The resolution of international financial crises: private finance and public funds" (2001) *Bank of Canada Review*; online <http://www.bankofcanada.ca/en/review/2002/jointpapere.pdf>
- Halliday, Terence, Michael Levi and Peter Reuter "Global surveillance of dirty money: Assessing assessments of regimes to control money-laundering and combat the financing of terrorism" (2014) *Centre on Law and Globalisation*; online <http://www.undrugcontrol.info/en/issues/money-laundering/item/6740-global-surveillance-of-dirty-money>
- Hulsse, Rainer, "Creating demand for global governance: The making of a money-laundering problem" (2007) 21:2 *Global Society* 155-178.
- Kemal, M. Ali & Ahmed Waqar Qasim, "Precise Estimates of the Unrecorded Economy" (2012) *Winter Vol. 51, No. 4, Part II Pakistan Development Rev* 505
- Lee, Emily, "The soft law nature of Basel III and international financial regulations" (2014) 29: 10 *J Intl Banking L & Reg* 603-612
- Levi, Michael, and Peter Reuter, "Money laundering: A review of current controls and their consequences" (2006) 34 *Crime and justice: A review of research* 289-375; online http://faculty.publicpolicy.umd.edu/sites/default/files/reuter/files/levi_and_reuter.pdf
- Levi, Michael and William Gilmore, "Terrorist finance, money laundering and the rise and rise of mutual evaluation: A new paradigm for crime control?" (2002) 4:2 *Eur J L Reform* 337–364.
- Lichtenstein, Cynthia Crawford, "Hard law v. soft law: unnecessary dichotomy?" (2001) 36 *Intl Lawyer* 1433
- Löwy, Michael, "Weber against Marx? The Polemic with Historical Materialism in the Protestant Ethic" (1989) *Vol. 53, No. 1 (Spring) Science & Society* 71-83
- Mac Géidigh, Donal, Friedrich Schneider and Matthias Blum, "Grey matters: Charting the development of the shadow economy" (2016); online http://www.econ.jku.at/members/Schneider/files/publications/2016/GreyMatters_short.pdf
- Mahmood, Zafar, "Reverse capital flight to Pakistan: analysis of evidence" (2013) *Volume 52; Number 1. Spring Pakistan Development Rev*
- Morgan, J. S., "Dirty Names, Dangerous Money: Alleged Unilateralism in U.S. Policy on Money Laundering" (2003) 21 *BJIL* 771

- Morriss, Andrew P. and Clifford C. Henson, "Regulatory effectiveness and offshore financial centers" (2013) 53:2 Va J Intl L 417-466.
- Munoz, Almudena De la Mata, "The future of cross-border banking after the crisis: facing the challenges through regulation and supervision" (2010) European Business Organisation L Rev 576
- Norton, Joseph J., "A 'new international financial architecture'? – reflections on the possible law-based dimensions" (1999) 33 Intl Lawyer 891
- Pahuja, Sundhya, "Technologies of Empire: IMF conditionality and the reinscription of the North/South Divide" (2000) 13 Leiden J Intl L 749
- Passas, Nikos, "Financial intermediaries – Anti-money laundering allies in cash-based societies?" (2015) U4 Chr. Michelsen Institute 10; online <http://www.u4.no/publications/financial-intermediaries-anti-money-laundering-allies-in-cash-based-societies/>
- Passas, Nikos, "Fighting terror with error: The counter-productive regulation of informal value transfers" (2006) 45:4-5 Crime L & Soc Change 315-336.
- Pearce, Frank & Steve Tombs, "Foucault, Governmentality, Marxism" (1998) 7:4 Soc & Leg Stud 567-575
- Picciotto, Sol, "Liberalisation and democratisation: the forum and the hearth in the era of cosmopolitan post-industrial capitalism" (2000) 63 Law & Contemp Probs 157
- Pieth, Mark & Gemma Aiolfi, "The private sector becomes active: the Wolfsberg Principles" (2003) 10:4 Journal of Financial Crime 359-365
- Pieth, Mark, "The prevention of money laundering: A comparative analysis" (1998) 6:2 Eur J Crime, Crim L & Crim J 159- 168.
- Pistor, Katharina, "Sovereign wealth funds, banks and governments in the global crisis: towards a new governance of global finance?" (2009) 10:3 European Business Organisation L Rev 333-352
- Posner, Richard A. "[Theories Of Economic Regulation](#)" (1974) 5:2 Bell J Economics 335-358.
- Raza, Muhammad Subtain, Muhammad Fayyaz, & Haseeb Ijaz, "The hawala system in Pakistan: a catalyst for money laundering and terrorist financing" (2017) 5:4 Forensic Research and Criminology Intl J 00167.
- Rehman, Zia-ur, "Militant Economy of Karachi" (2014) 6: 1 Conflict and Peace Studies (Pakistan Institute of Peace Studies)
- Roubini, Nouriel, "The successful end of the Argentine debt restructuring saga" (2005); online http://www.roubiniglobal.com/archives/2005/03/the_end_of_arge.html
- Rueda, Arthur, "The implications of strong encryption technology on money laundering" (2001) 12 Alb LJ Sci & Tech 1
- Ryder, Nick, "Terror funds" (2007) 157 New LJ 1305
- Sassen, Saskia, "The participation of states and citizens in global governance" (2003) 10 Ind J Global Leg Stud 5
- Schneiderman, David, "Constitutional approaches to privatisation: an inquiry into the magnitude of neo-liberal constitutionalism" (2001); online <http://www.law.duke.edu/journals/63LCP/Schneiderman>
- Segura-Serrano, Antonio, "International economic law at a crossroads: global governance and normative coherence" (2014) 27: 3 Leiden J Intl L 677-700

