Judging the Generals: Judicial-Military Interactions in Authoritarian and Post-Authoritarian States

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ABSTRACT

Judging the Generals:

Judicial-Military Interactions in Authoritarian and Post-Authoritarian States

A dissertation presented to the Faculty of the
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By Yasser Kureshi

In many countries around the world, from dictatorships such as Thailand to young democracies such as Nigeria, militaries continue to hold positions of power, undermining the rule of law and the meaningful realization of democracy. Yet little attention has been paid to the role courts might play in enhancing civilian control over the military. This lacuna is especially surprising given the "judicial turn" in politics that has become evident globally in recent years, empowering judiciaries with unprecedented authority to reshape political landscapes. This dissertation asks: *under what conditions do courts contest the prerogatives of politically powerful militaries?*

To answer this question, this dissertation focuses primarily on the case of Pakistan. Pakistan is a particularly illuminating case because Pakistan's high courts shifted from collaborating with the military to contesting its authority at a time when military power was at its height, and the courts had been widely discredited, making it a least likely case for such assertive behaviour.

The main argument put forth in this dissertation is that the shift in judicial assertiveness towards the military in Pakistan is best explained by a change in the *audiences* with which judges interact, both individually and institutionally. I argue that the judiciary converges on a set of institutional norms and preferences in response to the preferences of the institutions and networks, or "*audiences,*" with which judges interact, and which shape the careers and reputations of judges. The judiciary's affinity to the military diminishes as these audiences from which judges seek approval, grow independent from the military. This *audience-based* approach helps in conceptualizing how

institutional norms form *and* change. I devise a typology of judiciaries based on institutional interlinkages with the military in countries located across the authoritarian and post-authoritarian spectrum. In Pakistan, I argue that courts shifted away from loyalty to the military, as three processes (institutional, demographic and political) broke the institutional interlinkages between the military and judiciary, reducing the military's role as a key *audience*, and increasing the role of independent and politically active bar associations as the audience shaping the judiciary's norms and preferences.

The underlying logic governing this transition applies, I argue, far beyond the Pakistani case, generating important lessons on the conditions under which courts bring powerful militaries under civilian control. The concluding chapter briefly discusses how the audience-based framework can also explain the dynamics of judicial assertiveness towards the military in Egypt and Indonesia.

The associated argument that this dissertation makes is that variation in judicial assertiveness towards the military is also selective, contingent upon the type of military prerogative being challenged. The judiciary is deferential to the military if the prerogative being challenged is connected to the military's maintenance of its institutional autonomy. This means that the judiciary is more likely to challenge the military on matters related to violation of democratic process and economic corruption but less likely to challenge it on matters of "national security." I argue that the selective nature of the judiciary's assertiveness is strategic. Taken together, these arguments explain variation in judicial contestation of military prerogatives across types of issues and over time.

This dissertation places three fields of scholarship in political science in conversation with one another: judicial politics, civil-military relations, and democratization. It also contributes to the literature on comparative political institutions as it shows how institutional norms and preferences can change over time. Finally, the study provides important insights on designing judicial systems to play meaningful roles in bringing politically powerful militaries under civilian control and promoting the establishment of democracy.

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"Military rule is against the dignity, honor and glory of the nation that it achieved after great sacrifices 62 years ago; it is against the dignity and honour of the people of Pakistan, who are committed to upholding the sovereignty and integrity of the nation by all means."

Chief Justice Iftikhar Chaudhry (2009)

"We as judges of the Supreme Court are sitting here as representatives of the will of the people, and only because of their will was this institution established."

Chief Justice Jawwad Khawaja (Dawn 2013)

These two quotes from two recent Chief Justices of Pakistan's Supreme Court epitomize the Pakistani judiciary of the 21st century. It is today a confident, populist judiciary seeking to assert its authority over other state institutions and reminding Pakistan's historically dominant military of the limits of its authority and influence. The quotes highlight the dramatic transformation that had taken place in the judiciary, which, after decades of deference to and collaboration with the military, has become willing to challenge the military's supremacy and impunity.

Justices Khawaja and Chaudhry were among over a 100 superior court judges who, in November 2007, refused to submit to the control of a powerful Pakistani military regime. 2007 was a watershed year in Pakistan's history. On November 3rd, 2007, General Musharraf, Pakistan's military ruler since 1999, proclaimed a state of emergency in the country and suspended Pakistan's constitution. Musharraf's Proclamation was motivated by a growing confrontation with Pakistan's judiciary. After a series of landmark decisions that challenged the foundations of military supremacy in Pakistan, the military regime removed Chief Justice Iftikhar Chaudhry from his office and detained

him. The regime ordered the remaining judges of the High Courts and the Supreme Court to take an oath to uphold the new provisional constitutional order, and thus dismiss any challenge to the powers and authority of Musharraf's military regime. The judges who refused to take this oath were to be immediately removed from judicial service. In an impressive show of defiance, a majority refused to take the oath, and were removed from office. The picture of Justice Chaudhry being manhandled by security officials soon became an iconic image that galvanized and mobilized support for the judiciary in its confrontation with the military. As the confrontation between the two institutions escalated, Pakistan's lawyers mobilized across the country, celebrating the judiciary's newfound commitment to socio-economic activism, encouraging its growing assertiveness against the military regime, and resisting efforts by the military to subdue the judiciary. As a leader of the Lahore High Court Bar Association from this period, explained:

> It started with November 3rd 2007. Police broke into the High Court premises. They took us to the Anti-Terrorist court the next morning. All of us lawyers were sent to Kot Lakpat jail. After the arrests, there was no moving back even an inch, even a millimeter…Restoration (of the Chief Justice) was the first agenda. Independence (of the judiciary) after that. We all wanted rule of law…This Chief Justice (Iftikhar Chaudhry), he was a symbol of justice because he stood up to everyone...even the military. By now lawyers had started thinking of themselves as a political party. From Communist lawyers to Islamist lawyers they were all united as one.

The events of November 2007 highlighted just how potent a threat an activist judiciary posed to the authority and stability of Pakistan's military regime, and also how defiant the judiciary was willing to be in the face of a powerful military. The Pakistani judiciary in 2007 was a far cry from the judiciary that had repeatedly upheld multiple military coups, provided legal cover to the authority and actions of preceding military regimes, and collaborated in maintaining military supremacy in the Pakistani state. Why did the Pakistani judiciary shift from collaborating with the Pakistani military to contesting its prerogatives?

This shift from collaboration to contestation demands explanation for several reasons. First, the actions of the judges were especially unexpected from a judiciary that had gained a reputation of collaboration with and subservience to the military. Second, the courts contested the military's authority at a time when the military regime was relatively stable without a clear political opening or weakness to explain increasing judicial assertiveness. Third, the pattern of contestation between the judiciary and military was characterized by jurisprudence that paid little attention to procedural constraints or jurisdictional limitations. A judiciary that had in the past veered in the direction of a formalist approach to decision-making now prioritized the nebulous concept of the 'public interest' over any concern about the constitutional limits of judicial power. Fourth, the judiciary's clash with the military demonstrated the importance of civil society in shaping inter-institutional dynamics, as the events of 2007 were actively encouraged and even coordinated by Pakistan's community of lawyers.[1]

The question of the judiciary's shift becomes even more significant given the outcome of the confrontation between the judiciary and the military. Musharraf's actions against the judiciary and the resistance from the judiciary and legal community helped galvanize a mass movement against his regime. Within a few months of Musharraf's emergency proclamation, he was forced to step down as president and the military had to accept the resumption of democratic rule. Thus, the events in Pakistan demonstrate the consequential role courts can play in challenging powerful militaries in authoritarian and post-authoritarian states and shaping the trajectories of these states. Further, the years since the fall of Musharraf's regime and the resumption of democracy have proven that the assertive populist judiciary was hardly an aberration created by the unique political circumstances of a late-stage authoritarian regime or prompted by the leadership of a single maverick Chief Justice.

[1] "You are our heroes!" remarked senior lawyer Naz Mohammadzai as she met the Peshawar high court judge, Justice Dost Mohammad Khan, one of the judges who refused to take oath under the Provisional Constitutional Order (PCO), at his official residence in Peshawar.

Instead, the judiciary has continued to challenge both military and civilian centers of power, thereby furthering the judicialization of politics and contesting the military to establish judicial supremacy in Pakistan's political system. Thus, understanding the shift in the judiciary's relationship with the military in Pakistan helps us understand both the role courts can play in furthering democratization, and the sources of the judicialization of politics in the context of authoritarian and post-authoritarian states. Therefore, the central theoretical question that this dissertation addresses is: *under what conditions do courts contest the prerogatives of politically powerful militaries?*

However, even at the height of judicial assertiveness towards Pakistan's military, the judiciary remained deferential to the military on certain questions pertaining to the conduct of security operations. Most surprisingly, in 2015, the judiciary ceded its own jurisdiction, allowing the military to establish military courts outside the judicial hierarchy to try civilians accused of terrorism or terrorism-related activities. This deference clearly does not align with the trend of increasing assertiveness in recent years and merits a separate explanation. Therefore, the additional question this dissertations asks is: *Does judicial assertiveness vis-à-vis the military vary depending on the military prerogative being challenged?*

In examining both the dramatic and consequential transformation in the judicial-military relationship in Pakistan and the variation in judiciary's assertiveness across military prerogatives, this dissertation helps shed light on several questions central to comparative politics and public law. These include the sources of high-risk judicial activism, the causes of the judicialization of politics, the limits on judicial assertiveness, and how construction of the judiciary's role and institutional relationships can further the establishment of democracy and the rule of law.

Judicial Assertiveness in Authoritarian and Post-Authoritarian States

Scholars of judicial politics have demonstrated a growing interest in understanding the emergence of assertive judiciaries outside the context of established democracies, including authoritarian and post-authoritarian states, where the political context shaping judicial decision-making is less fluid, and the institutional safeguards protecting judicial independence and authority are less secure. The two primary approaches to explaining judicial decision-making focus on interests and ideas (Hilbink and Woods 2011). Theories based on interests hold that judges are motivated by the goal of realizing their policy preferences and focus on the strategies of judges in maintaining or expanding judicial authority to do so. Strategic judges will rationally adjust their behavior in accordance with calculations about how other political actors will respond to their decisions, minimizing any risk to their authority to achieve their policy goals (Epstein and Knight 1998; Hekmke 2005; Vanberg 2015). The interests-based approach cannot, however, explain high risk judicial activism, where the judiciary risks likely defiance and retaliation, but acts assertively anyway. Why would a judge knowingly put his interests at risk by acting assertively? Explaining high-risk activism requires engaging with the other interests of judges, interests that go beyond the narrowly instrumental preservation and acquisition of power to include reputation-building and job satisfaction.

Ideas-based explanations focus primarily on the sincere attitudes and policy preferences judges hold, and how they motivate or dissuade judicial assertiveness. The attitudinal approach (e.g. Segal 2008) uses individually held judicial preferences to explain their assertive decisions. However, this attitudinal approach treats judicial attitudes as exogenous and does not explain how these attitudes are formed and change (Hilbink 2012). Institutionalists acknowledge that the norms and

preferences of judges are not exogenous to judicial institutions but are constructed or constituted within the structure of the judiciary (Clayton and Gillman, eds. 1999; Hilbink 2007; Kapiszewski 2012).

Much of the institutionalist literature draws on insights from both the ideas and interest-based approaches. This scholarship argues that both interests and ideas are shaped by the institutional setting in which they develop (Hilbink 2009). Different institutional settings allocate power and resources across different actors, empowering and constraining them differently. In doing so, institutional settings guide the behavior and expectations of actors within these institutions by determining both which actors have more authority over the other actors, and which actors' norms and understandings of justice and rationality have primacy (March and Olsen 2011). Those actors whose authority is established and preferences are legitimized within the judiciary would then shape what behavior is appropriate for judges. March and Olsen (2011) explain that the rules of appropriate behavior are entrenched through history-dependent processes of adaptation, such as learning or selection. Applied to the judiciary, this means that either judges, through professional socialization, will learn to prioritize certain norms and preferences in order to achieve their interests, or only judges who prioritize certain norms and preferences will be selected into these institutions. Through these processes the institutional setting encodes norms and preferences which then guide the actions of the judiciary.

In what follows, I build on the insights of this institutionalist literature by i) outlining the mechanisms through which actors outside the judiciary, such as the military, can shape the norms and preferences governing appropriate behavior within the judiciary, and thus guide both sincere and strategic judicial behavior and ii) developing a generalizable framework to understand the history-dependent processes through which norms and preferences that are encoded within the judiciary can change over time.

Overview of the Argument

1. Judicial Audiences and the Evolution of Judicial Norms and Preferences

The main argument put forth in this dissertation is that the shift in judicial assertiveness towards the military in Pakistan is best explained by a change in the *audiences* with which judges interact, both individually and institutionally. I argue that the judiciary converges on a set of institutional norms and preferences in response to the preferences of the institutions and networks, or "*audiences,*" with which judges interact. I build on the concept of an *audience* as developed by Baum (2007). An audience, for the purposes of this discussion, could be political institutions, civil and political organizations or social and professional groupings, that are attentive to the decisions that judges make, and from which judges have reasons to seek approval or support when making decisions. The judiciary's affinity to the military diminishes as the audiences from which judges seek approval grow more independent from the military.

Before delving into the theory and application to the Pakistani case, a few definitions are necessary. This project is a study explaining variation in judicial assertiveness. Kapiszewski (2007: 18) defines judicial assertiveness as "the degree and frequency with which courts challenge powerful actors in their rulings, that is, decide cases in ways that seek to nullify restrict or change the behavior of those actors." This is not to be conflated with judicial activism, which is the tendency towards issuing rulings that legally innovate by straying away from established precedents or narrow readings of statutory and constitutional law (Kapiszewski 2007).[2]

This study follows Kapiszewski's (2007) recommendation that, in order to understand judicial assertiveness, we should separately examine courts' assertiveness with respect to particular powerful

[2]While the two phenomena differ, often an increase in judicial assertiveness happens when a judiciary embraces judicial activism as a norm. In Pakistan's case, as will be shown in subsequent chapters, the judiciary grew more assertive as it grew more willing to deviate from established precedents that favored deference and subservience to the Pakistani military.

actors, in this case politically powerful militaries. In applying the concept of judicial assertiveness to the context of civil-military relations, I describe an increase in judicial assertiveness towards the military, as an increase in "judicial contestation of military prerogatives." Borrowing from the work of Stepan (1988) on civil-military relations and democracy, I define "military prerogatives" as the powers or privileges the military presumes it has and I define judicial "contestation" as disagreements between the military and the judiciary over the extent of the military's prerogatives. These disagreements manifest themselves in judicial decisions challenging the military's prerogatives.

The argument I make is that an increase in judicial contestation of military prerogatives is a product of a shift in audiences shaping judicial norms and preferences away from the military. I argue that, as the military's *institutional interlinkages* with the judiciary decrease, the military's role as an *audience* shaping judicial norms and preferences decreases.

Institutional interlinkages are defined as a link to the internal rules and processes of the judiciary that allow the military to shape the internal structure and culture of the institution. I discuss two types of institutional interlinkages: *utilitarian* and *normative*. If institutions, organizations or networks have a role in the appointments, promotions, transfers and disciplining of judges, I describe this as *utilitarian* interlinkage with the judiciary. Social and professional networks from which judges are recruited and with which they identify have *normative* interlinkages with the judiciary, as these networks can affect judges' reputations if judges do not manifest a commitment to a shared set of norms and preferences. Thus, the institutions, organizations and networks that have interlinkages with the judiciary are the critical audiences for the judiciary. Through these interlinkages, these audiences shape judicial behavior.

In judicial-military relations in authoritarian and post-authoritarian states, the military seeks to shape the willingness of judges to contest the military by designing judicial institutions in such a way that the military or its societal allies are the key audiences for both judicial careers and reputations. If

the military or its allies are in a position to affect judicial careers, then the military possesses utilitarian interlinkages with the judiciary. If the judiciary is recruited from social and professional networks that are tied to and benefit from the military, then the military possesses normative interlinkages with the military. Through these interlinkages, the military can shape the norms and preferences underlying judicial behavior.