- Shurong, Zhao and Saif ur Rahman, "Rethinking Civil-Military relations in a Pakistan: Some Lessons from Turkey" (2017) 6:3 *Journal of Socialomics*
- Tomasic, Roman & Folarin Akinbami, "Towards a new corporate governance after the global financial crisis" (2011) 22:8 *Intl Co & Com L Rev* 237-249
- Thomas, Chantal, "Does the 'good governance policy' of the International Financial Institutions privilege markets at the expense of democracy?" (1999) 14 *Conn J Intl L* 551
- Tsingou, Eleni, "Global financial governance and the developing anti-money laundering regime: What lessons for international political economy?" (2010) 47:6 *International Politics* 617–637.
- Solove, Daniel, "'I've Got Nothing to Hide' and Other Misunderstandings of Privacy" (2007) 44 [San Diego L Rev](#) 745
- van Duyn, Petrus C., M. S. Groenhuijsen and A. A. P. Schudelaro, "Balancing financial threats and legal interests in money laundering policy" (2005) 43 *Crime, L & Soc Change* 117.
- Walker, George, "Credit crisis, Bretton Woods II and a new global response: pt 2" (2009) 2 *J Intl Banking and Financial L* 77
- Walker, John & Brigette Unger, "Measuring global money laundering: 'The Walker Gravity Model'" (2010) 5:2 *Rev L & Economics* 821–853.
- Ward, Jonathan, "The new Basel accord and developing countries: problems and alternatives" (2002) Cambridge University; online <http://www.cerf.cam.ac.uk/publications/files/Ward04.pdf>
- Weber, Rolf, "Multilayered governance in international financial regulation and supervision" (2010) 13 *J Intl Econ L* 683
- Wilmarth, Arthur E., "Controlling systemic risk in an era of financial consolidation" (2002); online <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/wilmar.pdf>
- Woodiwiss, Michael & Dick Hobbs, "Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric of Organized Crime Policing in America and Britain" (2009) 49:1 *Brit J Crim* 106-128

Books¹⁰⁹⁸

- Abbas, Azmat, *Madrasah Mirage: A contemporary history of Islamic schools in Pakistan* (Islamabad, Emel Publications, 2018).
- Abbas, Hassan, *Pakistan's drift into extremism: Allah, the Army, and America's War on Terror* (New Delhi, Pentagon Press, 2007)
- Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford, Stanford University Press, 1998).
- Alexander, Kern, Rahul Dhumale, & John Eatwell, *Global governance of financial systems: the legal and economic regulation of systemic risk* (Oxford, Oxford University Press, 2005).
- Alldrige, Peter, *Money-laundering law: Forfeiture, confiscation, civil recovery, criminal laundering and taxation of the proceeds of crime* (Oxford, Hart, 2005).

¹⁰⁹⁸ The names in the square parentheses after a citation refer to the names used in the footnotes in the text.

Althusser, Louis; Etienne Balibar; Roger Establet; Pierre Macherey & Jacques Ranciere, *Reading Capital*, translated by Ben Brewster and David Fernbach (London, Verso, 2015).

Amin, Samir, *Capitalism in the age of globalisation: the management of contemporary society* (London, Zed Books, 2014).

Appadurai, Arjun, *Modernity at large: cultural dimensions of globalisation* (Minneapolis, University of Minnesota Press, 1995).

Arendt, Hannah, *The Human Condition* (Chicago, The University of Chicago Press, 1958/1998).

---, *The Origins of Totalitarianism* (New York, Harcourt Brace Jovanovich, 1951/1973).

Babbie, Earl, *The Practice of Social Research* (Wadsworth Publishing, 1951/1973).

Ball, Kirstie & Lauren Snider (eds), *The Surveillance-Industrial Complex: a political economy of surveillance*. (New York, Routledge, 2013).

Bauman, Zygmunt, *Society under Siege* (Cambridge, Polity Press, 2002).

Beare, Margaret E. (ed.), *Critical reflections on transnational organised crime, money laundering, and corruption*. (Toronto, University of Toronto Press, 2003).

Beare, Margaret E., and Stephen Schneider, *Money laundering in Canada: Chasing dirty and dangerous dollars* (Toronto, University of Toronto Press, 2007).

Bennett, Tim, *A practitioner's guide to money laundering compliance* (London, LexisNexus, 2004).

Bourdieu, Pierre, *The Logic of Practice*, translated by Richard Nice (Cambridge, Polity Press, 1990) [Logic]

---, *Language and Symbolic Power*, ed by John B Thompson, translated by Gino Raymond & Matthew Adamson (Cambridge, Harvard University Press, 1991) [Symbolic]

---, *Acts of Resistance: Against the Tyranny of the Market*, translated by Richard Nice (New York, The New Press, 1998) [AoR]

Braithwaite, John & Peter Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000).

Carver, Terrell, ed & trans., *Marx: Later Political Writings* (Cambridge, Cambridge University Press, 1996). [Later Marx]

De Vaus, David, *Research Design in Social Research* (London, Sage Publications, 2001).

Drezner, Daniel W. *All Politics is Global: explaining international regulatory regimes* (Princeton, Princeton University Press, 2007).

Eggers, David, *The Circle* (Toronto, Knopf Canada, 2013)

Faubion, James D., ed, *Essential Works of Foucault 1954-1984: Vol 3: Power* (London, Penguin, 2000). [Power]

Foucault, Michel, *Discipline and Punish: the Birth of the Prison*, translated by Alan Sheridan (New York, Random House, 1995). [D&P]

- Foucault, Michel, *History of Sexuality: Vol 1: an introduction*, translated by Robert Hurley (New York, Pantheon Books, 1978) [HoS]
- Gill, Stephen, *Power and Resistance in the New World Order* (New York, Palgrave Macmillan, 2003).
- Gilpin, Robert, *Global Political Economy: Understanding the International Economic Order* (Princeton, Princeton University Press, 2001)
- Gold, Michael and Michael Levi, *Money laundering in the UK: An appraisal of suspicion-based reporting* (London, The Police Foundation and University of Wales, 1994).
- Gordon, Colin, ed, *Michel Foucault: Power/Knowledge: selected interviews and other writings: 1972-1977* (New York, Pantheon Books, 1980). [P/K]
- Halliday, Simon & Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge, Cambridge University Press, 2009).
- Hoare, Quintin & Geoffrey Nowell Smith, eds & trans, *Selections from the Prison Notebooks of Antonio Gramsci (1929-1935)* (London, Lawrence and Wishart, 1971). [SPN]
- Hoare, Quintin, ed, *Antonio Gramsci: Selections from Political Writings (1910-1920)*, translated by John Mathews (London, Lawrence and Wishart, 1977). [SPW I]
- Hoare, Quintin, ed & trans., *Antonio Gramsci: Selections from Political Writings (1921-1926)* (London, Lawrence and Wishart, 1978). [SPW II]
- Haqqani, Husain, *Magnificent delusions: Pakistan, the United States and an epic history of misunderstanding* (New York, Perseus Group, 2013).
- Hardt, Michael & Antonio Negri, *Empire* (Cambridge, Harvard University Press, 2001).
- , *Multitude* (New York, The Penguin Press, 2004).
- Heilbroner, Robert L. *The Worldly Philosophers: the Lives, Times, and Ideas of the Great Economic Thinkers* (London, Penguin, 2000).
- Hindess, Barry, *Discourses of Power: from Foucault to Hobbes* (Oxford, Blackwell Publishers, 1996) [Discourses]
- Hindess, Barry & Paul Hirst, *Mode of Production and Social Formation: an auto-critique of Pre-Capitalist Modes of Production* (London, The Macmillan Press, 1977). [Mode]
- Hinterseer, Kris, *Criminal finance: The political economy of money laundering in a comparative legal context* (The Hague, Kluwer Law International, 2002).
- Hobbes, Thomas. *Elements of Law, Natural and Politic*; available for download at HeinOnline [Elements]
- Hunt, Allan & Gary Wickham, *Foucault and law: towards a sociology of law as governance* (London, Pluto Press, 1994).
- Jaffrelot, Christophe, *The Pakistan Paradox: Instability and Resilience* (Oxford, Oxford University Press, 2015).
- Jalal, Ayesha, *Partisans of Allah: jihad in South Asia* (Lahore, Sang-e-Meel Publications, 2008).

- Kennedy, David, *A world of struggle: how power, law and expertise shape global political economy* (Princeton, Princeton University Press, 2016).
- Lukes, Steven, *Power: a radical view* (Basingstoke, Palgrave Macmillan, 2005).
- Lyon, David, *The Culture of Surveillance* (Cambridge, Polity Press, 2018).
- MacPherson, C.B., ed, *Thomas Hobbes: Leviathan* (London, Penguin, 1968). [Leviathan]
- Mann, Michael, *The Sources of Social Power Volume 1: A History of Power from the Beginning to AD 1760* (New York, Cambridge University Press, 1986). [Mann 1]
- , *The Sources of Social Power Volume 2: The Rise of Classes and Nation-States, 1760 - 1914* (New York, Cambridge University Press, 1993). [Mann 2]
- , *The Sources of Social Power Volume 3: Global Empires and Revolution, 1890 - 1945* (New York, Cambridge University Press, 2012). [Mann 3]
- , *The Sources of Social Power Volume 4: Globalisations, 1945 – 2011* (New York, Cambridge University Press, 2012). [Mann 4]
- Musharraf, Pervez, *In the line of Fire: a memoir* (London, Simon & Schuster, 2006).
- Malik, Muneer A., *The Pakistan Lawyers' Movement: an unfinished agenda* (Karachi, Pakistan Law House, 2008).
- Masciandaro, Donato, ed, *Global financial crime: Terrorism, money laundering and offshore centres* (London, Routledge, 2004).
- Mitsilegas, Valsamis, *Money laundering counter-measures in the European Union: A new paradigm of security governance versus fundamental legal principles*. (PhD dissertation, University of Edinburgh, 2000/ The Hague, Kluwer Law International, 2003).
- Nawaz, Shuja, *Crossed Swords: Pakistan, Its Army, and the Wars Within* (Karachi, Oxford University Press, 2008).
- Naylor, R. T. *Wages of crime: Black markets, illegal finance and the underworld economy* (Montreal, McGill-Queen's University Press, 2002).
- O' Malley, Joseph & Richard A. Davis, eds & trans., *Marx: Early Political Writings* (Cambridge, Cambridge University Press, 1994). [Early Marx]
- Parsons, Talcott, *The Social System* (Abingdon, Routledge, 1991)
- Patton, Michael Quinn, *Qualitative Evaluation and Research Methods* (Newbury Park, CA, Sage Publications, 1990).
- Pearce, Frank, *Crimes of the Powerful: Marxism, crime and deviance* (London, Pluto Press Limited, 1976).
- Pogge, Thomas, and Krishen Mehta, eds, *Global tax fairness* (Oxford, Oxford University Press, 2016).
- Poulantzas, Nicos, *State, Power, Socialism*, translated by Patrick Camiller (London, NLB, 1978).
- Rashid, Ahmed, *Pakistan on the brink: the future of Pakistan, Afghanistan and the West* (London, Penguin Group, 2012).
- , *Descent into chaos: Pakistan, Afghanistan and the threat to global security* (London, Penguin Group, 2008).

- Reuter, Peter, and Edwin M. Truman, *Chasing dirty money: The fight against money laundering* (Washington, DC, Institute for International Economics, 2004).
- Rheinstein, Max, ed and trans., *Max Weber on Law in Economy and Society* (Cambridge, Harvard University Press, 1966).
- Robinson, Jeffrey, *The laundrymen: Inside money laundering* (New York, Arcade, 1996).
- , *The sink: How banks, lawyers and accountants finance terrorism and crime — and why governments can't stop them* (London, Constable and Robinson, 2004).
- Rodrik, Dani, *The globalisation paradox: why global markets, states and democracy can't coexist* (Oxford, Oxford University Press, 2011).
- Rubin, Herbert & Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data* (New York, Sage Publications, 1995).
- Ruggiero, Vincenzo, *Dirty money: On financial delinquency* (Oxford, Oxford University Press, 2017).
- Sassen, Saskia, *Territory, authority, rights: from medieval to global assemblages* (Princeton, Princeton University Press, 2006).
- Santos, Boaventura de Sousa, *Towards a New Legal Commonsense* (Scotland, Butterworths, Lexis Nexis, 2002).
- Shah, Aqil, *The Army and Democracy: military politics in Pakistan* (Cambridge, Harvard University Press, 2014).
- Sharman, J. C., *The money laundry: Regulating criminal finance in the global economy* (Ithaca, NY, Cornell University Press, 2011).
- Sharman, J. C. and Percy S. Mistry, *Considering the consequences: The development implications of initiatives on taxation, anti-money laundering and combating the financing of terrorism* (London, Commonwealth Secretariat, 2008).
- Shaxson, Nicholas and John Christensen, *The finance curse: How oversized financial centres attack democracy and corrupt economies* (London, Tax Justice Network, 2013); online <https://www.taxjustice.net/topics/finance-sector/finance-curse/>
- Siddiq, Ayesha, *Military Inc.: inside Pakistan's military economy* (Oxford, Oxford University Press, 2007).
- Simon, Roger, *Gramsci's Political Thought: an Introduction* (London, Lawrence and Wishart, 2015).
- Sklair, Leslie, *Globalisation: capitalism and its alternatives* (Oxford, Oxford University Press, 2001).
- Stessens, Guy, *Money laundering: A new international law enforcement model* (Cambridge, UK, Cambridge University Press, 2000).
- Stiglitz, Joseph E., *Globalisation and its discontents* (New York, W.W. Norton & Company Inc, 2002).
- Tombs, Steve and David Whyte, *The corporate criminal: Why corporations must be abolished* (London, Routledge, 2015).
- van Duyne, Petrus and Michael Levi, *Drugs and money* (London, Routledge, 2005).
- Woodward, Bob, *Bush at war* (London, Simon & Schuster, 2002).