I develop a typology of four different relationships between the judiciary and the military that shape the judiciary's jurisprudential approach to the military. This typology outlines both how different institutional arrangements shape the variation in judicial assertiveness towards the military in different countries and how judicial norms and preferences regarding the military may change over time. When the institutional interlinkages between the military and the judiciary change, judicial norms and preferences in favour of the military shift, and the judiciary moves between the categories in the typology. I outline this typology in the table below:

Table 1.1: Typology of Judicial-Military Relationships

		Normative Interlinkages	
		Yes	**No**
Utilitarian Interlinkages	**Yes**	Loyal Court	Controlled Court
	No	Collaborative Court	Transactional Court

The first category is the *Controlled Court*, where the military and judiciary enjoy utilitarian interlinkages, i.e. the military shapes the judicial norms and preferences through the appointment and promotion process. The second is the *Collaborative Court*, where the military and judiciary enjoy normative interlinkages, i.e. the regime shapes the judicial norms and preferences through recruiting judges from networks aligned with the military. The third is the *Loyal Court*, where the military and

judiciary enjoy both utilitarian and normative interlinkages. The fourth is the *Transactional Court*, in which neither the military nor its affiliates are in primary control of the appointment process, nor are the judges recruited from professional networks closely tied to the military. The military and the judiciary enjoy no institutional interlinkages and thus the military cannot shape the norms and preferences of the judiciary.

The Pakistani case helps outline both how institutional interlinkages shape the judiciary's approach towards the military, and how shifts in audiences change the judiciary's approach towards the military over time. Over the course of Pakistan's history, the judiciary's relationship with the military shifted across these categories, as the judiciary started as a Loyal Court in the years after independence, transitioned to a Controlled Court in the 1980s, and finally became a Transactional Court by the turn of the century. In the first twenty years after Pakistan's independence, the military and affiliated elites were the critical audiences shaping the judiciary's norms and preferences, which ensured that a norm of upholding the military's interests and political supremacy was entrenched within the judicial system. However, since then, the Pakistani judiciary has transitioned away from the military, as the military and affiliated elites saw their role as audiences for the judiciary diminish, while the politically active lawyer's community became an increasingly critical audience shaping the judiciary's norms and preferences. The result of this transition has been a concomitant shift in judicial norms and preferences, as the judiciary embraced a less deferential and collaborative set of norms and sought to play a more expansive and authoritative political role in Pakistan's political system that increasingly placed it at odds with the military. Thus, the change in judicial audiences generated a change in judicial norms and preferences, which led to increased contestation and confrontation between the judiciary and the military. This is not to say that other factors did not play important roles in explaining the variation in judicial assertiveness towards the military, as the judiciary was also responsive to variations in the strength of the military, interruptions in the

constitutional framework, and the growth of electronic media coverage. However, to account fully for the variation in judicial assertiveness towards the Pakistani military, it is necessary to understand the audiences shaping institutional norms and preferences.

What processes drove the Pakistani judiciary's movement from Loyal Court to Transactional Court? I argue that three processes led to a change in judicial audiences. First, institutionally, a separation of the judiciary from executive control through a series of constitutional reforms and judicial decisions endowed the former with significantly more autonomy and reduced the military's influence in judicial careers. Second, demographically, the increasing indigenization of the judiciary, led to a commensurate shift in the judiciary's priorities and preferences. A shift in the composition of networks from which judges were primarily recruited, from a foreign-educated elite closely aligned with the military elite to a locally-educated middle class network of lawyers, more distant from the military and more attentive to mass politics and preferences, reduced the military's role in the networks with which judges sought to build a reputation. Third, politically, at the same time that the private legal sector became a primary pipeline for judicial appointments, Pakistan's bar associations of private lawyers became increasingly politicized entities that embraced activism and opposition to military rule as norms. As the bar had become the major recruiting site for Pakistan's judiciary, this meant that judge-hopefuls increasingly had to fall in line with these norms and to some degree, assert their independence from the military and embrace the more activist stance prevalent in the bar. Thus, as a result of these three processes the military's institutional interlinkages with the judiciary were diminished, and the bar of activist lawyers became an increasingly critical audience shaping the norms and preferences of the judiciary.

2. Military Prerogatives and Selective Judicial Assertiveness

The audience-based explanation accounts for the change over time in Pakistan, and, I argue, can be generalized to account for differences between the assertiveness of courts vis a vis militaries in other countries. But it is not an all-encompassing explanation of judicial behavior, and cannot adequately explain why the judiciary remained deferential on questions pertaining to national security, even as it grew assertive when dealing with other military prerogatives.

Therefore, in answering the second question, the associated argument that this dissertation makes is that variation in judicial assertiveness towards the military is also selective, contingent upon the type of military prerogative being challenged. The judiciary is deferential to the military in cases where the prerogative being challenged is connected to the military's maintenance of its institutional autonomy. By *institutional autonomy* I mean the discretion the military requires to organize itself for the purpose of carrying out its core security mission with the resources it deems that it requires, without external interventions (in short, preventing civilian intervention into the military). This means that the judiciary is more likely to challenge the military on matters related to violation of democratic due process and economic corruption but less likely to challenge it on matters of "national security" and internal military protocol. I argue that the selective nature of the judiciary's assertiveness is strategic. If the military determines that its institutional autonomy is being undermined it is highly likely to retaliate and undermine the authority of the judiciary, regardless of how costly such retaliation might be for the military. Accordingly, in such cases judicial norms are trumped by judicial strategy, and the strategic judiciary would seek to avoid provoking strong military retaliation by deferring to the military on such questions. Thus, even an otherwise assertive judiciary would defer to the military on questions of the military's institutional autonomy.

Taken together, these two arguments can explain variation in judicial contestation of military prerogatives both across types of cases and over time. The findings of this study can be applied to the context of judicial-military interactions across a wide range of authoritarian and post-authoritarian states where the military has ruled or continues to rule. In making these arguments, I shed light on how the fluid political environment of authoritarian and post-authoritarian states affects judicial decision-making. The study also contributes to the new institutionalist literature by by developing a generalizable framework to explain how institutional norms and preferences both are entrenched and can change over time. The study highlights how judicial behavior is shaped by both material interests, including the advancement of careers and furthering political authority, and non-material interests that include reputation-building and job satisfaction. The audience-based framework incorporates insights from political sociology into the study of institutionalist settings and conditions, to provide a more complete understanding of the development of norms and preferences shaping judicial behavior. Finally, the study provides important insights on how to design a judiciary that can play meaningful roles in bringing politically powerful militaries under civilian control and promote the establishment of democracy (Helmke 2009). It pays close attention to how the design of the judiciary enables institutions, organizations and networks to use both formal and informal channels to shape judicial behavior.

Methodology of the Study

This dissertation offers a longitudinal analysis of jurisprudence towards the military in Pakistan since its independence till 2015. Pakistan makes an illuminating case for studying judicial-military interactions for a number of reasons.[3] First, the Pakistani military has been at the helm of Pakistan's

[3] Other cases are provided in the full universe of country cases in Appendix 4.

political system for most of its history, with a wide range of prerogatives, including political prerogatives, economic prerogatives and security prerogatives. This makes it possible to examine how judicial assertiveness varies across different types of military prerogative. Second, Pakistan's judiciary shifted from collaborating with the military to contesting the military's prerogatives, providing an opportunity to reveal the conditions under which the judiciary's relationship with the military shifts over time. Third, the Pakistani judiciary contested the military's authority, when the military directly ruled the state, facing few political challengers, making Pakistan *a least-likely* case for the emergence of judicial contestation of the military. Since political factors alone do not explain the judiciary's shift towards greater contestation of the military, studying Pakistan allows me to focus on the implications of changing institutional relations, norms and preferences for judicial behavior.

For this study I use three data separate data sources. The first is a dataset of over eight hundred high court and Supreme Court decisions collected between 1973 and 2015. 723 of these decisions deal with challenges to military prerogatives. I chose 1973 as the start date for collecting judicial decisions because Pakistan has been under the same constitutional framework since then. While this constitution has undergone several amendments, and suspensions during initial periods of martial law, the courts have still operated under its framework and used the 1973 Constitution as the touchstone for decision-making throughout this period. I collected these decisions from the following law reporters: Pakistan Law Decisions (PLD), Pakistan Law Journal (PLJ), Supreme Court Monthly Report (SCMR), Civil Law Cases (CLC), Pakistan Criminal Law Journal (PCrLJ), Yearly Law Review (YLR), Pakistan Law Commission (PLC), Key Law Reports (KLR) and Sindh and Balochistan Law Review (SBLR). I located relevant decisions using their citations that were compiled in the Annual Law Digest (ALD). These decisions dealt with are broadly three types of military prerogative wielded by the Pakistan army:

i) the military's political authority to intervene in and manage the political affairs and policy-making institutions of the state,

ii) The military's institutional autonomy to formulate national security policy and manage its internal affairs; and

iii) The military's control over and administration of its economic assets.

These decisions were then subjected to two types of analysis. First, I coded each decision based on the extent to which it contested the military's prerogatives. Second, I studied the content and legal reasoning of each decision in detail, to understand the key concerns and priorities of the judges in each decision.

The second source of data is an archive of newspaper articles, judicial speeches, judicial biographies and bar association resolutions, collected from the 1960s till today. I collected newspaper articles from the following newspapers: Dawn, The News, Morning News, Pakistan Times, The Muslim, The Leader, Daily Times, Daily News, The Nation, Express Tribune and Pakistan Today. These newspaper articles provide a useful historical overview of the Pakistani judiciary and legal community and their relationships with other state institutions, and they supply important political context for the judiciary's decisions. I also used bar associations resolutions and judicial speeches in both English and Urdu to understand changing attitudes, priorities and preferences in both the bar and bench. Judicial speeches and judicial biographies were also a useful source of information on the educational and professional backgrounds of judges, allowing me to track trends in the education and professions of judges over time. Together the archival research also helped me understand the judiciary and judicial-military relations in the early period of Pakistan's history preceding the Constitution of 1973.

The third source of data is semi-structured interviews with lawyers and retired judges conducted in both English and Urdu. I used a method of snowball sampling to recruit a total of 85

lawyers and judges for interviews. The sample included 15 retired judges, and 70 lawyers. The judges I interviewed came from different generations on the bench, including judges who served in the 1980s and 1990s, judges who served after 2000, and judges who have only retired recently. The sample includes judges recruited from the bar of professional lawyers and judges appointed from the subordinate judicial bureaucracy. I interviewed lawyers who had participated in relevant court decisions, either contesting the military or defending the military. I also interviewed lawyers who had played important roles in the politics of the bar associations. I spoke to lawyers from different generations starting from the 1960s to today, who have worked in different sectors of the legal profession. This included government lawyers, military lawyers, human rights lawyers and bar association leaders. Thus, my interview sample gave me a diverse range of perspectives and experiences pertaining to different aspects of judicial-military relations in Pakistan.

In the interviews, I probed judges about their personal, professional and education backgrounds, their relationships with other judges and political institutions with a focus on the military, their views on landmark judicial decisions and the role of the judiciary, and their motivations and preferences in individual decisions with which they had been personally involved. When speaking to lawyers, I spoke to them about the relationship between the bar and the bench, their views on landmark judicial decisions and the role of the judiciary, their experience with the politics of the bar and the politics of judicial appointments, their opinions on the relationship of the judiciary with the military, and their insights on individual decisions with they had been personally involved. The interview data enriches the narrative constructed through case law and archival data, by providing insights into the politics, norms and preferences informing bar-bench relations and judicial decisions regarding the military that are unavailable through studying public records. Interviews with judges and lawyers focused on similar topics but remained relatively open-ended to allow interviewees to expand upon topics with which they had greater expertise or experience. Since

interviews could not always be taken face value, I sought to corroborate responses through my interviews with other judges and lawyers. To protect anonymity, interviews with retired judges and lawyers are assigned the letters J and L, respectively, and a random number between 1 and 100 generated and assigned to each interview. All interviews are referenced only by that code, and the interview date. Thus, an interview with a retired judge would be referenced by a code such as J-91, January 4th, 2017, and an interview with a lawyer would be referenced by a code such as L-40, December 20th, 2016.

The *audience-based* thesis for explaining variation in judicial assertiveness over time was developed through close institutional analysis of the judiciary and its relationships with the bar associations and the military, and carefully tracing the process by which the judiciary and its relationships changed over time. I used three streams of information for this analysis. The first closely examined judicial decisions pertaining to the military to track patterns in judicial contestation over time, and examine how the court's perception of its role, its procedural and jurisdictional constraints, and its relationship with the military and society changed over time. The second collected information from judicial speeches, biographies, interviews and newspaper articles to track judicial appointments and transfers over time and examine how changes in judicial appointment procedures changed the criteria for judicial appointments and the social and professional composition of the bench. The third closely examined information collected from newspaper articles, bar association resolutions and interviews to track changes in the ambitions, preferences and expectations of the legal community. I then brought these three streams of information together to trace how changes in the judicial appointment process and changes in the norms and activities of the bar associations effected judicial decision-making towards the military. In short, I traced the process by which the changing audiences of the judiciary affected the norms and preferences underlying the judiciary's behavior towards the military over time.

The thesis of *selective assertiveness* is developed and tested using a mixed-method analysis. First, I analyze the coded dataset of 723 court decisions pertaining to military prerogatives between 1973 and 2015, using a logistical regression, to determine how variation in the type of military prerogative being challenged will affect judicial contestation of the military. After completing this analysis, I closely studied a selected sample of 8 relevant cases from the period 2008 to 2015 that allowed me to examine how the judiciary dealt with questions regarding the military's institutional autonomy. To carry out this close study, I relied on each high court's written opinions, transcripts from interviews, secondary sources and newspaper accounts of the cases and the decisions. This information allowed me to identify how judges factored military responses into their decisions and strategized around these concerns. The combination of both quantitative and qualitative methods of analysis allowed me to consider multiple explanations for variations in judicial contestation across cases and show how the thesis of selective assertiveness best explains this variation, and how strategic concerns motivated this selective assertiveness towards military prerogatives.

Structure of the Study

This dissertation proceeds as follows. The first section develops the dissertation's '*audience*' argument for explaining variation in judicial contestation of military prerogatives over time, and the second section develops and tests the dissertation's '*selective assertiveness*' argument for explaining variation in judicial contestation across different types of military prerogatives.

The first section of the dissertation is divided into Chapters 2, 3, 4 and 5. After surveying the literature on judicial behavior, Chapter 2 argues for i) examining the effect of the institutional environment in which the judiciary operates in authoritarian and post-authoritarian states on judicial decision-making, ii) incorporating a wider range of judicial motivations into studying judicial

behaviour, and iii) teasing out the mechanism by which judicial relations with state institutions and society can reconfigure the norms and preferences of the courts. I then detail the audience-based approach to understanding judicial behavior and outline how it addresses all the three concerns discussed above and applies to the context of states where the military is a powerful and autonomous political actor. Finally, I probe the utility of this audience-based approach in the case of Pakistan, outlining how the Pakistani judiciary's interest in seeking the consent and approval of certain audiences impacted changes in judicial norms and preferences regarding the military.

Chapter 3 of the dissertation applies the audience-based explanation to explaining why the judiciary was *loyal* to the military in the first twenty years of Pakistan's history, supporting the military's rise to power and preeminence I first explore the political developments of this period and then describe how the jurisprudence of this era helped consolidate and legitimize military rule and furthered its agenda and discretion. I then show that the judiciary actively collaborated with the military because the military and judiciary developed close institutional interlinkages during this period, ensuring the military was a critical audience shaping the judiciary's internal norms and preferences. In the final part of this chapter, I discuss Pakistan's first period of constitutional democratic rule between 1973 and 1977 and outline the beginning of the judiciary's institutional separation from the military.

In Chapter 4, I describe and explain changes in the Pakistani judiciary's behavior towards the military between 1977 and 1999. Throughout this period, I show that the judiciary gradually shifted towards staking out a more independent position from the military, preserving and cautiously expanding its own role and jurisdiction. In the second section of this chapter, I show that regime-related factors, namely the prevailing political configuration and the authority and influence of the military, all did play a role in shaping the judiciary's jurisprudence, but they could not alone explain the incremental shift that was evident in the approach of the judiciary over the course of this period. I

then argue that the incremental shift in the judiciary towards increased independence from the military and expansion and protection of its own jurisdiction was linked to a change in the audiences that shaped judicial norms and preferences during this period. I use a combination of sociological data on judges, archival information on judicial appointments and bar association politics, and interviews with judges and lawyers to trace the change in judicial audiences, and how this led to a change in judicial norms and preferences. I show that the military's institutional interlinkages with the judiciary diminished, and the judiciary's interlinkages with the politically active bar of professional lawyers grew, which reshaped the norms and preferences of the judiciary.