Wilks, Stephen, *Rethinking the dynamics of remittance regulation within the context of networked global governance* (PhD dissertation, York University, 2011). [unpublished]

Woodiwiss, Michael, *Organised crime and American power: A history* (Toronto, University of Toronto Press, 2001).

Essays or Entries from Collection of Essays, Dictionaries or Encyclopedias

Ahmed, Sanaa & Margaret Beare, "Money Laundering" in Beth M. Heubner, ed, *Oxford Bibliographies in Criminology* (New York, Oxford University Press, 2018); available online.

Beare, Margaret E., "Canada: Internal Conspiracies – Corruption and Crime" in F. Allum and S. Gilmour, eds, *Handbook of Organized Crime and Politics* (Cheltenham, UK, Edward Elgar Publishing. Ltd, 2019) 189-208

Beare, Margaret E., "Shadow Boxing against the Crimes of the Powerful" in Steven Bittle, Laureen Snider, Steve Tombs & David Whyte, eds, *Revisiting Crimes of the Powerful: Marxism, Crime and Deviance* (Abingdon, UK, Routledge Press, 2018). 45-59

Beare, Margaret & Michael Woodiwiss, "U.S. Organised Crime Control Policies Exported Abroad" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014)

Beare, Margaret E., "Case Study – 'voluntary' ethical conduct: anti-money laundering compliance and the financial sector" in W. Craig, ed, *Ethics Codes: the regulatory norms of a global society* (Aldershot, UK, Edward Elgar, 2005).

Biersteker, Thomas J. & Sue E. Eckert, "Introduction: the challenge of terrorist financing" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007). 1-16

Biersteker, Thomas J. & Sue E. Eckert, "Conclusion: taking stock of efforts to counter the financing of terrorism and recommendations for the way forward" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007) 289-304

Bourdieu, Pierre, "The Forms of Capital" in J. Richardson, ed, *Handbook of Theory and Research for the Sociology of Education* (New York, Greenwood, 1986) 241-258; online
<https://www.marxists.org/reference/subject/philosophy/works/fr/bourdieu-forms-capital.htm#n3>

Eckert, Sue E., "The US regulatory approach to terrorist financing" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007) 209-233

Gunaratna, Rohan, "The evolution of al Qaeda" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007) 47-62

Gunning, Jeroen. 2007. "Terrorism, charities and diasporas: contrasting the fundraising practices of Hamas and al Qaeda among Muslims in Europe" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007) 93-125

Helleiner, Eric, "The politics of global financial regulation: Lessons from the fight against money laundering" in J. Eatwell and L. Taylor, eds, *International capital markets: Systems in transition* (Oxford, Oxford University Press, 2002).

Jessop, Bob, "**Althusser, Poulantzas, Buci-Glucksmann: Weiterentwicklung von Gramscis Konzept des integralen Staats**" in S. Buckel and A. Fischer-Lescano, eds, *Hegemonie gepanzert mit Zwang. Zivilgesellschaft und Politik im Staatsverständnis Antonio Gramscis* (Baden-Baden, Nomos, 2007). English translation: "Althusser, Poulantzas, Buci-Glucksmann: Elaborations of Gramsci's Concept of the integral State"; online

<https://bobjessop.org/2014/02/01/althusser-poulantzas-buci-glucksmann-elaborations-of-gramscis-concept-of-the-integral-state/>

Karstedt, Susan, "Organising Crime: The State as Agent" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014).

Kilchling, Michael, "Finance-Oriented Strategies of Organised Crime Control" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014).

Levi, Michael, "Money Laundering" in Letizia Paoli, ed, *The Oxford Handbook on Organised Crime* (Oxford, Oxford University Press, 2014).

Pahuja, Sundhya, "Global formations: IMF conditionality and the South as legal subject" in Peter Fitzpatrick & Patricia Tuitt, eds, *Critical beings: law, nation and the global subject* (Hantspp, Ashgate Publishing Limited, 2004) 161-179

Picciotto, Sol, "International law: the legitimation of power in world affairs" in P. Ireland & P. Laleng, eds, *The Critical Lawyers' Handbook 2* (London, Pluto Press, 1997)

Stern, Jessica & Amit Modi, "Producing terror: organizational dynamics of survival" in Thomas Biersteker & Sue Eckert, eds, *Countering the Financing of Terrorism* (London, Routledge, 2007) 19-46

Webley, Lisa, "Qualitative Approaches to Empirical Legal Research" in P. Cane & H. Kritzer, eds, *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2010)

Reports

Article 19, *Country Report: The Right to Information in Pakistan* (November 2015); online <https://www.article19.org/resources/country-report-the-right-to-information-in-pakistan/>

Baker, Andrew (University of Sheffield), Gerald Epstein (University of Massachusetts Amherst) & Juan Montecino, *The UK's Finance Curse? Costs and Processes* (University of Sheffield, 2018); online <http://speri.dept.shef.ac.uk/wp-content/uploads/2019/01/SPERI-The-UKs-Finance-Curse-Costs-and-Processes.pdf>

Baran, Zeyno, *Hizb-ut-Tahrir: Islam's political insurgency* (Washington DC, The Nixon Centre, 2004); online http://www.bits.de/public/documents/US_Terrorist_Attacks/Hizbut-ahrirIslam'sPoliticalInsurgency.pdf

Basel Committee on Banking Supervision, *Bank failures in mature economies* (Basel, Bank for International Settlements, 2004); online http://www.bis.org/publ/bcbs_wp13.pdf [Mature economies]

Centre for Law and Democracy, *Note on the Pakistan Right of Access to Information Bill, 2017* (October 2017); online https://www.law-democracy.org/live/wp-content/uploads/2012/08/Pakistan.RTI_Note_Oct17.pdf

Christensen, John, *When will the British government impose public registries on its tax havens?*, (Tax Justice Network, March 4, 2019); online https://www.taxjustice.net/2019/03/04/when-will-the-british-government-impose-public-registries-on-its-tax-havens/?fbclid=IwAR1ZpBGwMVL9UFNIOOSMGirs1pbyErQPQuzO2hpbm9vm9j9d4_7gN0eFTEE

Demirgüç-Kunt, Alsi, Leora Klapper, Dorothe Singer, Saniya Ansar & Jake Hess, *The global Findex database 2017: measuring financial inclusion and the fintech revolution*. (Washington DC, The World Bank, 2017); online https://globalfindex.worldbank.org/node?field_databank_country_target_id=7 [Findex]

FATF, *Virtual currencies: Key definitions and potential AML/CFT risks* (2017); online <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf>.

German, Peter, *Dirty Money: An Independent Review of Money Laundering in Lower Mainland Casinos conducted for the Attorney General of British Columbia* (March 2018); online https://news.gov.bc.ca/files/German_Gaming_Final_Report.pdf

Global Financial Integrity. 2015. *Illicit financial flows from developing countries: 2004–2013*; online http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf.