Chapter 5 describes and explains the judiciary's increasing assertiveness and clashes with the military during the period from 1999 to 2015. Through this period, I show that the judiciary adopted a more *transactional* approach towards the military, gradually shifting to challenging the military's political agenda and undermining the foundations of the military regime, before seeking to supplant the military as the overseer of Pakistan's democratic political order. I first show that regime-related factors could not alone explain the emergence of judicial assertiveness in the absence of meaningful political openings. I then use archival information on judicial appointments and bar association politics, judicial rhetoric on and off the bench and interviews with lawyers and judges to argue that the incremental shift in the judiciary towards increased independence from the military and growing institutional interlinkages with the politically active bar of professional lawyers, generated a more assertive judiciary. The process of changing audiences manifested itself in the activist and populist norms and preferences in the judiciary during this period. Thus, I show how the change in audiences discussed in Chapter 4 best explains the judiciary's contestation of military prerogatives during this period.

The second section of the dissertation is divided into Chapters 6 and 7. Chapter 6 first discusses the theoretical debates regarding strategic judicial behavior and civil-military relations that

this study seeks to contribute to. It then details the dissertation's argument that the judiciary is strategically deferential to the military in cases where the prerogative being challenged is connected to the military's maintenance of its *institutional autonomy*. Chapter 7 tests this hypothesis of selective assertiveness through a dataset of high court judgments from Pakistan that pertain to the prerogatives of the military. It then uses information collected from judges' opinions, newspaper articles, and interviews to trace out the effect of strategic concerns on judicial behavior towards the military using case studies of relevant individual judgments.

Chapter 8 summarizes the analysis of the dissertation, applies the audience-based argument discussed in this dissertation to the context of other authoritarian and post-authoritarian contexts, and develops the theoretical implications of my arguments. It demonstrates that the audience-based explanation provides leverage in explaining judicial-military relations in a diverse set of authoritarian and post-authoritarian contexts including Indonesia and Egypt. It also shows that the audience-based explanation has value for understanding judicial behavior beyond judicial-military interactions as well. The chapter closes by discussing the broader lessons that can be taken from this analysis about the roots of judicial behavior, and role of the judiciary in furthering democracy where politically powerful militaries obstruct the process of democratic consolidation.

SECTION 1

JUDICIAL ASSERTIVENESS, JUDICIAL AUDIENCES AND THE MILITARY IN PAKISTAN

Chapter 2

JUDICIARY, RULE OF LAW AND THE MILITARY

Introduction – Answering the Empirical and Theoretical Puzzle

This study asks: *under what conditions do courts contest the prerogatives of politically powerful and autonomous militaries?* The empirical puzzle posed by Pakistan is: why did the Pakistani superior judiciary *shift*, beginning in the late 2000s, from being a "junior partner" to the military through much of its history, to an institution autonomously exercising power and frequently clashing with the military (Oldenberg 2016).

This puzzle is especially compelling for two reasons. First, the military has been the country's most powerful institution since independence and the judiciary's contestation of the military began at a time when the military's position at the helm of the political system was stable and uncontested. Second, the superior judiciary had gone from an institution respected for the intellectual caliber and judiciousness of its judges to being the subject of widespread disparagement for incompetence, poor legal training, corruption, and an inability to manage an increasingly cumbersome workload (Siddique 2013; Khan 2015). Counterintuitively, it was when the institutional capacity of the judiciary seemed weakest that the willingness to challenge the powerful military has been the strongest. This study therefore seeks to explain the puzzling shift in the assertiveness of Pakistan's superior judiciary towards the military.

Although the analysis is primarily focused on Pakistan, it was motivated by and speaks to

much broader theoretical concerns. Theories of democracy and democratization have come to a growing consensus around the value of the rule of law as integral to democracy (Held 1987; Shapiro 1996; Hilbink 2007). Yet, if rules are not applied consistently across institutions, and certain institutions maintain special privileges and remain immune from judicial scrutiny and accountability, then the rule of law and consequently the legitimacy and functionality of democracy is undermined. For this reason, when a coercive institution such as the military retains special prerogatives, that render it unaccountable to civilian institutions, this undermines democracy (Fitch 2001). In countless countries around the world, from dictatorships such as Egypt and Thailand to young democracies such as Pakistan, Indonesia, and Nigeria, militaries continue to hold positions of power. Where the armed forces wield independent authority and play an active, autonomous role in politics, they limit popular sovereignty, the guiding principle of democracy (Hunter 1995).

Merryman's definition of the rule of law is instructive: "the rule of law is a system of government in which acts of agencies and officials of *all* kinds are subject to the principles of legality, and in which procedures are available to interested persons to test the legality of governmental action, and to have an appropriate remedy when the act in question fails to pass the test" (Merryman 1985: 40-41). This definition of the rule of law places the judiciary in a unique position of relevance as a site upon which all agencies and officials can be held accountable and their actions can be subject to meaningful scrutiny. As this concept of the "rule of law" has gained currency in politics around the world, there has been a global "judicial turn" in politics (Holland 1991; Tate 1995; Stone Sweet 2000; Amit 2004). Both the judicialization of politics, i.e. the reframing of political controversies as justiciable issues (Hirschl 2008), and the juridicialization of society, i.e. society's reliance upon justiciable terms for making claims on the state (Shapiro 1994), have made the judiciary an increasingly consequential site for organizing the political system in states around the world.

The task of establishing the 'rule of law' is both urgent and complex in the developing world because of the testing political circumstances typically found in these states (Tietel 2001). Where democracy has not been established, authoritarian rulers rule in a state of legal exception without any constraints, or they construct legal and judicial frameworks to project their power and control (Ginsburg and Moustafa 2007). In states where democracy has recently been established, the rule of law is undermined by the continued strength and influence of former ruling elites, and the weaknesses of new representative institutions, a disparity that is frequently enshrined in the post-authoritarian legal or constitutional framework (Hirschl 2004). In these circumstances, judicial scholars have focused on explaining how judiciaries establish their independence and assert and expand their authority, where both the formal legal charters and the political realities of the state complicate the substantive realization of the rule of law. This study contributes to this literature by shedding light on the judiciary's relationship with the military in authoritarian and post-authoritarian states. Most authoritarian regimes have been ruled by military leaders, and in many new democracies the military retains special powers, and the coercive authority of the military allows it to undermine the rule of law when and where it does not suit its interests (Geddes 1999; Pion-Berlin 2017). Therefore, understanding the conditions under which the judiciary is willing to challenge a ruling or formerly ruling military and hold it accountable, is essential to understanding how the rule of law is established given that strong coercive institutions and weak representative institutions characterize most authoritarian and post-authoritarian states today (Rios-Figueroa 2016).[4]

In addressing the theoretical puzzle of judicial assertiveness towards powerful militaries, I explain how judicial ideas and interests interact to shape judicial behavior. Interests refer to the rational goals judges seek to attain which affect the choices they make in decisions. Ideas refer to the

[4] Appendix 4 provides a universe of authoritarian and post-authoritarian states where the military has or continues to hold power and influence, and thus, where this argument about the conditions for establishing civilian control over the military through the judiciary can be applied and tested.

constellation of values, ideas and preferences that influence the judges' decisions.

I adopt an 'audience-based' approach (Baum 2007) that identifies the key audiences that judges consider salient when making decisions, and I explain how these audience impact both judicial ideas and interests. I argue that the Pakistani judiciary shifted from being loyal to the military to being autonomous from and frequently clashing with the powerful military, due to a shift in the audiences that shaped the norms and preferences underlying judicial behaviour. Three processes: the *separation* of the judiciary from the executive, the *indigenization* of the judiciary, and the *politicization* of the Pakistani bar of private lawyers, have all served to alter the audiences that shape the judiciary's institutional ideology, distancing the judiciary from a relationship of subordination to, and collaboration with, the military,

In this section I first discuss the literature on judicial assertiveness that this study seeks to contribute to, drawing attention to a wider range of judicial motivations that shape judicial decision-making, and teasing out the mechanism by which political and social actors can reconfigure the courts. I then detail the audience-based approach to understanding judicial decision-making and outline how it applies to the context of states where the military is a powerful and autonomous political actor. Finally, I probe the application of this audience-based approach to the shift in judicial contestation of military prerogatives in Pakistan. I discuss how the Pakistani judiciary's interest in seeking the consent and approval of certain audiences impacted its norms and preferences, and then how the relevant audiences shifted for the judiciary over time leading to a change in the judiciary's relationship with the military.

Current Explanations for Judicial Assertiveness

This study focuses on explaining variation in judicial contestation of military prerogatives.

Judicial contestation refers to judicial assertiveness specific to the military. There is a growing literature explaining when the judiciary will assert itself against powerful political actors, across different types of political systems, which Hilbink (2012) refers to as positive judicial independence (Karlin 2006; Peabody 2011). This literature on judicial decision-making posits several different explanations for variation in judicial assertiveness, divided into explanations based on interests and ideas (Woods and Hilbink 2009; Ingrams 2015).

Interest-based explanations hold that judges, motivated by the goal of realizing their policy preferences will i) act on their sincere preferences when they can but ii) adjust their behavior in accordance with calculations about how other political actors will respond to their decisions, to minimize any risk to their authority to realize their policy preferences as closely as possible (Epstein and Knight 1998; Helmke 2005; Carruba & Gabel 2014; Vanberg 2015). Strategic judges can act both reactively and proactively to preserve and enhance their authority to maximize preferences. Reactive judicial strategies involve acting assertively when the political system is fragmented, or when the judiciary has considerable public support, making it costly for other actors to retaliate against the judiciary.[5]

Proactive judicial strategies involve raising the costs for other institutions to defy or retaliate against the judiciary, by cultivating favourable public perceptions over time, through decisions. In a dynamic setting, the perceived benefits of an independent judiciary and public support for the judges is "a function of the manner in which judges exercise their authority" (Vanberg 2015: 180). The

[5]Section 2 discusses the literature on how political fragmentation effects variation in judicial assertiveness in more detail. A growing literature in judicial politics, within the strategic school, is also concerned with how societal support is crucial to explaining judicial assertiveness (Vanberg 2005; Vanberg 2015). One approach has been to study how general public support for the judiciary plays a key role in raising the cost of non-compliance or retaliation by the other branches of government. Since courts typically lack the power of implementation, judges aim to raise the costs of noncompliance for elected officials, and therefore, they are cognizant of maintaining public support, or a "reservoir of goodwill" as a bulwark against encroachment and a tool to encourage compliance (Caldeira and Gibson 1992; Peabody 2011). Therefore, courts in both the US and abroad are responsive to the need for public support, taking account of public preferences in their rulings (Caldeira 1986; Vanberg 2000; Gibson and Caldeira 2003; Friedman 2009).

judgments made in one period affect the public support for an assertive judiciary in the future. Constitutional courts around the world have been found to strategically avoid clashes with powerful actors in the early phase of the court's existence and cultivate favourable public perceptions over time, through decisions, so as to strategically enhance judicial authority over time (Epstein et al. 2001b; Ginsburg 2003). The US Supreme Court avoided clashes with a potentially hostile administration in the early years, and the Court largely served the interests of the federal government during much of the nineteenth century (Graber 1998; Whittington 2007). Once the judiciary has developed enough public support, elected branches of government risk losing public support if they clash with or undermine the judiciary. While cultivating general public support is important as a way to raise the costs of non-compliance for elected political actors who depend upon mass support to stay in power, electoral support is not the primary source of authority and legitimacy for unelected actors such as the military.

Several scholars have explored the importance of specific constituencies to determine how their support has increased the space for judicial assertiveness and the likelihood of compliance by other actors. Staton (2010) posits that Mexican judges were particularly concerned about support within the media.[6] Guarneri (2003) writes that the Italian judiciary only became an effective check on other political actors when it was backed by big business and the media. Mate (2010) argues that, even in the case of elected branches, support of elite 'governance constituencies' matters most. This includes bar associations, professional policy groups, government agencies, and other constituencies that occupy privileged positions of influence and impact within the political system.[7]

Scholars have particularly emphasized the significance of the legal complex or support

[6] In a study of public relations strategies used by courts in Mexico, Staton (2010) finds that judges promoted themselves in the media and were more likely to strike down government policies when the Mexican media provided coverage of those cases.

[7] In India, the judiciary issued decisions favourable to the interests of these elite 'governance constituencies', which later allowed it to act assertively against the elected government (Mate 2010).

structure: bar associations, judges' clubs and other civil society organizations that can take legal actions and mobilize to raise the costs of non-compliance by other branches (Epp 1998; Halliday et al. 2007). Active support from legal professional associations and human rights organizations helped the Egyptian judiciary to take assertive decisions on human rights during the time of Mubarak's dictatorship (Moustafa 2007). Similarly, in Pakistan, Ghias (2010) writes that the Supreme Court grew particularly assertive towards Musharraf's dictatorship with the support of an expansive and mobilized legal complex, which supported the judiciary.

Thus, the interest-based literature would explain variation in judicial assertiveness towards a powerful military by focusing on the external political environment and how it enables and constrains judicial assertiveness, this approach suffers from three limitations. First, interest-based scholarship has only considered how societal actors, and especially the legal complex, shape judicial assertiveness, through the provision of institutional support. But the legal complex also has direct ties to individual judges and thus can affect the interests of individual judges which impacts judicial decision-making. Further, the legal complex may also have an important ideational influence on the judiciary, which the interest-based literature does not adequately consider. Second, interest-based explanations for judicial assertiveness cannot explain high risk judicial activism, where the judiciary risks likely defiance and retaliation when acting assertively but acts assertively anyway (Hilbink 2012). Why would a judge knowingly risk authority by acting assertively, if it is not in his or her interest? Third, a critical weakness in the interest-based literature has been that it has assumed that maximizing policy is the main concern of most judges, i.e. their primary motivation is to see their policy preferences realized through the decisions they make. However, Epstein and Knight (2012) rightly concede, that they "were wrong" in making this assumption. Treating judges purely as policy maximizers hinders our ability to explain why judges adhere to jurisprudential norms, how judges choose between case precedents and legal doctrines, and why some judges are more constrained by

precedent and doctrine than others. Expanding the set of motivations for judicial decision-making and understanding what processes shape these motivations is necessary to provide a more accurate understanding of the conditions favouring judicial assertiveness towards other political actors.

In expanding our understanding of the motivations of judges, Epstein and Knight (2012) provide several other personal motivations for judges that coincide with the policy maximization motivation. These include external satisfaction, salary/income and promotion. External satisfaction refers to "reputation, including prestige, power, influence and celebrity (Epstein and Knight 2012)."[8] Many judges are concerned with developing reputations as "able judges" (Epstein and Knight 2012) who are oriented towards the "craft" of judicial decision-making. Thus judges, interested in developing reputations, are frequently attentive to the opinions and positions of the audiences with whom they seek to craft a reputation (Baum 1997). The relevant audience may vary, depending on the institutional relationship of the court with other institutions and/or with constituencies in society. In Egypt, judges emerge from a judicial bureaucracy, and go on to join a Judges' Club. In this closed system, judges interact regularly mostly with other judges in the Judges' Club and therefore would be especially attentive to the opinions of other judges who they socialize and interact with regularly (Brown 1997). In formerly British colonies such as India, judges typically are recruited from the lawyer's community, and this is the community within which they have been socialized. Developing a good reputation with the lawyers' community would therefore be important for external satisfaction. Beyond the communities most closely tied to the judiciary, reputation with the general public can also be a source of great satisfaction. In the age of independent mass media, judges may seek to become celebrities, and this may shape their decision-making (Staton 2010). The satisfaction gleaned from celebrity status may well affect the willingness to act assertively.[9]

[8] Other scholars who have discussed judges' interest in building an external reputation include Shapiro and Levy (1994) Drahozal (1998), and Schauer (2000).

[9] In Pakistan, the former Chief Justice Iftikhar Chaudhry actively courted media attention for his hearings and decisions, as Chaudhry sought to build on his celebrity status (Siddique 2015).

Judges, like all public servants, care about their salary, income and their position within the judicial hierarchy, as all these contribute to the satisfaction they get from their career. Toma (1996) suggests that the US Congress and Supreme Court enter a "contract for budgetary enforcement in exchange for politically influenced output." Judges are also motivated to reach the top of the judicial system. Their primary interest may be reaching the top of the judicial system, as this gives them the best opportunity to realize their policy preferences. But they are also interested in being promoted because reaching the top of the judicial system is the measure of success within a judicial career, and such a promotion would bring judges satisfaction, as well as a higher income and other benefits. Judges would make decisions in line with the interests of those who control both court budgets and the court promotion process. In Chile, judges seeking career promotions made decisions that aligned with the ideological disposition of the judges in the Supreme Court, which controls the judicial promotion process (Hilbink 2007).

Therefore, a more accurate explanation of variation in judicial assertiveness must incorporate, alongside the motivation to realize policy goals, judges' motivations to satisfy relevant audiences in order to build a reputation among them, and progress in their career trajectory. Thus, we need to look beyond current interest-based explanations to understand high-risk judicial activism, the impact of society on judicial norms and preferences, and the role motivations beyond realizing policy preferences play in shaping judicial behavior.

Ideas-based explanations provide some analytical leverage in addressing the short-comings of the interest-based literature. These explanations focus primarily on the values and preferences judges hold, the sources of these preferences, and how they motivate or dissuade judicial assertiveness. Attitudinalists use individually held judicial preferences to explain assertive decisions (Segal and Spaeth 2002). In this approach, judges decide cases in line with their sincere ideological values juxtaposed against the factual stimuli presented by the case. At the judge level, differences in judges'

attitudes should influence aggregate levels of ideological voting. Thus, a leftist judge will act assertively to challenge a right-wing government, and an activist judge will intervene in a wider range of policy issues than a restrained judge (Segal 2008). This approach suggests that courts are more assertive when the majority of judges ideologically oppose the policies underlying the laws or state actions under scrutiny. It assumes the intellectual and institutional autonomy of the judges and treats their policy preferences as fixed and exogenously determined, not considering how their preferences may be endogenous both to the internal institutional dynamics of the judiciary and to the external political environment within which the judiciary is situated.

Institutionalists do not treat these beliefs as exogenous but seek to explain how these values and preferences are constituted. They shift the explanatory focus to the institutional design, norms and culture of the judiciary, which influence the willingness and ability of judges to act assertively. The institutionalist literature looks beyond the dichotomy of ideas and interests, in which interests are purely understood as the acquisition of power, and ideas as a set of policy preferences. Institutionalist scholars explain how particular institutional structures form over time and how these institutional structures constrain judicial choices and constitute judicial preferences (Whittington 2000). March and Olsen (2011) explain how institutional settings guide the behaviour and expectations of political actors by determining both which actors have more or less power over the other actors, and which actors' norms and understandings of justice and rationality have primacy. Rules of appropriate behaviour are encoded and legitimized within the judiciary through history-dependent processes. Institutionalist scholars have shown how processes have shaped the values, norms, ideologies and motivations judges deploy which affect willingness and ability of judges to act assertively (Pierson 2004; Smith 2008). The institutions act as sites for preference formation, and institutional designs incentivize judges to take particular ideological positions and adopt particular conceptions of the role of the judiciary within the political structure of the state (Clayton and Gillman, eds. 1999; Ginsburg

2012). Scholars have explored the sources and consequences of the entrenchment of particular judicial norms (Stone 1992; Clayton 1999) and legal doctrines (Bussiere 1997) within a judicial system or explained how judicial appointment systems shape the character (Epstein et al. 2001; Kapiszewski 2012; Nathan 2013), and internal culture within the judiciary (Kapiszewski 2010; Jillani 2012). They have also probed judicial education and training and promotion systems, to understand how both the education and career trajectory of judges facilitate the development of a particular conception of the role of the courts among judges. Hilbink (2007) argues that judicial conservatism in Chile can be explained by an institutional structure that incentivized judges to adopt an anti-political conception of the role of the judiciary to move forward in their careers, leading to the formation of a conservative ideological disposition within the judiciary that persisted over time,

Woods (2010), Hilbink and Couso (2011) and Hilbink (2012) provide useful guides for explaining changes in judicial norms and preferences, by drawing attention to the diffusion of new ideas through judicial communities and exposure to new international legal doctrines. This literature shows that change in judicial norms and preference is not likely guided by a single coherent process, but through multiple disjointed experiences that disrupt prior institutional settings and delegitimize past norms and preferences, creating space for new ideas about the norms and preferences to gradually gain legitimacy. The new norms and preferences are internalized through a series of processes including socialization, diffusion, learning and selection, all of which can shape changes in judicial decision-making.

Therefore, this study builds on this literature by providing a generalizable framework for explaining shifts in judicial assertiveness, that i) incorporates a more diverse set of motivations than policy-maximization, ii) outlines the mechanism through which institutions determine judicial interests *and* constitute judicial preferences, and iii) and explains how a cluster of processes combine to change judicial norms and preferences as institutions and institutional relationships evolve.

Judges and their Audiences

The interest-based approach sheds light on judicial strategy and how, in each decision, judges seek to realize their goals within the institutional framework within which they operate. The ideas-based approach sheds light on how judicial norms and preferences form, and how these ideational positions are deployed in the process of decision-making. I integrate these approaches, using what Baum (2007) calls an "audience-based perspective." An audience, for the purposes of this discussion, could be political institutions, civil and political organizations or social and professional groupings, that are attentive to the decisions that judges make, and that judges, have reasons to seek approval or support from, when making decisions.[10][11] This audience-based explanation builds on the awareness that judges have two goals beyond policy maximization:

i) Career Advancement: Judges seeking to advance their careers, by gaining necessary promotions, and increasing pecuniary and non-pecuniary benefits, would seek the approval of those audiences in a position to control the process of appointment, promotion and budgetary allocation. If superior judges control promotions and discipline within the judicial system, then they are a crucial audience that the judge seeks to satisfy, or if the executive branch controls promotion and discipline, then the executive is a crucial audience that the judge seeks to satisfy. The gatekeepers in the careers of judges will play a decisive role in shaping the institutional ideology that judges will then administer, since judges entering the judiciary would have a strong incentive to endorse the ideological

[10] I use the word 'potentially', because, not all judgments activate the interest of these actors, and because, not all actors that are interested in a judge's decision necessarily matter to a judge. For example, a journalist in another country writing about a judges' decisions may be attentive to the judges' decisions but his interest and attention, is unlikely to matter too much to the judge, when making decisions.

[11] This audience-based perspective bears similarity to the literature on legitimacy, and how governments seek legitimacy from salient audiences (Booth and Seligson 2009). Just as each government seeks to convince those who could overthrow the government of the government's 'right to rule', each judge seeks to convince those who control their careers and reputations of their 'right to be a judge' and 'capability to be a judge.'

positions of the gatekeepers in their system, in order to get ahead.

ii) Reputation (Esteem) Building -: Judges seek to be respected and liked by those groups who judges are closely tied to, as their own esteem and satisfaction in the job is tied to gaining such respect (Cass 1995; Drahozal 1998; Posner 2009). Thus, judges will seek to make decisions in line with the attitudes and preferences of the groups and networks within which they have been socialized and which they identify with or interact with regularly. The networks judges are socialized in also shape the values and ideologies of judges, and upholding the values judges share with these networks would be crucial to maintaining the esteem and respect of these networks. Judges seeking to build a positive reputation have an incentive to uphold the values they learn through and share with their networks, even when strategically this may not lead to optimal decisions. Baum (2007) quotes an American litigating attorney who writes "Even life-time appointed Supreme Court justices have a constituency to answer to: the bar from which they come, the social and cultural elite with whom they mix, and the general public whose acclaim they desire." (Baum 2007: 43).

Thus, at any given time, judges are negotiating the motivations to advance careers, and build esteem, and, each of these motivations implicate particular audiences. Different institutional designs connect the judiciary to different audiences (Ginsburg & Garoupa, 2009, 2015; Garnieri & Piana 2011). This audience-based approach helps build a more thorough understanding of the conditions under which judges are more or less willing and able to act assertively against government institution.

I argue that the audiences that are salient in the processes of career and reputation-building help shape the institutional norms and preferences of the judiciary. The networks judges are recruited from, and the authorities that judges are recruited and promoted by, both seek to ensure that their preferences are reproduced on the bench. Therefore, judges who sincerely share the audiences'

preferences and values, and judges who strategically endorse the audiences' preferences and values will advance in their careers and enhance their reputations. As this process of learning and selection repeats itself over time, and more and more judges who express these preferences enter and move upward in the judicial hierarchy and build reputations as judges, the preferences of these audiences become normalized within the judicial system and form the institutional norms and preferences of the judiciary. The key here is to identify and interrogate the process by which these preferences become codified within the judiciary, and internalized by judges, thus serving as cognitive filters through which judges interpret their institutional environment and role within this environment (Hay 2006).

The mechanism through which audiences shape judicial norms and preferences are institutional interlinkages. Institutional interlinkages are connections among policy processes, rules, norms and principles of two or more institutions.[12] There are two types of institutional interlinkages crucial to this discussion: *utilitarian* and *normative* interlinkages. Where two institutions share *utilitarian interlinkages,* one institution is in a position to shape the costs and benefits within another institution. If institutions, organizations or networks have a role in the appointments, promotions, transfers and disciplining of judges, I describe this as utilitarian interlinkage with the judiciary. Where two institutions share *normative interlinkages,* one institution can affect the compliance with norms by another institution. Those institutions, organizations, or networks with which judges seek to build a reputation have normative interlinkages with the judiciary, as they can affect judges' reputations if judges do not comply with their norms. The institutions, organizations and networks that have interlinkages with the judiciary are linked to the internal structure and culture the judiciary and judges need to appeal to them in order to advance careers and craft reputations, making them the critical audiences for the judiciary. Through these interlinkages, these audiences shape the norms and

[12] The concept of institutional interlinkages is adapted from the study of interlinkages between international institutions in global governance that explain the transmission of global norms across international institutions. The literature on global climate governance and energy policy uses a typology for interlinkages including institutional interlinkages and utilitarian interlinkages which I adapt for this study (Stokke 2001; Goldthau 2013).

preferences of the judiciary.

Thus, the audience-based explanation integrates insights from both interest-based and ideas-based explanations. It outlines how judges adopt norms and preferences in response to the preferences of judicial audiences, for sincere reasons, and in the interest of furthering their careers and building their reputations. This process leads to the entrenchment of institutional norms and preferences that underlie judicial behavior.

The audience-based approach addresses the shortcomings of the interest-based approach, as it i) expands the number of judicial interests and motivations to provide a more accurate understanding of judicial behaviour ii) explains how societal groups can actually shape the norms and the judiciary, when they serve as audiences for the judiciary, and iii) also explains high-risk judicial activism[13]. It also improves on current ideas-based explanations. Recognizing the fact that salient audiences lie at the heart of this process of norm and preference formation also helps shed light on how institutional norms and preferences evolve. Simply put, when the salient audiences in the process of judicial recruitment and promotion change, the preferences that have been entrenched in the judicial system are contested, and over time, replaced. Thus, by examining the process by which the actors controlling judicial careers, and the networks within which judges seek to craft their reputations change, we can understand how institutional norms and preferences are reconstituted, and trace how these new norms and preferences affect changes in judicial assertiveness.

Judges and their Audiences in Military Regimes and New Democracies

I now apply this audience-based perspective to the context of the authoritarian and post-

[13] Judges might advance their interests in career building andreputation enhancement by behaving in accordance with the norms and preferences that have been normalized within the judiciary by the relevant audiences, even when adhering to these norms carries a high risk of jeopardizing their interest in policy maximization.

authoritarian states where the military has wielded and continues to wield considerable power, operating as an independent political principal in a political system that does not adhere to the rigid trichotomy of powers that we find in entrenched, consolidated democracies.

When any military regime comes to power, it has a vested interest in maintaining its prerogative to play a leading role in running the affairs of the state, including leadership selection, law-making and policy-making, and to avoid contestation of these prerogatives. Therefore, the new regime sets about reorganizing state institutions so as to consolidate and project the power of the new regime and minimize contestation of its new political power and policy agenda. There is an expansive literature on the creation of rubber-stamp parliaments through rigged elections and the engineering of loyal political parties (Gandhi and Przeworski, 2007; Gandhi and Lust-Okar, 2009; Boix and Svolik, 2013), but the judiciary also attracts the interest and intervention of military regimes. The military also has an interest in manufacturing a "rubber-stamp" judiciary that is expected to legitimize its prerogative to politically intervene and govern, and unlikely to contest its powers, and challenge its actions. Using the audience-based approach, this means the ruling military would seek to ensure that it is the most consequential audience for judicial actions, and is in a position to impose career and reputational costs on judges should they contest the military.

The new military regime has two options in producing a judiciary that will act as an instrument of the regime: i) create a *weak* judiciary unable to challenge the military (as described in detail in section 2, or ii) create a *loyal* judiciary unwilling to challenge the military. Typically, most regimes will use a mixture of actions that both weaken the judiciary and ensure that judges are loyal.

There are two ways the military can go about creating a loyal judiciary: by creating a *controlled court* or by creating a *collaborative court*. Most military regimes will seek to combine features from both types of judiciaries to ensure loyalty. A *controlled court* is one that shares utilitarian interlinkages with the military or political elites tied to the military i.e. the military is a key

audience for the careers of judges. Kapiszewski (2012) argues that who appoints, sanctions and removes judges at the lower rungs of the judiciary can significantly affect the political and jurisprudential leanings of those judges. The key to creating a *controlled court* is placing the military or affiliated members of the ruling coalition in positions that govern the career trajectory of judges, through the appointment, removal, promotion, case assignment and disciplining processes that are common to all judiciaries. Essentially, a *controlled court* is one where each judges' career depends upon ensuring the continued support of the military or affiliated elites. Where the military-led executive controls the appointment and promotion of judges it is relatively easy for the judiciary to be controlled. In Nigeria, during the military dictatorships of the 1970s and 1980s, judicial officers were appointed by the President of Nigeria and the state governors on the recommendations of their State Judicial Commissions which were appointed by the Governors. The President and Governors had both powers of appointment and removal of judges. Nigeria's military dictators frequently used these powers to remove judges who are hostile to their interests and ensure a silent loyal judiciary.

While the Nigerian judiciary is clearly not independent from the military-led executive branch, direct military intervention is not always necessary to control the judiciary. If the appointment authorities are staffed by institutions, organizations or elites who support the military, the military may not even need to be in a position to control the powers of the judiciary or the careers of individual judges, in order to ensure loyalty. In Chile the judicial bureaucracy remained relatively insulated from Pinochet's dictatorship. Yet, the military regime could count on a supportive judiciary because the career trajectory of judges lay in the hands of the Supreme Court, which was managed by judges from the conservative political elite actively opposed to the Socialist regime that preceded Pinochet's coup (Hilbink 2007). This elite had historically staffed the Supreme Court and controlled judicial careers, ensuring the perpetuation of an apolitical judicial ideology deferential to the military regime.

The other mechanism for ensuring judicial loyalty is creating a *collaborative court*. The idea that the social and professional sources of judicial recruitment would shape the values and ideals of these judges is well established among law and society scholars (Ladinski 1965). Hirschl (2004) argues that across South Africa, Israel, Canada and India, the elite background of judges can help explain their support for an increasingly neo-liberal approach to managing the economies of these states. Edelman (1992) finds that the Israeli legal community and political leadership deemed it essential that judges were recruited from Israel's Jewish majority, since judges recruited from the Arab minority would not have the necessary traditional Judaic values. In Turkey, Belge (2006) contends that the selective activism shown by the independent Turkish Constitutional Court after 1961,was a product of a Kemalist sociopolitical alliance between judges, military officers and other secular nationalist elites, as they all shared a similar world view that impacted how the judges acted towards other Kemalist institutions When judges come from particular social and professional backgrounds and interact regularly with people from their network, they identify with those who share their backgrounds, and will value building a reputation with these networks, and this often affects their decision-making.