Global Financial Integrity, *The Library Card Project: The Ease of Forming Anonymous Companies in the United States* (March 2019); online https://www.gfintegrity.org/wp-content/uploads/2019/03/GFI-Library-Project_2019.pdf

Gray, Larissa, Kjetil Hansel, Pranvera Recica-Kirkbride & Linnea Mills, *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington DC, World Bank and OECD, 2014); online <https://openknowledge.worldbank.org/bitstream/handle/10986/20002/210274.pdf?sequence=1&isAllowed=y>

Hayes, Ben, *The impact of international counter-terrorism on civil society organisations: understanding the role of the Financial Action Task Force* (Washington DC, Bread for the World, April 2017); online https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_68_The_impact_of_international_counterterrorism_on_CSOs.pdf

Human Rights Commission of Pakistan, *Annual Report 2014*; online <http://hrcp-web.org/hrcpweb/annual-report-2014/>

Human Rights Watch. *World Report 2014: Pakistan*; online <https://www.hrw.org/world-report/2014/country-chapters/pakistan>

International Commission of Jurists, *Authority without accountability: the search for justice in Pakistan* (2013); online <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/12/ICJ-AUTHORITY-WITHOUT-ACCOUNTABILITY-PAKISTAN-FINAL-.pdf>

OECD, *Illicit financial flows from developing countries: Measuring OECD responses* (Paris, OECD, 2014); online <http://dx.doi.org/10.1787/9789264203501-en> [OECD 2014a]

OECD, *Better policies for development 2014: Policy coherence and illicit financial flows* (Paris, OECD, 2014); online <http://dx.doi.org/10.1787/9789264210325-en> [OECD 2014b]

OpenCorporates, *The closed world of company data: An examination of how open company data is in Open Government Partnership countries* (undated); online http://opencorporates.com/downloads/ogp_company_data_report.pdf

Transparency International, *Just for Show: Reviewing G20 Promises on Beneficial Ownership* (2015); online https://www.transparency.org/whatwedo/publication/just_for_show_g20_promises

Transparency International, *No reason to hide: Unmasking owners of Canadian companies and trusts* (2016); online <http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf>

UNCTAD, *Urgent global action needed to tackle tax avoidance* (2014); online http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=838&Sitemap_x0020_Taxonomy=CSO

UNCTAD, *Trade and development report 2014*; online http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf

UNECA, *Illicit financial flow: Report of the high level panel on illicit financial flows from Africa* (2016); online http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf

UNODC, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes* (2011); online https://www.unodc.org/unodc/en/frontpage/2011/October/illicit-money_-how-much-is-out-there.html

US State Department, *Patterns of Global Terrorism* (1997); online <http://www.higginsctc.org/patternsofglobalterrorism/1997pogt.pdf>

Walker, John, *Estimates of the extent of money laundering in and throughout Australia*. (AUSTRAC, Government of Australia, 2004); online <http://www.criminologyresearchcouncil.gov.au/reports/200304-33.pdf> .

World Bank, *De-risking in the financial sector* (2016); online <http://www.worldbank.org/en/topic/financialmarketintegrity/brief/de-risking-in-the-financial-sector>

World Bank, *The puppet masters: How the corrupt use legal structures to hide stolen assets and what to do about it* (2011); online <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>

World Economic Forum, *Organized crime enablers* (Global Agenda Council on Organized Crime, 2012); online <https://www.weforum.org/reports/organized-crime-enablers>.

Addresses and Papers delivered at Conferences

Beare, Margaret E., “Compliance expectations: banking on the banks” (Paper delivered at Thirty-third International Symposium on Economic Crime, Jesuit College, Cambridge, September 9, 2015) [unpublished]

Camdessus, Michel. (Address by the former managing director of the IMF at the Plenary Meeting of the Financial Action Task Force on Money Laundering, Paris, February 10, 1998); online <http://www.imf.org/external/np/speeches/1998/021098.htm>

Passas, Nikos. (Hearing on “Trading with the enemy: Trade-based money laundering is the growth industry in terror finance” before the House Financial Services Committee Task Force to Investigate Terrorism Financing, 2016); online <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba00-wstate-npassas-20160203.pdf>

Tombs, Steve, “The Real and the Imaginary Social Order: state-corporate symbiosis ‘after’ the crisis” (Paper delivered at “Revisiting Crimes of the Powerful: a Global Conversation on Capitalism, Corporations and Crime” symposium, Toronto, May 2017) [unpublished]

van Duyne, Petrus C. “Transnational organised crime, laundering and the congregation of the gullible” (Valedictory address delivered at Tilburg University, 2011); online <http://www.petrusvanduyne.nl/wp-content/uploads/2017/08/Afscheidsrede-Valedictory.pdf>

Magazines

Arshad, Amber. “Interview: Aamir Khawas”, *Aurora* (Nov-Dec 2016); online <https://aurora.dawn.com/news/1141640>

Chimni, B.S., “Marxism and International Law: A Contemporary Analysis”, *Economic and Political Weekly* 34:6 (Feb. 6-12, 1999), 337-349; online <https://www.jnu.ac.in/sites/default/files/Marxism%20and%20International%20Law%20BSCchimni.pdf>

Fair, C. Christine, "Why Pakistan Army is here to stay: prospects for civilian governance?", *International Affairs*, Vol. 87, No. 3, (2011) 571-588

Fair, Christine C. "Pakistan's sham election: how the army chose Imran Khan", *Foreign Affairs* (July 27, 2018); online <https://www.foreignaffairs.com/articles/pakistan/2018-07-27/pakistans-sham-election>

Khalilzad, Zalmay. "'We misled you': How the Saudis are coming clean on funding terrorism", *Politico* (September 14, 2016); online <https://www.politico.com/magazine/story/2016/09/saudi-arabia-terrorism-funding-214241?fbclid=IwAR0-gyGXH8x0jB-qFrdbBchuKbTdmGc5Mbqbcgj3UkiRfhPG9zTUb511OIQ>

McLeary, Paul & Dan de Luce, "Trump Administration Threatens to Cut Aid to Pakistan. Does It Matter?", *Foreign Policy* (August 23, 2017); online <https://foreignpolicy.com/2017/08/23/trump-administration-threatens-to-cut-aid-to-pakistan-does-it-matter/>

Rehman, I. A., "Justice under attack", *Newsline* (May 2019); online <https://newslinemagazine.com/magazine/justice-under-attack/?fbclid=IwAR2Yw42USVPMthfoj APBdSx6lqqZV15qPXGYeImzJiiEmZIMEoS3JUDUVk>