It is well developed in the study of military regimes that the military builds relationships with sections of society. Clapham and Philips (1985: 12-13) argue that military regime stability "depends on its capacity to acquire civilian allies who are willing to accept subordination to military leadership in exchange for…some share of the benefits which it provides." Geddes et al. (2014) hold that the military leaders who organize civilian support bases have survived longer.[14] Schamis (2002) argues that authoritarian regimes provide benefits to a coalition of segments of society in exchange for support. He outlines the relationship between the policymakers of the military regime and these

[14] This does not mean that these militarie\s become agents of particular constituencies, but they establish these relationships to reduce costs of coercion necessary to maintain their rule (Geddes et al.).

societal groups as the relationship between the regime and its "distributional coalition." The state distributes rents to the particular set of interest groups that support the regime and these groups typically collude in order to see their preferences translated into state policy (Schamis 2002).[15] These interest groups may rely on the military for access to state rents or to gain disproportionate influence in the policy-making process to ensure the implementation of policies suited to their interests. In the case of autocratic regimes in Brazil and Chile, military coups were supported by a coalition that included the domestic bourgeoisie, state bureaucrats, and representatives of foreign capital all of whom feared the threat posed to their interests by the mobilization of the working classes (Schamis 2002). Most authoritarian regimes sustain their rule through a mixture of coercion and patronage, rewarding interests of constituencies that support the regime, and repressing those sectors that the regime came into power to confront. If a military regime creates winners and losers, then the 'winners' support for a democratic transition is also likely to be the most tentative.

While the *controlled court* is a mechanism for creating a loyal judiciary from the top-down, the *collaborative court* is a mechanism for creating a loyal judiciary from the bottom-up. A *collaborative court* is one that is recruited from social and professional networks that are supportive of the military's right to rule. These networks benefited from the military's rule and have historically been part of the military's distributional coalition.

Judges in most judicial systems are recruited from other section of the state's legal complex: a "cluster of legal actors" related to each other in dynamic structures (Karpik and Halliday, 2012). It is composed of the different legally trained or engaged occupations that belong to the legal and judicial institutions of a given society and whose tasks are to create, elaborate, transmit and apply the law. Karpik and Halliday (2012) outlines the occupational groups that comprise the legal complex, which

[15] Schamis develops this idea of the military regime's distributional coalition from the work of Olson. Olson (1982: 44) defines the distributional coalition as groups "oriented to struggles over the distribution of income and wealth rather than to the production of additional output" i.e. rent-seeking coalitions who collude to gain benefits from the state directed towards them.

include private lawyers and prosecutors, judges, whether in a court system or in administrative and bureaucratic settings, governmental lawyers and prosecutors, legal academics, civil servants acting as appliers of regulation; and legal advisers, whether to government institutions or to private enterprises. The superior judiciary of any state is typically recruited from one or a combination of these sections of the legal complex. Thus, for each state the question is: which section/s of the legal complex are judges recruited from, and what is the relationship of that section with the military?

In closed recruitment systems, judges are typically recruited from judicial bureaucracies, and in open recruitment systems, judges are recruited outside the bureaucracy, typically from the legal profession (Epstein et al. 2001a; Pompe 2005; Ginsburg and Garoupa 2009). The community of lawyers or 'bar' is composed of private lawyers and is usually organized into bar associations. In countries where the bar is autonomous, bar associations jealously guard the autonomous regulation of the profession, and often mobilize to protect their autonomy from the control of state institutions, resisting alignment with institutions that seek to influence and infiltrate them. For example, the Malaysian Bar Association has, since its inception, fought with the Malaysian state over the freedom of the bar associations to choose its own leaders and to criticize political leaders and the courts (Karpik and Halliday 2012). Thus, self-regulatory, organized bar associations are less likely to be coopted by the military. If judges are emerging from a politically active, self-regulatory bar, they are more likely to be socialized in values of independence and assertiveness. Upon arriving on the bench, they would seek to maintain a reputation with the bar, through upholding values of independence. As an increasing number of judges are recruited from an independent-minded bar, given that judges will seek to build a reputation within the network they were recruited from, an independent role conception will entrench itself within the judiciary.

On the other hand, judges emerging from a judicial bureaucracy are trained as state employees, dependent upon a state salary, and on winning state support to move ahead in their

careers (Hilbink 2007). This professional network of judicial bureaucrats is likely to endorse deference to executive institutions such as the military, given its close association with and dependence on government, and disconnect from autonomous civil society organizations. However, it is not inevitable that judges emerging from the bar are necessarily assertive and independent, or judges from the judicial bureaucracy are necessarily deferential and restrained, and it is important to understand the social networks of members of the bar and the lower court, and the ideological milieu legal practitioners engage with in these potential pathways to appointment in the superior judiciary.

The section of the legal complex from which judges are recruited, is a critical audience with normative interlinkages with the judiciary, and the socioeconomic and political characteristics of that section of the legal complex, shapes the institutional norms and preferences of the judiciary. When the judiciary is embedded in a professional network that is both politically and socio-economically autonomous from the military, we should see a more independent-minded and less collaborative judiciary, as judges are socialized to value independence from the military, and their reputation with these networks would suffer from appearing as collaborators with the state. Hence, the military, seeking to establish a *collaborative court*, would build normative interlinkages with the judiciary, by recruiting from social and professional networks that are aligned with and dependent upon the military.

Most military dictatorships would adopt a combination of tactics to ensure the judiciary poses no challenge to the military and can help legitimize its role at the apex of the political system. The incentive to create a *loyal court* is that even after the military regime may come to an end, and the military shifts out of a position where it can directly undercut the authority of the judiciary, the judiciary would still be willing to play a role in maintaining the interests and prerogatives of the military. This could be because the military retains institutional interlinkages with the judiciary after democratization, or because the judicial norms and preferences entrenched during military rule

remain in place after the regime loses power.

In judicial-military relations in authoritarian and post-authoritarian states, a few lessons stand out. First, the military seeks to shape the willingness of judges to contest the military, by retooling recruitment patterns of the judiciary so that the military or its societal allies are the key audiences for the judicial career. Second, audiences matter for shaping judicial norms and preferences, and to understand when the judiciary is likely to contest the military we have to determine what audiences are in a position to affect both the career prospects and the reputation of judges, the key positions for shaping judicial norms and preferences.

The following table presents a typology for different types of judicial relationships with the military.

Table 2.1: A Typology of Court Relationships with the Military

	Normative Interlinkages		
Utilitarian Interlinkages		Yes (Social and/or Professional Networks are Recruited from are Aligned with the Military)	No (Social and/or Professional Network Judges are Recruited from are not Aligned with the Military)
	Yes (Appointing Authority/s Aligned with the Military)	Loyal Court (Indonesia 1971-1998)	Controlled Court (Egypt 2000 onwards)
	No (Appointing Authority/s Independent from the Military)	Collaborative Court (Brazil 1964-1969)	Transactional Court (Pakistan 1999 onwards)

Thus, we have four different types of institutional relationships with the military, depending upon the audiences involved in the recruitment and promotion process. The first is the *Loyal Court*, where the key audience/s that control the career path of judges are aligned with or include the

military, *and* the judges are recruited from a network that is aligned with the military. Therefore, judges seeking promotion or interested in building a reputation are expected to endorse institutional norms and preferences that serve the military's interests and, over time, as more and more judges endorse these norms and preferences it becomes normalized within the judiciary. The Indonesian Supreme Court during the 1970s and 1980s, during General Suharto's regime is an example of a *Loyal Court.* During the 1970s, the management of the judicial appointment system shifted from the Supreme Court to the Executive Branch, which then sought to coopt and control the Court. The government appointed judges willing to support the military-backed government, and the judicial bureaucracy was subsumed into the civil service (Pompe 2005). Thus, the Indonesian Supreme Court judges after the 1970s were appointed by the executive branch, and were appointed from the civil service, which resulted in a Supreme Court so loyal and deferential to the military regime, that, when democratization finally came to Indonesia, reforming the judicial system became an urgent priority (Pompe).

The second is the *Controlled Court*, where the regime seeks to primarily shape the judicial norms and preferences through the appointment and promotion process. During the 1990s, the Egyptian Supreme Constitutional Court, recruited from the largely independent Judges' Club, had grown increasingly assertive, expanding its space to challenge the formidable Mubarak regime, and it was supported by opposition groups and the mobilized bar associations (Moustafa 2007). Mubarak decided to intervene, by appointing a new Chief Justice Fathi Naguib, who had been Mubarak's Minister of Justice. In appointing someone from the executive, Mubarak broke the twenty-year norm of the Chief Justice being appointed from within the judiciary, and instead the appointing authority for the judiciary was now a member of the executive and a close affiliate of Mubarak (Moustafa 2006). Naguib then started recruiting judges to the Supreme Constitutional Court, packing the Court with those judges who endorsed his pro-Mubarak affiliation, and, in this way, the judiciary became

more deferential Court after 2001. Thus, the Mubarak government was able to *control* the judiciary.

The third is the *Collaborative Court*, where the regime shapes the judicial norms and preferences through recruiting judges from networks that aligned with the military. At the time of the coup of 1964, the Brazilian judiciary had been primarily recruited from the middle class and business elites who strongly supported the military at the time of the coup (Pereira 2005). Brazil's 1964 coup stands out in Latin America since civilian jurists actually partnered with the military in the process of the coup, and then were quick to use their judicial authority to legitimize the coup (Pereira). Thus, the judicial elite came from a class closely tied to the military, and actively collaborated in ensuring the success of Brazil's military regime after 1964.

The fourth is the *Transactional Court*. In the *Transactional Court*, neither the military nor its affiliates are in primary control of the appointment process, nor are the judges recruited from professional networks closely tied to the military. The military and the judiciary enjoy no institutional interlinkages and thus the military cannot shape the norms and preferences of the judiciary. I call this the *Transactional Court* because this court will not see itself as subordinate to the military nor share an ideological agenda with the military and will only support the military where the interests of the two institutions align. Where their interests clash, i.e. where the prerogatives of the military clash with the interests and ambitions of the judiciary, the judiciary is more likely to clash with the military. The judiciary towards the latter half of General Musharraf's regime in Pakistan is a useful example. During this period, judges were mostly recruited through a process in which the military regime had a limited role, from the bar which was organized into bar associations that were autonomous from and increasingly oppositional to the military. The result was a Pakistani judiciary that took an independent, transactional approach to the military which became more evident during the latter half of General Pervez Musharraf's regime, and led to a major clash between the two institutions, ultimately precipitating the regime's demise. It is important to remember here that the

Transactional Court will not necessarily clash with the military frequently, only that the judiciary is not beholden to the military, and therefore would be more willing to clash with the military when the interests and ambitions of the two institutions do not align.

The framework outlined above also explains the mechanism by which judicial norms and preferences towards the military shift. Institutional norms and preferences shift when the institutional arrangement under which these norms and preferences gets entrenched and keeps reproducing itself is disrupted. This would happen when the judiciary shifts between the categories outlined above. The question is: how do institutional interlinkages between the military and the judiciary get disrupted? First, the pool from which judge are selected can change, or the values and ideas held within that network can change. Processes that can change the pool of judicial recruits could include an institutional shift in the source of recruitment to another section of the legal complex, such as increasingly recruiting judges from the judicial service or bureaucracy as opposed to a more autonomous bar of private lawyers. It could also include changes in the socio-economic background of the network, as, over time an increasing number of lawyers in the bar may come from demographics that have not traditionally been part of the military's distributional coalition. Secondly, the appointment authority, or the values held by that appointing authority can change over time as well. In Egypt, the appointing authority shifted from a member of the autonomous Judges' Club to a member of President Mubarak's executive branch, which over time, changed the disposition of the Supreme Constitutional Court. A shift in institutional norms and preferences only begins once the place of new audiences in the judicial career and reputation building processes is institutionalized, and it happens gradually as the new audience preferences are normalized within the judiciary. Thus the second argument of this dissertation is:

If there is a shift in the authorities managing judicial careers or in the networks from which the judicial institution is recruited, towards authorities and networks that are not aligned with or

dependent upon the military, then the judiciary will adopt a more transactional approach to the military, and contestation of military prerogatives will increase.

Thus, using the audience-based framework, this study develops a more holistic understanding of the judiciary's approach to decision-making in the complex institutional environment of military regimes, and new democracies, where militaries remain independent political principals. This framework sheds light on the multiple motivations of judges, explains how the military can impact these motivations to shape judicial norms and preferences towards the military, and how judicial norms and preferences vary depending upon the audiences implicated. In the last section, I discuss how this framework applies to the Pakistani case and generate a case-specific hypothesis.

Case Study – Judicial-Military Interactions in Pakistan

The Pakistani judiciary has undergone a significant transformation in terms of its authority and relationship with other state institutions, including the military. Through much of its history the superior judiciary had been seen as the handmaid of the military, legitimizing each of its coup d'etats and giving the military's political actions legal cover, approving constitutional amendments made by the military to increase its powers, and collaborating with the military in undermining civilian democratic governments (Neudorf 2017). Crucially though, throughout this history, due to the persistent weakness of the other civilian state institutions, and the discontinuities that occurred in the institutional development of the legislature whenever a coup occurred, a great responsibility was always placed on the superior judiciary to organize the power structure of the state, among the competing power centers, both during periods of dictatorial rule and democratic transition.

While the relationship between the military and the judiciary has been the subject of much analysis over the years, the primary focus of this work has been the landmark Court judgments

legitimizing the handful of military coups (Hasan 2001; Khan 2005; Neudorf 2017).[16] This focus leads to a narrow and oversimplified narrative of judicial obsequiousness in the face of military will.

While the Pakistani judiciary strategically discriminates between different military prerogatives as outlined in the previous section, the judiciary has shown a greater willingness to contest military prerogatives of all types in recent years. The judiciary has always played a consequential role in shaping the civil-military balance of power, but this jurisprudence has changed in recent years.

Newburg (1995), in her penetrating study of the Supreme Court's jurisprudence, reflects on the "unseemly weight" that judicial decisions have had on the political structure and trajectory of the state, and highlighted both the lamentable concessions the Court has made to the military-controlled Executive branch, and the occasional efforts the court has made to carve out some space for constitutional and justiciable rights, to ensure that executive power could not be unlimited and unchecked. Yet Newburg's book ends in 1995, prior to the 2000s and the superior judiciary bursting forth into a period of unprecedented relevance and activism at the forefront of the movement to end General Musharraf's military regime and restore a democratic constitutional order (Ghias 2012; Cheema and Gilani 2015). The epilogue to Newburg's narrative of cautious deference and judicial self-preservation would be an assertive court, actively seeking to expand its jurisdiction and clashing with the military in areas of competing interest. This increase in judicial contestation is particularly unexpected, given that it began at a time that the military regime of General Musharraf was still stable, having coopted or neutralized most of its political opponents. Therefore, the question is: *Why*

[16] Most analysis of the Pakistani judiciary comes from law scholars, and focused primarily on Pakistan's landmark constitutional decisions and their jurisprudential impact (Hasan 1994; Khan 2005; Siddique 2008), Pakistan's experience with Islamic law (Redding 2001; Lau 2006) and Pakistan's growing public interest jurisprudence (Alam et al. 2000, Khan 2015). There has been only limited work, outside the realm of public law, which examines the Pakistani judicial institution and its relationship with state and society, beyond its contribution to Pakistan's constitutional corpus (Newburg 1995; Siddique 2013; Cheema and Gilani 2015; Khan 2016; Azeem 2017).

has the Pakistani judiciary's contestation of military prerogatives increased over time?