Vanbergen, Graham, "Money Laundering and the City of London's 'Crime Scene': Haven of Tax Havens for the Mega-Wealthy", *Global Research* (April 5, 2016); online <https://www.globalresearch.ca/money-laundering-and-the-city-of-londons-crime-scene-haven-of-tax-havens-for-the-mega-wealthy/5513335>

Newspapers, newswires and other news sources

Abi-Habib, Maria, "China's 'Belt and Road' plan in Pakistan takes a military turn", *New York Times* (December 19, 2018); online <https://www.nytimes.com/2018/12/19/world/asia/pakistan-china-belt-road-military.html?fbclid=IwAR19neRpOOFzKWBiWzUFd2nSple7sKh4WJMf20dTqMi6CPKUzqu9ZiZIVVU>

Abi-Habib, Maria, Shah Meer Baloch & Zia-ur-Rehman, "Violent Extremist or Political Candidate? In Pakistan Election, You Can Be Both", *New York Times* (July 17, 2018); online <https://www.nytimes.com/2018/07/17/world/asia/pakistan-election-extremists.html>

Abi-Habib & Salman Masood, "Military's Influence Casts a Shadow Over Pakistan's Election", *New York Times* (July 21, 2018); online <https://www.nytimes.com/2018/07/21/world/asia/pakistan-election-military.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>

Ahmad, Imtiaz, "Successful or not? Pakistan, US media differ in interpretation of Mike Pompeo's visit", *Hindustan Times* (September 8, 2018); online <https://www.hindustantimes.com/world-news/successful-or-not-pakistan-us-media-differ-in-interpretation-of-mike-pompeo-s-visit/story-CXo7lOapMb5h68SOOBQOYI.html>

Ahmed, Salahuddin, "Scrap reference against Justice Isa", *Dawn* (June 9, 2019); online <https://www.dawn.com/news/1487022?fbclid=IwAR0Y-apX2irecFZHyaYhz2wnBc-JRLxGA0U-izr4eRtOtuzWhhTiDw Mm6w>

Ali, Kalbe, "Who is Khadim Hussain Rizvi?", *Dawn* (December 3, 2017); online <https://www.dawn.com/news/1374182>

Anderson, John Ward & Kamran Khan, "Heroin plan by top Pakistanis alleged", *Washington Post* (September 12, 1994); online https://www.washingtonpost.com/archive/politics/1994/09/12/heroin-plan-by-top-pakistanis-alleged/311942bb-983a-416e-b735-7d71a07ba030/?utm_term=.a6d83f37c04d

Associated Press. "Pakistan army rejects US findings on border attack", *Guardian* (December 23, 2011); online <https://www.theguardian.com/world/2011/dec/23/pakistan-army-rejects-us-findings>

Babar, Mariana, "Placement on FATF grey list: US wants to see Pakistan suffer, says Miftah", *The News International* (February 27, 2018); online <https://www.thenews.com.pk/print/286105-placement-on-fatf-grey-list-us-wants-to-see-pakistan-suffer-says-miftah>

Baloch, Shafi, Raza Jafferri & Imtiaz Ali, "[Sharjeel Memon sent back to jail after 'liquor bottles' recovered from hospital room](#)", *Dawn* (September 1, 2018); online <https://www.dawn.com/news/1430344>

BBC report, "Musharraf admits US aid diverted", *BBC* (September 14, 2009); online http://news.bbc.co.uk/2/hi/south_asia/8254360.stm

BBC report, "Pakistan outrage after 'Nato attack kills soldiers'", *BBC* (November 26, 2011); online <https://www.bbc.com/news/world-asia-15901363>

BBC Monitoring Unit, "Musharraf rallies Pakistan", *BBC* (September 19, 2001); online http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1553542.stm

Bennett-Jones, Owen, "Pakistan's MQM 'received Indian funding'", *BBC News* (June 24, 2015); online <https://www.bbc.com/news/world-asia-33148880>

Boone, Jon, "Pakistani chief justice's son accused of taking gifts to influence father", *Guardian* (June 12, 2012); online <https://www.theguardian.com/world/2012/jun/12/pakistan-chief-justice-son-gifts>

[Booth, Robert & Helena Bengtsson](#), "The London skyscraper that is a stark symbol of the housing crisis", *Guardian* (May 24, 2016); online <https://www.theguardian.com/society/2016/may/24/revealed-foreign-buyers-own-two-thirds-of-tower-st-george-wharf-london>

Cassara, John A., "Delaware, den of thieves?", *New York Times* (November 1, 2013); online <https://www.nytimes.com/2013/11/02/opinion/delaware-den-of-thieves.html?searchResultPosition=1>

CBC News, "Military gear missing from Afghan mission shipments", *CBC News* (January 12, 2012); online <https://www.cbc.ca/news/politics/military-gear-missing-from-afghan-mission-shipments-1.1198183>

Chaudhury, Dipanjan Roy, "Global watchdog FATF puts Pakistan on notice", *The Economic Times* (November 5, 2017); online <https://economictimes.indiatimes.com/news/defence/global-watchdog-fatf-puts-pakistan-on-notice/articleshow/61521911.cms>

Cohen, Patricia, "Need to hide some income? You don't have to go to Panama", *New York Times* (April 7, 2016); online <https://www.nytimes.com/2016/04/08/business/need-to-hide-some-income-you-dont-have-to-go-to-panama.html?searchResultPosition=2>

Cribb, Robert & Marco Chown Oved, "Snow washing: Canada is the world's newest tax haven", *Toronto Star* (January 25, 2017); online <http://projects.thestar.com/panama-papers/canada-is-the-worlds-newest-tax-haven/>

Daily Times report, "Ban not fully enforced", *Daily Times* (February 24, 2019); online <https://dailytimes.com.pk/357982/ban-not-fully-enforced/>

Damon, Arwa & Brent Swails, "China and the United States face off in Djibouti as the world powers fight for influence in Africa", *CNN* (May 27, 2019); online <https://www.cnn.com/2019/05/26/africa/china-belt-road-initiative-djibouti-intl/index.html>

Dawn report, "[Former bank chief claims being forced in Mehrangate](#)", *Dawn* (March 8, 2012); online <https://www.dawn.com/news/701078>

Dawn report, "[Former TTP spokesman Ehsanullah Ehsan has turned himself in: Pak Army](#)", *Dawn* (April 17, 2017); online <https://www.dawn.com/news/1327567>