I consider the plausibility of a few possible explanations for this shift in judicial assertiveness towards the military, and find that while each of the factors discussed below had an impact on the jurisprudence of the judiciary towards the military, each of these explanations is endogenous to the effect of a change in audiences reshaping the norms and preferences of Pakistan's judiciary. I then argue that a shift in judicial audiences away from the military played a critical role in explaining increased judicial contestation of military prerogatives.

i) Legal Approach: The Pakistani judiciary has, in recent years shifted from articulating its decisions in the language of legal positivism to demonstrating a greater inclination to relax procedure and discard legal standing requirements in order to expand the jurisdiction of the court, justified on the basis of acting in the public interest (Khan 2015). However, while this turn in legal norms is critical to understanding the judiciary's increased assertiveness towards other state institutions including the military, it does not fully account for this increased activism for two reasons. First, beyond tracking the jurisprudential precedents through which this new set of norms evolved, this explanation does not tell us what motivated this shift in the institutional norms of the judiciary away from a focus on procedure and toward an emphasis on public interest. Second, even in the past judges did not always endorse this legal positivism, as they were, at times, willing to bypass procedure, precedent and even the clear commands of the constitution, when called upon to adjudicate upon the legitimacy of military coups. Thus, while legal positivism was the dominant jurisprudential paradigm for much of Pakistan's history, the judiciary had shown a willingness to violate these jurisprudential norms when the outcome favoured the status quo in the civil-military balance. Therefore, a shift in legal norms from legal positivism to outcome-based activism does not provide a complete picture.

ii) Attitudinal Approach: In this view, the judiciary's past collaboration with the military reflects the attitudinal support of the judiciary for military policies, and in recent years judicial policy preferences

have shifted, explaining the change in the judiciary's decision-making. While there has certainly been an attitudinal shift in the judiciary away from active collaboration with the military over time, this explanation is incomplete for two reasons. First, simply focusing on judicial attitudes does not provide us an explanation for the shift in judicial attitudes. Second, Pakistani judges' new assertiveness is not simply a product of changing policy preferences, as judges also seem to be imbued with a new conception of their role as powerful stakeholders in the political system, obligated to reshape both state and society. Third, my research showed that, during the Musharraf regime, even when judges made decisions supporting an expansion of military authority, they sought to present themselves as acting independently of, and sometimes, even in defiance of, the military. These concerns pertaining to reputation clearly informed judicial decision-making. Thus, policy maximization, the prime focus of the attitudinal approach, does not adequately explain the judiciary's activist turn.

iii) Media and Public Support Approach: Another explanation is that the judiciary grew more willing to assert itself against the military when it benefitted from the growth of private media that provided favourable coverage to the judiciary when it asserted its authority. Since the early 2000s, Pakistan saw a private televised media boom. During multiple interviews, judges and lawyers spoke about how the proliferation of private news outlets, connected judges with the public in a way that they had not been connected before. Favourable coverage from the media brought the judiciary public support, and this favourable coverage emboldened judges to assert themselves against state institutions, including the powerful military. The media's role is significant but this explanation assumes that the judiciary's willingness to challenge the military had always been there, and the support of media coverage provided the judiciary with the opportunity to act against the military. Yet the judiciary had historically not simply deferred to military preeminence but had actively played a role in enhancing and legitimizing military authority, indicating there had now been a shift in the preferences of the

judiciary that was not prompted by the media.

Instead, I argue that the proliferation of the media had a more indirect role to play in increasing judicial willingness to contest state institutions. The proliferation of the media closely connected the judiciary with audiences that judges cared about and gave these audiences a platform through which they could engage closely with, and form and express opinions about, judicial decisions. Judges coming from social networks were now especially concerned with how the media covered their decisions and shaped their reputation with their respective networks. Thus, I argue that the role of the media was to increase the importance of the judicial motivation to build reputations with social networks with which these judges identified, by reducing the distance between the judges and their social and professional networks, and this impacted judicial decision-making. However, the question remains: why did the audiences that affected judicial reputation prefer an assertive judiciary challenging other state institutions?

iv) Leadership Approach: The explanation that gained currency among scholars of the Pakistani judiciary's recent assertiveness has been focused on leadership variables. The Chief Justice of the Court wields considerable power in the Pakistani judicial system, as he plays the most consequential role in the process of promoting judges, selecting judges for benches, and determining the original jurisdiction of the superior judiciary. Further, the rise in judicial activism and the confrontation between the judiciary and the military was most closely associated with one Chief Justice: Iftikhar Chaudhry. The period during which Chaudhry was Chief Justice saw the superior judiciary's activism and assertiveness reach unprecedented levels (Siddique 2015). Chaudhry's tenure as Chief Justice was certainly a critical juncture in Pakistan's judicial history. But Chaudhry was not alone in asserting the Court's authority. Chaudhry's assertive approach would have had limited impact if it did not have the support and sympathies of sections of Pakistan's legal complex, including other judges and bar association leaders. Thus, Chaudhry could not have resisted Musharraf's military dictatorship

in isolation, and the question arises as to what conditions developed within the judiciary that made Chaudhry's assertive tenure possible.

All these explanations provide some insights into why the Pakistani judiciary started contesting military prerogatives with increased frequency. Yet, none adequately captures why the superior judiciary entered a phase of assertive decision-making that i) continued during periods of direct military control and democratic transition regardless of the balance of power between civil and military institutions, ii) deviated significantly from past precedent and jurisprudential norms, and iii) has not significantly diminished since Justice Chaudhry's term ended.

iv) Audience Approach: I argue that each of these explanations, including the attitudinal shift, the media courtship, the court leadership role, and the change in jurisprudential norms, are endogenous to the shift in the judiciary's norms and prereferences. I argue that the Pakistani judiciary's turn towards increased contestation of military prerogatives is best explained by a shift in the authorities managing judicial careers and in the networks from which judges are recruited, towards authorities and networks not aligned with or dependent on the military.

As I detail in subsequent chapters, the Pakistani judiciary shifted from being a *loyal court* in Pakistan's early years, actively upholding military interests through its decision-making, to being a *transactional court*, aligning with the military when it suited the interest of the judiciary, and contesting the military when the two institutions clashed.

At the outset, after Pakistan's independence the Pakistan superior judiciary fit all the characteristics of a loyal judiciary. At the time of Pakistan's first military coup, soon after Pakistan's independence, the primary appointing authority was the military-led executive. Judges were personally hand-picked by Pakistan's military dictator Ayub Khan. Therefore, professional success was linked to pleasing the military rulers and their allies. Upward mobility within the superior

judiciary depended upon endorsing a strong military-led executive.

Superior court judges at the time were recruited from three streams: the executive-run lower judiciary, the civil service, and the bar of private lawyers. Thus, at least half of the judges came from government services subordinate to the military-run executive branch, and the remainder came from the lawyer's community. Most private lawyers at the time belonged to Pakistan' post- colonial elite, educated and trained in the United Kingdom with strong ties to the bureaucratic and military officers elite that emerged from the same elite network. The military regime actively sought to preserve the privileges of these elite networks. These elite lawyers and bureaucrats were trained and socialized in networks that sought to reproduce the British colonial system which institutionalized a powerful executive branch that preserved elite privileges and kept mass society at a distance (Jalal 1990). Thus, Pakistan's judicial elite were appointed directly by the military regime and came from Pakistan's bureaucrats and post-colonial elite lawyers, both networks that belonged to the military regime's distributional coalition. This system ensured that both the key audiences for career advancement and reputation-building had an interest in promoting the military's authority, thus constructing institutional norms and preferences favouring collaboration with the military in advancing its political agenda and interests.

However, three key transitions in Pakistan's judicial structure and legal complex led to a change in the key audiences shaping judicial norms and preferences.

i) The *indigenization* of the Pakistani judiciary. Over the next few decades fewer and fewer judges emerged from Pakistan's western educated post-colonial elite, as an increasing number of judges came from locally educated middle-class backgrounds. As the rewards for being private commercial lawyers increasingly outweighed the rewards for joining the judiciary, a growing proportion of foreign-educated elite lawyers gravitated towards private commercial law, while the judiciary became more appealing to locally educated middle class lawyers seeking the upward mobility and respect

promised by being members of the judicial elite. Thus, the composition of the network from which judges were primarily recruited changed from a foreign educated and trained elite disconnected from mass politics and closely aligned with the military elite, to a locally educated middle class network engaged with mass politics and less tied to future military rulers. The poorer education standard of the local law schools also often meant that future judges were not well trained in procedural rules and the technical framework of the law. A lack of procedural training, and an interest in sustaining a reputation of competence in the absence of adequate proficiency, had a counterintuitive effect. Judges felt less restricted by procedural requirements and paid more attention to providing judgments that would win the praise of the middle-class lawyers' community. The indigenization of the judiciary meant i) that the judiciary was no more embedded in Pakistan's post-colonial elite, but in Pakistan's middle class, and ii) that building a reputation with this network which meant paying less attention to procedure and more attention to popular outcomes.

ii) The *Politicization* of the Pakistani Legal Complex: In the years after Pakistan's independence the Pakistani lawyers' community was still very small, and politically relatively inert, and Pakistan's prominent bar associations focused primarily on professional concerns. However, towards the late 1960s and 1970s, the lawyer's community became increasingly involved with the tumultuous political events reshaping Pakistan's political order at the time.[17] These events ended the monopoly certain elite groups had over the state's politics, as mass society, including the legal networks, grew increasingly politically aware and engaged. However, the critical juncture for Pakistan's lawyers' community was the dictatorship of General Zia ul Haq which sought to suppress all sites for mass politics in the country, banning political parties, cancelling all political meetings and prohibiting any elections. One of the first and only venues General Zia permitted to continue with electoral traditions

[17] These events included the national democratic movement against Ayub Khan, the rise of Pakistan's first mass political party the Pakistan People's Party, and Pakistan's first democratic elections and civilian political government,

was the bar (for reasons that will be explained in subsequent chapters), and the result was that bar associations were one of the few spaces available for political activity. Soon this attracted political workers and political party members into the bar associations, and the bar became a site for the development of an oppositional politics that challenged the military regime.[18] An anti-establishment politics favouring judicial activism emerged in Pakistan's bar, the key recruiting site for Pakistan's judges, and judges increasingly had to at least pay lip service to this growing norm of activism in order to maintain a reputation within the bar. This is not to say that many lawyers and judges were not still willing to work with and cooperate with the military, but presenting one's self as independent from the military became increasingly important for building a reputation within the legal complex.

iii) The *Separation* of the Judiciary from the Executive: The Constitution of 1973, promulgated during Pakistan's first brief period of democratic rule, established the principle that the judiciary and the executive branch had to be separated. Over a series of steps this separation was formally completed. First, the practice of appointing judges from the civil service came to an end, and, at least two-third of superior court judges came from the bar, while only one-third came from the lower courts. Second, the judiciary was able to assume control of its own budget and financial resources. Third, and most crucially, the judiciary's separation from the executive was completed, when the judiciary was able to assume control over the judicial appointment process. In the consequential *Al-Jehad Trust* case in 1996, the Supreme Court removed the executive branch's discretion in appointments.[19] This had two important effects: First, the path to judicial selection did not require establishing a reputation with the executive branch, diminishing the role of the executive institutions as key audiences in career advancement. Second, as the voice and role of the executive branch diminished in the process of appointments, the role of the bar increased. Judges being former lawyers

[18] Bar politics increasingly became about challenging the military regime, and bar association elections centered around electing leaders on the basis of their willingness to confront the military regime

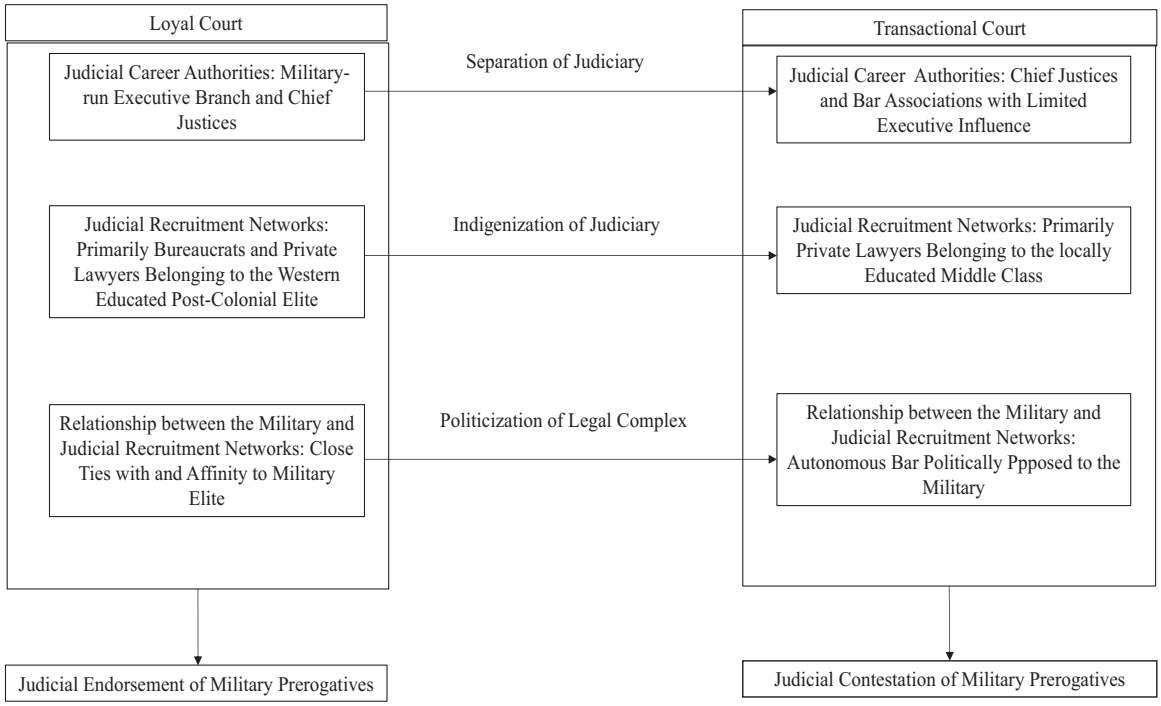
[19] This decision was made during Pakistan's longest period of uninterrupted democratic rule, although the military remained the most powerful state institution.

themselves, increasingly consulted and relied on the advice of their fellow lawyers from their respective bars in making appointments. Thus, reputation within the lawyers' community became an increasingly important consideration in the process of judicial appointments.

By the late 1990s, the institutional environment of the Pakistani judiciary had been completely rearranged, and the audiences shaping judicial norms and preferences in the 1960s had been largely replaced as a consequence of these three processes. In particular, i) the military, as the primary executive institution had lost its preeminence in the judicial appointment process, while judges and bar leaders became more consequential audiences in this process, and ii) judicial recruitment shifted from a section of the legal complex that was more aligned with the military, to one that was more independent from, and, on certain issues, oppositional to the military. Thus, I argue that: *When the audiences salient for career advancement and reputation building within the judicial system shifted towards authorities and networks that were not aligned with the military, the Pakistani judiciary shifted from a Loyal Court to a Transactional Court, that was more willing to contest military prerogatives when interests and ambitions clashed.*

The figure below charts the evolution of the judiciary from a Loyal to a Transactional judiciary.

Figure 2.1: Evolution of the Pakistani Judiciary



Thus, the Pakistani case illuminates the key features of judicial-military relationships in authoritarian and post-authoritarian states. The Pakistani judiciary grew more willing to contest the military's prerogatives over time, as the military played a diminished role in appointments and judges were appointed from a bar that was not aligned with the military, taking the judiciary in a direction of greater independence from and confrontation with the military.

Conclusion

The central claim of this study then is that, when explaining judicial-military interactions in authoritarian and post-authoritarian states, where the military acts as an autonomous political principal, the willingness of the judiciary to contest military prerogatives depends on whether the

authorities and networks shaping judicial norms and preferences are aligned with the military or not. The study develops an 'audience-based approach' to show that judges have motivations beyond policy maximization, including career advancement and reputation building, and that these motivations make different audiences consequential, and these audiences will shape the norms and preferences underlying judicial behaviour. Further, this audience-based approach explains how judicial norms and preferences shift. Thus, this approach borrows from both the ideas-based and interest-based frameworks to provide a holistic and unified framework for explaining variation in judicial assertiveness towards authoritarian and post-authoritarian militaries.

In the case of Pakistan, I will demonstrate the utility of this theoretical framework in subsequent chapters. Initially the institutional features of the Pakistani judiciary, particularly the appointing authorities and the professional and social networks in which the judiciary was embedded, promoted a pro-military bias among judges, and this loyal court endorsed a wide range of military prerogatives. However, over time there was a change in authorities and networks from which judges sought support and approval, as autonomous and politically active bar associations became a more salient audience, and this changing institutional environment reshaped the judiciary's institutional norms and preferences. Thus, the judiciary's relationship with the military became more transactional, as the Pakistani courts only supported the military where their interests aligned and contested the military's prerogatives where their interests clashed.

Chapter 3

THE LOYAL COURT – 1947-1977

The Entrenchment of a Judicial Military Partnership

Introduction

This Pakistani judiciary, in its institutional structure developed during the British colonial era. After Pakistan gained its independence in 1947, the judiciary became an important supporting pillar of the military-bureaucratic nexus that consolidated its control over the political order of the state. Between 1958 and 1971, the state was directly ruled by a military regime. Why did the judiciary support the military's rise to power and preeminence in this period?

This chapter answers this question by offering a brief history of the institutional development and jurisprudence of the high courts during this period. I first explore the political developments of this period, and then describe how the jurisprudence of this era helped consolidate and legitimize military rule and furthered its agenda and discretion. My objective is to show that the judiciary actively collaborated with the military because the military and judiciary developed close institutional interlinkages during this period, ensuring the military was a critical audience shaping the judiciary's internal norms and preferences.[20] Under British rule, the judiciary was constructed as part of a set of institutions wedded to the purpose of upholding the discretion of the British executive institutions to

[20] By institutional interlinkages, I mean that the military and military affiliated elites are linked to the inner workings of the judicial institutions through roles in judicial career paths and judicial recruitment networks.

maintain order and stability in the state. Judges were appointed by the British executive and were recruited from the same pool of British-trained elite bureaucrats and barristers. After independence, the civil-military bureaucracy continued to control the appointment process, and the judges continued to be nominated from the same pool of British trained lawyers and bureaucrats, who belonged to the same social and professional networks as the bureaucratic and military elites. Those seeking to further their judicial careers and reputations, had neither the professional understanding nor incentives to challenge the discretion and ambitions of the military. Thus, the judiciary became an active collaborator in upholding and legitimizing military dominance in Pakistan's political order, not because of strategic concerns about preserving judicial authority in a time of military supremacy, or legal and constitutional limitations on judicial authority, but because an institutional norm of collaboration with the military was entrenched during this period.

In the final part of this chapter, I discuss Pakistan's first period of constitutional democratic rule between 1973 and 1977, and outline the beginning of the judiciary's separation from the military, exploring how a new democratic constitutional order, and the changing roles of the military and the judiciary began to slowly disrupt the internal norms and preferences within the judiciary.

Thus, this chapter outlines the heyday of judicial-military collaboration, explains how this collaboration was sustained for such a long period, and then how the judiciary started evolving into a more autonomous institution.

Section 1: Pakistan after Independence – 1947-1970

Military and Bureaucratic Ascendance After Independence

When the Pakistani state was formally established, it was little more than a state on paper.

The state was composed of five provinces that had seceded out of the political structure of colonial India, and had no established governing institutions bringing these provinces together under a single administrative umbrella. Pakistan was composed of one large province, East Pakistan on the eastern edge of the Indian sub-continent (which gained its independence from Pakistan in 1971, and is now known as Bangladesh), and four smaller provinces (Punjab, Sindh, Balochistan and the North-West Frontier Province) on the opposite end of the sub-continent in the north-west.[21] The Muslim League, the founding political party of Pakistan, was a loose coalition of interests with little organizational thickness to manage the task of integrating the new state, unlike its counterpart in India, the Indian National Congress (Tudor 2013). In the absence of centralized administrative arrangements, a founding party with insufficient organizational machinery, a financial crisis, a massive demographic change and refugee crisis, and unsettled borders with a looming threat from India, Pakistan faced an acute existential crisis.

In the absence of a new constitution, the state continued to be regulated under the legal instruments of British India, the Government of India Act of 1935 and the Indian Independence Act of 1947, which together functioned as a provisional constitution.[22] The Government of India Act was the blueprint for British rule, and had created only partial self-rule, establishing elected provincial assemblies, but placing primary authority in the hands of a set of paternalistic executive institutions, tasked with maintaining order, stability and control over the colonies. At the apex of this administration was the vice regal office of the Governor-General which represented the British Crown and could dismiss provincial governments at will. The Governor-General was assisted by an administrative bureaucracy with its organized hierarchical structure of command and control, and coercive institutions, including a military, which had a significant role and presence in the north-

[21] These were the provinces that were identified as Muslim majority provinces within British India.
[22] Indirect elections meant that the directly elected provincial assemblies voted on the candidates for the constituent assembly, as opposed to the general population. See Government of India Act 1935; Indian Independence Act 1947.

western regions bordering Afghanistan. The Indian Independence Act in 1947 provided for the creation of an indirectly elected constituent assembly with the task of drafting a new constitution, but maintained the unelected Governor' General's role.[23] At the outset, the provincial arenas served as the main centers of political activity, while at the level of the central government there were two types of leaders: indirectly elected politicians with no identifiable bases of support, and civil and military bureaucrats, well-versed in the traditions of British Indian administration (Jalal 1990). The federal politicians of the Muslim League did not have the support nor connections to organizationally link the districts and provinces to the state, and after Jinnah (the party's leader and founder of Pakistan) died in 1948, the party was in organizational disarray. Jalal argues that a "superiority syndrome" quickly developed within the bureaucracies who viewed politicians with "condescension and suspicion" (Jalal, 70). With unsettled borders, internal discord, and war with India in 1948, the rapid expansion of the military also became a priority. Given Pakistan's dire financial situation, the country turned to the US for aid, and the US sought the new state as a Cold War ally, and focused its aid and assistance on the army, which soon bypassed the political government to develop independent relations with the US for the purpose of arms procurement (Jalal). Thus, by 1951, power had shifted from the political founders of the state to the civil and military bureaucracy which was made most apparent when a civil bureaucrat, Malik Ghulam Muhammad known for his "impatience with politicians and parliamentarians," and close ties with the military, assumed the powerful position of Governor-General (Jalal, 136).

Developing a constitution for the new state was also proving particularly difficult as the military and civil service leadership, primarily recruited from West Pakistan, resisted a representative constitutional arrangement that gave East Pakistan, which constituted a majority of the population,

greater political authority and autonomy. By 1954, the impasse between the indirectly elected constituent assembly and the alliance of the bureaucrat governor-general, the commander-in-chief of the military and senior civil servants reached its height and Ghulam Muhammad declared an emergency and unilaterally dissolved the constituent assembly, a first in a long series of interventions by unelected civil and military bureaucrats seeking to consolidate power.[24]

The Judiciary in the Early Years After Independence

Where did the judiciary fit into this picture of growing bureaucratic and military control?

During British rule, the Government of India Act 1935 established a judicial system with a set of High Courts and Chief Courts across India. The judiciary had little institutional independence, as it was constructed, "not as a check on the executive," but as part of the civil service administration (Siddique 2013, 87). Judges of the High Courts did not have a fixed tenure, as they were appointed and could be removed by the Crown, i.e. by the Governor-General, on condition of their "good behavior," and there were several British judges who were retained even after independence (Sidhwa 1989, 17).

After independence, Pakistan's Federal Court was established in 1949 at the apex of the judicial system. Sir Mian Abdur Rashid was the first Chief Justice of Pakistan's Federal Court, and the courts continued to be run in accordance with the Government of India Act, 1935.[25] However, in 1954, the Government of India Act was amended to grant the courts writ jurisdiction. Writs are a legal instrument developed in British common law, and refer to official orders directing the behavior

[24] As the Dawn newspaper subsequently noted on the Governor-General's dissolution "There have indeed been times—such as that October night in 1954— when, a general to the right of him and a general to the left of him, a half- mad Governor General imposed upon a captured Prime Minister the dissolution of the Constituent Assembly and the virtual setting up of a semi- dictatorial executive." (Dawn 1957).

[25] Under this arrangement, each major province had a Chief Court or a High Court, and the decisions of the High Court could be appealed to the Federal Court.

of another of government such as an executive agency or lower courts, and give the judiciary the authority to check the actions of other government institutions.[26] From the start, Newberg (1995, 49) writes, the courts became an important forum, as participants in the political arena used the courts to "air their views, and challenge their opponents" and it provided the only bridge between the discordant political and administrative systems at the time.

So what role did the judiciary play in this period? The judiciary was put to the test in 1955, in the historic *Maulvi Tamizuddin* case.[27] A Bengali politician Maulvi Tamizuddin petitioned to the Sindh High Court challenging the Governor-General's dissolution action. In determining the legality of the Governor-General's actions, the judiciary was called upon to determine the balance of power between the governor general and the constituent assembly. The Sindh High Court ruled in favour of the Constituent Assembly, arguing that the power of dissolution was limited and deciding in favour of legislative supremacy and a restrained executive. The Governor-General then appealed this decision, and the judiciary's authority to review the Governor-General's actions in the Federal Court (the Supreme Court after 1956).

By 1954, Justice Abdur Rashid had been replaced by Justice Munir as the Chief Justice. Justice Munir's assumption of the Chief Justiceship was in itself, a product of executive manipulation within the judiciary. Several judges were senior to Justice Munir in the Supreme Court, but the machinations of Governor-General Ghulam Muhammad helped bring Justice Munir to the helm (Khan 2016).[28] Justice Munir had already developed a reputation for favouring executive power

[26]High Courts accept five types of writ: the writ of *habeas corpus*, the writ of *mandamus*, the writ of *certiorari*, the writ of *quo warranto*, and the writ of *prohibition*. The writ of *habeas corpus* is issued to executive authorities compelling them to release someone from detention and bring them before the courts. The writ of *mandamus* is issued to lower courts or government officials when judicial or executive officers are not following the laws, to ensure that they do. The writ of *certiorari* is issued when a decision made by a lower court is accepted for appeal. The writ of *quo warranto* is issued when the person claims any power without legal authority or when an official does any act without the backing of law. When the lower courts accept a case outside their jurisdiction the higher courts can issue a writ of *prohibition* to stop the lower court's proceedings.

[27] See *Federation of Pakistan v Maulvi Tamizuddin Khan*, PLD 1955 FC 240.

[28] Khan (2016) writes that Justice Akram was supposed to be appointed Chief Justice, but the Governor-General told him that he was inclined to appoint a British judge over a Pakistani judge as Chief Justice, unless Justice Akram agreed to

during his time as Chief Justice of the Lahore High Court. More significantly, Ghulam Muhammad took the Chief Justice into consultation before dissolving the constituent assembly (Jalal 1990). Under the circumstances, the close ties between Justice Munir and Ghulam Muhammad, and his prior involvement with the decision to dissolve the assemblies, it comes as little surprise that Munir and the Federal Court upheld the order of dissolution.

The Court ruled that the Sindh High Court simply did not have the jurisdiction to question the dissolution decision by the Governor-General because the statute that had granted the judiciary the power to accept writs against the Governor-General had not received the assent of the Governor-General. In this historic decision, Newberg (1995, 47) writes that "defining constitutionalism as a limit on the legislature, Munir set the groundwork for executive supremacy and intervention." Munir described the Governor General's exercising of powers of dissolution as a necessity to avert disastrous outcome, and his judgment faulted the politicians of the Constituency Assembly, stating "if the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business."

In a subsequent decision that emanated from the fallout from the Governor-General's dissolution action, the Court revisited these questions, and the Governor-General's powers of assent and dissolution.[29] This time the Court formalized the logic outlined in the *Tamizuddin* decision, articulating the doctrine that came to be known as the 'doctrine of necessity.' Justice Munir held that the actions taken by the Governor General lay outside the Acts of 1935 and 1947 but were necessary to "prevent the State from dissolution and the constitutional and administrative machinery from breaking down" and said "an act which would otherwise be illegal becomes legal if it is done *bona fide* under the stress of necessity." The Court agreed that the Governor General, in declaring

forego the position. Justice Akram was forced to accept this or face the possibility of forcing the return of an English judge at the helm of the judiciary.

[29] See *Reference by his Excellency Governor-General* 1955 PLD FC 435

emergency, had acted outside the legal framework but was justified in doing so because of the necessity to save the state. This doctrine of necessity became the legal foundation for extra-constitutional interventions through Pakistan's history. Thus in 1955, the Federal Court played an important role in consolidating the control of the civil-military bureaucratic axis over the political order.

Justice Munir said in a speech some years later, after retiring, that the decisions he made in 1955 were necessary as there would have been "chaos in the country and a revolution that would have been formally enacted possibly by bloodshed (Chaudhry 1973)." Munir claimed he had saved the country from revolution. A lawyer who personally knew Justice Munir said that Munir privately claimed that if the judiciary did not decide in favour of the Governor-General, "there was a real possibility of a coup d'etat, and the military would takeover."[30] Yet, Justice Munir's public claim to be forestalling a revolution and private claim to be holding back a military takeover were belied by his subsequent judgements regarding the military takeover in 1958.

Martial Law in Pakistan: 1958-1968

Pakistan's first Constitution was established in 1956, after a new and weaker constituent assembly agreed to meet a key demand of the bureaucracies that the four provinces of West Pakistan were integrated into One Unit, giving the civil service direct control over the integrated region, and developing parity between West Pakistan and East Pakistan, undercutting the Bengali electoral majority.[31] The new President, Iskander Mirza, was himself a Major General integrated into the civil bureaucracy, indicating how the alliance of civil and military bureaucrats had ascended to the helm of

[30] Interview No. L-51, April 20th, 2017.
[31] Field Marshall Ayub Khan later claimed he played the decisive role in ensuring that the One Unit plan was inserted in the new constitution (Jalal 1990).

the political system. Shah (2014b) writes that the military officers held politicians in contempt, and believed that centralized government, unmediated by populist pressures, was a prerequisite for national security. This prejudice was reaffirmed by the rapid development and professionalization of the military with the assistance of US aid and training, while the political government continued to be paralysed by deadlock.

The new constitutional arrangement did little to resolve tensions between East and West Pakistan, and the military and civil service feared that the Bengali majority would win in the upcoming elections and demand a real decentralization of power. After four governments fell in quick succession, because of an inability to bring the executive and the legislature on the same page on core questions of the federation, and a growing economic crisis, the military directly intervened and took over in a military coup in October 1958. The military cited internal strife, partisan bickering, provincialism and economic degradation threatening national security, as reasons necessitating intervention (Jalal 1990). The constitution was suspended only two years after its proclamation, the assemblies were all dissolved, political parties were banned and elections were postponed indefinitely. At the helm was a 'diumvirate' of President Iskander Mirza and the Commander in Chief of the army, Ayub Khan. Ayub Khan, in a diatribe against the political class said there was "no limit to the depth of their (politicians') baseness, chicanery, deceit and degredation" (CMG 1958a). Mirza called this a "peaceful revolution" stating "My authority is revolution…I have no sanction in law or Constitution" (CMG 1958b). Within a month, Ayub Khan and a group of generals in the central cabinet decided to remove Mirza and assume complete control of the state.

Ayub Khan's regime ruled Pakistan from 1958 to 1968. Until 1962 the state was run under the Laws (Continuance in Force) Order of 1958, which maintained the basic legal framework of the 1956 Constitution but provided the executive with unfettered powers. During its early years, the

regime had two primary guiding principles of governance: "administrative efficiency and the negating of politics (Newberg, 79)." Ayub Khan carried out a series of reforms and reorganization efforts pushed through via executive ordinances, and his regime was characterized by a close partnership between the military and the civil service bureaucracy. A series of executive orders including the 1959 Public Offices (Disqualification) Order and the 1959 Elective Bodies (Disqualification) Order were used to purge thousands of politicians. Repressive measures were also used against public protests and strikes, as well as media publications. In 1959, Ayub Khan established the Basic Democracies Order, a radical revision of Pakistan's electoral system, creating a system of limited representation, simultaneously devolving political power to the local level, and increasing the power of the central government and bureaucracy, undercutting the provincial tier of government at which most political parties were organized.

In 1962, Ayub Khan introduced a new constitution, that formalized the Basic Democracies System and turned Pakistan from a parliamentary to a presidential system, with Ayub Khan as President. The new constitution brought a formal end to martial law but placed the military leader firmly at the helm of a centralized and largely undemocratic and unrepresentative political system. He also introduced the Political Parties Act that permitted the reintroduction of political parties in the political system but regulated them. Finally, in 1964, in the First Amendment to the Constitution, fundamental rights were reintroduced, thus restoring the civilian courts as venue for challenging the military's rights violations. Ayub Khan then ran for presidential election in 1965, and won, in a new constitutional framework, with limited representation, and a powerful president-led executive.

The Judiciary Under Ayub's Military Regime

On the same day that Ayub Khan took full control of the state, the Supreme Court upheld

usurpation of power by the military.[32] A suit had been issued regarding the Frontier Crimes Regulations, the regulatory framework for Pakistan's tribal frontier that fell outside the regular legal framework, to determine whether writs against the Frontier Crimes Regulations were valid once that constitution had been abrogated. The petition before the Court only pertained to the validity of writs in the absence of the constitution and was not framed to challenge the legality of the abrogation of the constitution in the military coup. But the Court, in a far-reaching decision, went far beyond the question posed by the petition to rule on the legality of the coup itself, and "seized this opportunity to provide the regime with validity."[33] Within a month of the coup, Justice Munir announced his theory of revolutionary legality, building on the theory of Hans Kelsen, and held "the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in which the former had not itself anticipated." He argued that a victorious revolution was simply an internationally recognized legal method of altering a constitutional order, and since this revolution was victorious it must be accepted as legal. In short, Munir argued that if the coup d'etat is successful, it is lawful.