Dawn report, "Ex-chief of Navy stripped of rank, benefits", *Dawn* (January 31, 2002); online <https://www.dawn.com/news/17343>

de Querol, Ricardo, "Interview: Zygmunt Bauman: 'Social media are a trap'", *El Pais* (January 19, 2016); online https://elpais.com/elpais/2016/01/19/inenglish/1453208692_424660.html

DeYoung, Karen, "Haqqani network to be designated a terrorist group", *Washington Post* (September 7, 2012); online https://www.washingtonpost.com/world/national-security/haqqani-network-to-be-designated-a-terrorist-group-obama-officials-say/2012/09/07/e6576ac0-f8f6-11e1-a073-78d05495927c_story.html?noredirect=on&utm_term=.a4ad1c2ab7f4

Editorial, "The War on Jang", *Newsweek* (November 26, 2014); online <http://newsweekpakistan.com/the-war-on-jang/>

Editorial, "Fighting, While Funding, Extremists", *New York Times* (June 19, 2017); online <https://www.nytimes.com/2017/06/19/opinion/saudi-arabia-qatar-isis-terrorism.html>

Flatley, Daniel, Margaret Talev & Nick Wadhams, "Trump Considers Emergency to Bypass Congress on Saudi Arms Deal", *Bloomberg* (May 23, 2019); online <https://news.yahoo.com/trump-considers-emergency-bypass-congress-001623269.html; ylt=AwrC1C3AR BcAC8AxAvwFAx.; ylu=X3oDMTBybGY3bmpvBGNvbG8DYmYxBHBvcwMyBHZ0aWQDBHNiYwNzcg-->

Frontline, "Interview: Vali Nasr", *Frontline* (October 25, 2001); online <https://www.pbs.org/wgbh/pages/frontline/shows/saudi/interviews/nasr.html>

Garside, Juliette & Caelainn Barr, "Banking leak exposes Russian network link to Prince Charles", *Guardian* (March 4, 2019); online <https://www.theguardian.com/world/2019/mar/04/banking-leak-exposes-russian-network-link-to-prince-charles-troika-laundromat>

Haider, Irfan & Matin Haider, "Battleground Islamabad: Imran vows to advance as clashes continue", *Dawn* (August 30, 2014); online <https://www.dawn.com/news/1128786/gadri-directs-marchers-to-move-towards-pm-house-peacefully>

Haider, Mehtab, "Pakistan submits terrorism financing report to FATF", *The News International* (January 5, 2019); online <https://www.thenews.com.pk/print/414797-pakistan-submits-terror-financing-report-to-fatf>

Hasan, Shoaib, "The Militant Economy", *The News International* (January 28, 2013); online http://e.thenews.com.pk/newsmag/mag/detail_article.asp?id=4482&magId=10

Hashim, Asad, "Seven things Pakistan's election results reveal", *Al Jazeera* (July 28, 2018); online <https://www.aljazeera.com/news/2018/07/pakistan-election-results-reveal-180728071614110.html>

Helmore, Edward, "Wolf of Wall Street film linked to money 'stolen from Malaysian fund', US claims", *Guardian* (July 21, 2016); online <https://www.theguardian.com/world/2016/jul/20/us-justice-department-1mdb-fund-seizure-fraud-investigation>

Iqbal, Shahid, "HBL vows to fight charges levelled by US regulator", *Dawn* (August 30, 2017); online <https://www.dawn.com/news/1354739>

Katz, Alan, "Huge pools of dirty money are Europe's worst-kept banking secret", *Bloomberg Businessweek* (March 4, 2019); online <https://www.bloomberg.com/news/features/2019-03-14/huge-pools-of-dirty-money-are-europe-s-worst-kept-banking-secret?fbclid=IwAR1a7XiXtiVg1o2mwST39GmGVO8GpChJHiwjE77piGwKrfNn5GSm5CBggwM>

Khan, M. Ilyas, "Profile: Hafiz Mohammad Saeed", *BBC* (June 2, 2009); online http://news.bbc.co.uk/2/hi/south_asia/6067694.stm

Khan, Omar Farooq, "Pakistan SC grants ex-PM Nawaz Sharif bail on medical grounds", *Times of India* (March 26, 2019); online <https://timesofindia.indiatimes.com/world/pakistan/pakistan-sc-grants-ex-pm-nawaz-sharif-bail-on-medical-grounds/articleshow/68580781.cms>

MacFarquhar, Neil, "India Wants Pakistani Group Added to U.N.'s Terrorism List", *New York Times* (December 9, 2008); online <https://www.nytimes.com/2008/12/10/world/10nations.html>

Myers, Joanne J., "Interview: Vali Nasr", *Carnegie Council for Ethics in International Affairs* (October 18, 2006); online <https://web.archive.org/web/20120914193938/http://www.carnegiecouncil.org/studio/transcripts/5400.html>

Naya Daur report, "KP Govt Transfers Rs30 Million School Funds To Samiul Haq's Seminary", *Naya Daur* (April 10, 2019); online <https://nayadaur.tv/2019/04/kp-govt-transfers-rs30-million-school-funds-to-samiul-haqs-seminary/?fbclid=IwAR2Ov3V7PCUc2EkNhROxnxppvX9ORRi3eSRndU3LPzSj0drhZdal350Hw>.

Osborne, Hilary, "UK vulnerable to money laundering on a massive scale, find MPs", *Guardian* (March 8, 2019); online https://www.theguardian.com/uk-news/2019/mar/08/uk-vulnerable-to-money-laundering-on-a-massive-scale-find-mps?CMP=Share_iOSApp_Other&fbclid=IwAR38WzvDEFCCztIkxKExQCuoVzqNjHtIDTSqfMTmswFQQbvtUVxEkRamECU

Oved, Marco Chown & Robert Cribb, "Ottawa vows to lift corporate secrecy in bid to stop tax evasion and money laundering", *Toronto Star* (July 18, 2017); online <https://www.thestar.com/news/canada/2017/07/18/corporate-secrecy-to-be-lifted-to-help-stop-tax-evasion-and-money-laundering.html>

Pathania, Jyoti M., "Verdict is out and the verdict is 'Uniform-ed Democracy', *Claws* (August 17, 2018); online <https://www.claws.in/1924/commentary-on-pakistan-elections-2018-verdict-is-out-the-winner-is-%c3%a2%c2%80%c2%9cuniform-ed-democracy%c3%a2%c2%80%c2%9d-dr-iyoti-m-pathania.html>

Reuters report, "Bid to block Pakistan F-16 sale fails in U.S. Senate", *Reuters* (March 10, 2016); online <https://www.reuters.com/article/usa-pakistan-fighters/bid-to-block-pakistan-f-16-sale-fails-in-u-s-senate-idUSKCN0WC2L4>

Reuters report, "Foreign NGOs in Pakistan working in 'unauthorised areas': State Minister for Interior Affairs", *Express Tribune* (December 22, 2017); online <https://tribune.com.pk/story/1590449/1-ngos-pakistan-working-unauthorised-areas-state-minster-interior/>

Roggio, Bill, "[Pakistani Taliban faction claims spokesman was captured in Afghanistan](https://www.longwarjournal.org/archives/2017/04/pakistani-taliban-faction-claims-spokesman-was-captured-in-afghanistan.php)", *Long War Journal* (April 20, 2017); online <https://www.longwarjournal.org/archives/2017/04/pakistani-taliban-faction-claims-spokesman-was-captured-in-afghanistan.php>

Rohde, David, Carlotta Gall, Eric Schmitt & David E. Sanger, "U.S. Officials See Waste in Billions Sent to Pakistan", *New York Times* (December 24, 2007); online <https://www.nytimes.com/2007/12/24/world/asia/24military.html>

Shah, Saeed and Shoaib Hasan, "Taliban Take Toll on Pakistan's Biggest City", *Wall Street Journal* (February 13, 2014); online <http://www.wsj.com/articles/SB10001424052702304558804579374901672957772>

Shams, Shamil, Masood Saifullah & Waslat Nazimi, "Taliban courts: When all alternatives fail", *Deutsche Welle* (February 5, 2015); online <https://www.dw.com/en/taliban-courts-when-all-alternatives-fail/a-18236353>

Shaxson, Nicolas, "The finance curse: how the outsized power of the City of London makes Britain poorer", *Guardian* (October 5, 2018); online https://www.theguardian.com/news/2018/oct/05/the-finance-curse-how-the-outsized-power-of-the-city-of-london-makes-britain-poorer?CMP=share_btn_tw

Sheppard, Lee, "Our hypocrisy on tax havens", *Forbes* (July 22, 2010). Online <https://www.forbes.com/2010/07/22/tax-finance-havens-economy-opinions-columnists-lee-sheppard.html#5a550c5b5f49>

Shields, Michael, "Swiss to ease seizure, repatriation of dictators' funds", *Reuters* (May 26, 2016); online <http://www.reuters.com/article/us-swiss-assets-idUSKCN0YG29Z>

Siddiqi, Faisal, "2007 déjà vu", *Dawn* (June 10, 2019); online https://www.dawn.com/news/1487244?fbclid=IwAR1jIPPt1CV-kyLGSujFghpB46muJwaq8VfPA24WE7O4cY_RWjFAf3yhmyo

Syal, Rajeev, "Drug money saved banks in global crisis, claims UN advisor", *Guardian* (December 13, 2009); online <https://www.theguardian.com/global/2009/dec/13/drug-money-banks-saved-un-chief-claims>

Taylor, Matthew & Tom Phillips, "London mayor launches unprecedented inquiry into foreign property ownership", *Guardian* (September 30, 2016); online https://www.theguardian.com/cities/2016/sep/29/london-mayor-sadiq-khan-inquiry-foreign-property-ownership?fbclid=IwAR2VZ77IxfEdYjOliyMJG_z91OlbN_gpk7aaF4e-zf83F26TMgpHREvk52g

Thompson, Barney, "Political risk is now a growth industry in its own right", *Financial Times* (September 28, 2014); online <https://www.ft.com/content/c1b94922-3765-11e4-8472-00144feabdc0>

Tisdall, Simon, "Ahmed Wali Karzai, the corrupt and lawless face of modern Afghanistan", *Guardian* (July 12, 2011); online <https://www.theguardian.com/world/2011/jul/12/ahmed-karzai-modern-afghan-warlord>

Walsh, Declan, "Internal forces besiege Pakistan ahead of voting", *New York Times* (January 15, 2013); online <https://www.nytimes.com/2013/01/16/world/asia/pakistan-high-court-orders-arrest-of-prime-minister.html>

Walsh, Declan, "Up to 70% of US aid to Pakistan 'misspent'", *Guardian* (February 27, 2008); online <https://www.theguardian.com/world/2008/feb/27/pakistan.usa>

Watson, Paul, "A Revolving Door for Pakistan's Militants", *LA Times* (November 17, 2002); online <https://www.latimes.com/archives/la-xpm-2002-nov-17-fg-pakterror17-story.html>

Wayne, Leslie, "How Delaware thrives as a corporate tax haven". *New York Times* (June 30, 2012); online <https://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?searchResultPosition=1>

Wintour, Patrick, "MPs attack ministers over delay to tax havens' public registers", *Guardian* (Jan 11, 2019); online https://www.theguardian.com/world/2019/jan/11/mps-attack-ministers-over-delay-to-tax-havens-public-registers?CMP=Share_iOSApp_Other&fbclid=IwAR3KBnMTDNCqNiSlmJJVfyKM7mC4DHRkOSRjuSszBcX7S8ni053wYPaZ7E

Yousuf, Kamran, "Budget 2011-2012: Defence spending up by 12%", *Express Tribune* (June 4, 2011); online <https://tribune.com.pk/story/182147/budget-2010-2011-defence-spending-up-by-12/>

Zaman, Qamar, "Ensuring transparency: Senate panel finalises draft Right to Information Act", *Express Tribune* (June 14, 2013); online <https://tribune.com.pk/story/563038/ensuring-transparency-senate-panel-finalises-draft-right-to-information-act/>

Working papers

Masciandaro, Donato & Raffaella Barone, "Worldwide anti-money laundering regulation: Estimating costs and benefits" (2008) Paolo Baffi Centre Research Paper series No. 2008-12; online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136107&rec=1&srcabs=2454934&alg=1&pos=8

McBarnet, Doreen, "When compliance is not the solution but the problem: From changes in law to changes in attitude" (2001), Working Paper no 18, Centre for Tax System Integrity Research School of Social Sciences Australian National Univ. Canberra, ACT; online <https://pdfs.semanticscholar.org/2a67/58231f73c3a177535f6df9ae0d347fb19bb1.pdf>

Quirk, Peter, "Macroeconomic implications of money laundering" (1996) IMF Working Paper 96/99, Institute for International Economics, Washington, DC; online <http://www.elibrary.imf.org/abstract/IMF001/04385-9781451962123/04385-9781451962123/04385-9781451962123.xml?redirect=true>

Zanforlin, Luisa, Ian Tower, Nier Erend, Michael Moore, Ana Carvajal & Randall Dodd, "The Perimeter of Financial Regulation" (2009) International Monetary Fund, Staff Position Note No. 2009/07; online <https://www.imf.org/en/Publications/IMF-Staff-Position-Notes/Issues/2016/12/31/The-Perimeter-of-Financial-Regulation-22826>