Thus Munir validated the proclamation of martial law, including the consequent restrictions on the judiciary, as the new regime created parallel military courts outside the jurisdiction of the civil courts, and banned any writs against the new government, under the Laws (Continuance in Force) Order of 1958. The *Dosso* case negates the earlier claims made by Justice Munir that he was holding back revolution and a military coup, since in this judgment he endorsed a military coup on the grounds that it was a successful revolution. The Court continued to uphold the new political order, and in *Mehdi Ali Khan* (1959), it held that any executive passed under the Order of 1958 was not void if it came into conflict with fundamental rights, and thus superseded fundamental rights.[34] In short, Munir and the Federal/Supreme Court helped establish and legitimize a new military government

[32] *State v Dosso* 1958 PLD SC 533
[33] Interview No. L-51.
[34] *The Province of East Pakistan v Md. Mehdi Ali Khan Panni,* PLD 1959 SC 387.

with vast executive discretion.

Justice Munir had retired as Chief Justice in 1960 and was replaced by Justice Cornelius. Cornelius had dissented in the famous 1955 decisions that upheld the dissolution of the assemblies, and, while concurring in the *Dosso* decision, he did not address the question of validating martial law in the decision but opined that fundamental rights "being natural rights" were not undone by the abrogation of the constitution and existed even in the absence of a legal framework.

Under Cornelius, the Court created a space for fundamental rights and a role for the judiciary within the new military regime system. Between 1964 and 1969, judges disagreed over the role and functioning of political parties, and the limits on executive power of the military regime to suppress opposing political parties and political expression. Even after legalizing political parties, the regime continued to dissolve political parties on the grounds that political parties violated public order. The judiciary resisted the unilateral dissolution of parties in *Maudoodi v West Pakistan* (1963), where the Supreme Court upheld the rights of the Islamist political party, Jamaat e Islami, and its members.[35] After 1965, political opposition against Ayub Khan grew, a slew of habeas corpus petitions came before the courts, from politicians and political activists who had been placed in preventive detention by the regime.[36] In 1966, when opposition parties convened a conference criticizing the government, in violation of Section 144 of the Pakistan Criminal Procedure Code, which prohibited such assemblies, speakers spoke about the need to bring about change in the political system. Political leaders who spoke at the conference were arrested for allegedly instigating riots and violating public order. When the high court upheld the detention orders, the Supreme Court, on appeal, chastised the court for deferring to the executive, saying that 'determining reasonable grounds for detention is a judicial function," and it set judicial standards for determining if preventive detention actions by the

[35] *Saiyyid Abul A la Maudoodi, et al. v The Government of West Pakistan and the Government of Pakistan*, PLD 1964 SC 673.

[36] *Government of East Pakistan v Mrs Rowshan Shaukat Ali Khan*, PLD 1966 SC 286.

regime were indeed lawful.[37] Cornelius' Court expanded the writ jurisdiction of the judiciary and upheld fundamental rights, in a series of thoughtful judgments.

Yet, as Newberg (1995) and Azeem (2017) point out, the judiciary during Ayub Khan's regime carved out a space for itself within the military regime, but ultimately did not challenge the contours of the garrison state. The Court's defense of the Jamaat e Islami's political activity was not extended to rights petitions by left-wing socialist, communist and nationalist political parties who were viewed as a greater threat. In *Mian Iftikharuddin* (1961), the Court upheld the government's dissolution of a publication house tied to left-wing political parties without providing any compensation. [38] In *Siraj Patwary* (1966), the Court upheld Ayub Khan's Basic Democracies system, articulating and upholding its principles and practices, and also sided with the regime in a question over the division of power between the provinces (namely East Pakistan) and the Center.[39] The Court set a very lenient standard for legislation, arguing that as long as a law is made in its proper form, i.e. followed a procedurally correct format, then it must be upheld, regardless of its content.[40] Thus, on the question of delegation of powers to the provinces, as long as the law limiting this delegation of powers was properly passed, it was legal. Similarly, on the question of preventive detention of politicians, the Court largely sided with the regime on its determinations of the public order. The Court had articulated a judicial standard for preventive detentions, but ultimately, based on this standard, continued to uphold the government's decision to detain political leaders in most cases.[41]

In short, during Ayub's military regime, the high courts did not challenge the military

[37] *Malik Ghulam Jilani v Government of West Pakistan*, PLD 1967 SC 33.
[38] Justice Dorab Patel, a future Supreme Court judge, condemned this decision saying "it would be extremely difficuklt to find a case during our Martial Laws in which the Martial Law authorities had acted in a manner as shocking as in Iftikharuddin's appeal" (Patel 2000, 78). *See Mian Iftikharuddin and Arif Iftikhar v the Government of Pakistan*, PLD 1961 SC 585.
[39] *Province of East Pakistan et al. v Sirajul Huq Putwari and others*, PLD 1966 SC 854.
[40] It "evinced remarkable faith in the government's pursuit of the common good" (Newberg, 100).
[41] In *Malik Jilani (*1967), the Court upheld most of the dissolution orders for speeches given criticizing Ayub Khan and his Constitution stating freedom of speech was not a "justification for politicians to play with fire in the hope that they will eventually be able to subdue the conflagration they caused."

regime's priorities and prerogatives, but merely sought to create a system where these priorities and prerogatives followed a set of procedures that were built into the constitution and upheld by the judiciary. As long as laws were properly passed, or executive actions were properly carried out, the judiciary was likely to uphold the actions of the military regime, even as they perpetuated the repression of politicians, activists, trade unions and political parties, and advanced the authority of the central government over the provinces.

The Judicial Role in the Era of Military-Bureaucratic Supremacy

It should be clear from the preceding account, that during this period of military and bureaucratic dominance of the political system, the judiciary threw its support squarely behind the military regime, while carving out a continuing role and relevance for itself. In so doing, the judiciary gained a reputation for collaborating with the regime. Rehman (1993) writes "What emerges is a litany with few but notable exceptions, of…decisions of dubious constitutional and legal validity by the high courts of the land…that brought grist to the mill of military and bureaucratic adventurers." Yet this era of pro-military jurisprudence is complicated by the respect accorded to the judges of this period by the legal community. One veteran lawyer told me "Justice Munir has been reviled, but he was the ablest judge this country has produced. He had a towering intellect and dominated the judiciary."[42] Former Chief Justice Nasim Hassan Shah wrote that "Justice Cornelius possessed a complete command of the principles of law and jurisprudence" and the veteran lawyer Hamid Khan described his tenure as Chief Justice as the "golden era of the judiciary(Braibanti 1999, xii, Khan 2016)." Justice S.A. Rehman, another luminary of the Supreme Court from this period was also remembered as a "a great jurist and judge (Morning News 1979; Dawn 1979a)." So how do we

[42] Interview No. L-51.

reconcile the long-running respect paid to the integrity and acumen of the judges of this period with the track record of support for the military?

One argument made is that the judiciary was guided by political realism: surviving in a time of military-bureaucratic dominance meant acquiescing to military authority or risking military disobedience and retaliation. In a later speech, Justice Munir indicated that, in the *Maulvi Tamizuddin*(1955) decision, he was acting strategically because real power lay with the military-backed Governor-General, saying "who could say that on 9th February, the coercive power of the state was at the service of the court and not the Governor General? (Hussain 1973, 21-22)" If the Court made decisions against the Governor-General, "who was to enforce them and was the court itself in a position to punish the contempt committed by disobedience?" (Ibid).

However, the judiciary's choices were not only motivated by strategic concerns about the risks of challenging a powerful military. Judges seeking to avoid a confrontation with the military had options other than upholding military authority. The High Courts and Supreme Court had considerable discretion in selecting cases for adjudication, and the Supreme Court had even more discretion in selecting cases for appeal.[43] In accepting a case for appeal, the courts also had the discretion to select and frame the legal questions they took up for appeal. This discretionary authority allowed the high courts and Supreme Court to avoid taking up cases regarding military authority, or, avoid taking up legal questions that directly affect the military's authority. *Dosso* (1958) was simply a case of murder committed in a region that fell under the jurisdiction of an exceptional set of laws. The case did not directly deal with the legality of the military regime. Therefore, the Supreme Court could have avoided dealing with the question of the validity of the regime (as Justice Cornelius did in his concurring opinion) or it could have simply not taken up the appeal petition, thus neither challenging the regime, nor giving it validation. Instead, the Court went much further, taking up the

[43] See Article 160 of the Constitution of 1956.

petition and using it as a vehicle for legitimizing the coup. *Dosso* typified the approach taken in a series of decisions by the judiciary where the courts did not simply uphold the policies and discretion of the military regime, but also provided detailed discussion of the merits, principles and necessity of these policies. On the other hand, in *Mehdi Ali Khan,* where the Court was pushed to review its decisions upholding military rule, it declined to carry out such a review, reading its own powers narrowly. Thus, the judiciary used its discretion selectively both to provide the military regime with legal legitimacy and to limit any legal challenges to this granted legitimacy. The manner in which the judiciary used its powers and discretion, indicates that strategic caution was not the only motivation for upholding the military regime's authority and legitimacy.

The judiciary's deference to the military during this period could also be explained the absence of a legal framework that provided them with the tools to muster meaningful challenges or restrictions on the regime. Authoritarian regimes often create new constitutional frameworks that limit the ability of judiciaries to uphold rights in the presence of an autocratic centralization of power (Barros 2008). In the absence of a constitutional framework providing fundamental rights and judicial review till 1962, and limited jurisdiction provided after 1962, the argument goes that, the judiciary simply did not have the legal means to challenge the actions of the regime. Newberg (1995, 93) takes this position when describing the period between 1958 and 1962 stating, "in the absence of constitutional rights the judiciary was at a loss to gain ground against military power." When the Lahore High Court ruled, for example, that the high courts had jurisdiction over certain orders of summary military courts, the martial law authorities simply passed a new law removing that jurisdiction, taking away the judiciary's legal authority to challenge the military (Newburg 1995).

However, the court's jurisprudence demonstrated that, when it came to validating military power, it was willing to step outside legal norms and constitutional frameworks. In *Dosso*, when Justice Munir upheld Ayub Khan's coup, he developed a theory of revolutionary legality that bore

little relation to the past precedents or the state's constitutional framework. When upholding the military coup, he stated "public law is not to be found in the books, it lies elsewhere in the events that have happened (Chaudhry 1973, 22)." But when the judiciary was presented with opportunities to apply the previous constitution (that,while abrogated, still operated in certain spheres), or natural rights, to define limits on the military-led executive, and permit the continued operation of some fundamental rights, it chose not to. In *Mehdi Ali Khan* (1959), the Court upheld the absence of justiciable rights, and permitted the military to extend its control further. Thus, the judiciary was not simply constrained by a formalistic approach to law that restricted the judges to the texts of the constitutions and laws, and that kept the judiciary silent in their absence. The judiciary *chose* to find extra-legal rationales for validating the military-run political system but *chose* to avoid reading fundamental rights into the new system, on the basis that the present legal framework placed constraints on it. Therefore, the legal framework under martial law did place some constraints on the judiciary, but how far these constraints actually limited the judiciary's ability to contest the military, depended on how the judiciary chose to interpret these limitations.

Outside the courts, there is also evidence that judges did not simply acquiesce to the authority of the regime but were integrated in the regime structure. Justice Munir was also one of the architects of the Laws (Continuance in Force) Order of 1958 that gave Ayub Khan unbridled executive power, and he was an adviser on the drafting of the 1962 Constitution that provided the President with unlimited power, of which Justice Manzoor Qadir of the West Pakistan High Court was the primary architect (Rahman 1993). Justice Shahabuddin served on the Constitutional Commission that Ayub Khan had put together to help draft a constitution in 1961 (Khan 2016), and Justice Cornelius served as legal adviser to Ayub Khan's military successor, General Yahya Khan (Azeem 2017). This was not simply a case of judicial deference in recognition of the authority of the military, as the members of the judiciary actively assisted the military in constructing the legal framework that legitimized and

expanded military regime's powers.

The courts were willing enablers of the expansion of military power and were not merely constrained by an asymmetry in power, or a lack of formal legal checks on executive power. So why were these highly respected and capable judges willing to collaborate in upholding the powers of the military regime?

The argument I offer, is that the pro-military inclination of the judiciary during this period is best explained by the institutional norms and preferences of the judiciary, shaped by its institutional interlinkages with the military. The institutional interlinkages between the civil-military bureaucracy and the judiciary, ensured that the military was a critical audience in shaping the internal norms and preferences of the judiciary, and served to reproduce a pro-military inclination within the high courts.

The first institutional interlinkage is the military's utilitarian interlinkage with the institutional hierarchy of the judiciary, determining appointments, promotions and case selection. After independence, Pakistan retained the same judicial appointment system established by the British, under which the Governor-General, and later the President (once a constitution was established) assumed the same power over the appointment process. Under the Constitutions of 1956 and 1962, the Chief Justice of the Supreme Court was selected by the President, and the judges of the High Courts were appointed by the President in consultation with the Chief Justice of Pakistan and the Chief Justice of the High Court. What this ideally meant was that the Chief Justice of the High Court initiated the appointment process by preparing a list of names consisting of leading advocates and senior judicial officers from the subordinate judicial bureaucracy whom he recommended for appointment as Judges. The file was then forwarded to the Governor of the Province who was appointed by the President, and he added his comments and recommendations. Then it was sent to the Federal Law Ministry from where it went to the Chief Justice of Pakistan. The Chief Justice added his own comments and recommendations, and then it was passed on to the Prime Minister's office

which made its own recommendations, before it finally went to the President. Ideally, therefore there were several tiers of comments and recommendations before a final decision was made, but ultimately the final decision remained with the President and the President had the discretion to reject all the recommendations and choose someone himself. Realistically, this meant that the high courts were unlikely to recommend someone who the President was likely to reject, and the President could bypass this process selecting candidates on his own, often directly from the civil service bureaucracy.[44]

Khan (1994) writes that Ayub Khan routinely abused this process to push forward his favourites. He appointed one member of his parliament as a high court judge, in exchange for his vote for an important legislative act, and also appointed the brother of a prominent politician who had helped him win his presidential election in 1965. Ayub Khan personally invited candidates short listed for high courts appointments for interviews during his regime and rejected candidates for arbitrary reasons. [45] Another future Chief Justice of the country was approved to become a High Court judge when his name came before Ayub Khan for interview, and Ayub Khan remembered his father and his previous interactions with the family and said, "I know his father, I do not need to interview him," approving him on the basis of this personal connection.[46] Thus, the military-run executive exercised direct control over the process of judicial appointments.

Beyond appointments, the same executive practices applied to promotions. The President was expected to consult with the Chief Justice before promoting judges to the Supreme Court and when appointing the Chief Justice of the Supreme Court, he was expected to respect seniority in the process of promotions. However, the President frequently violated this process to promote his favourites.

[44] Multiple interviewees told me that, during Ayub Khan's regime, the practice of *consultation* sometimes simply involved informing the Chief Justice of the President's choice beforehand.
[45] Khan (1994) writes that Ayub Khan had rejected candidates during interviews for cosmetic reasons such as poorly matched clothes, and regional affiliations.
[46] Interview No. L-9, April 10th 2017.

When Justice Munir became Chief Justice, he was handpicked by Governor-General Ghulam Muhammad, bypassing three senior judges who had been on the Supreme Court bench for a longer period. Similarly, Justice M.R. Kayani, a prominent judge of the West Pakistan High Court, and a critic of the military regime, was denied promotions to the Supreme Court until he finally retired from the bench. Thus, in this system, the executive branch, run primarily by the military and military-affiliated civil service, played the primary role in judicial appointments and promotions, and the military could ensure that the judges who were appointed and rose up the ranks, were those who were expected to decide in support of the military.

> "There was no real gap between the judiciary and the military. To become a judge, you spent your time ingratiating yourself to the establishment [a popular term for the nexus of the military and civilian bureaucracy]. Very few lawyers, seeking judicial appointments would be out there agitating against the regime."[47]

Thus, the military was an important audience for the judiciary, shaping its internal norms, as the system and its hierarchy incentivized granting discretion to the executive branch, limiting relief to oppositional political parties, and upholding the prerogatives of the military regime.

The second institutional interlinkage with the military was the pool from which judges were recruited. The social and professional network judges came from and were socialized in, played a big role in shaping their worldview, and also was the network with which judges sought to build a reputation. The judiciary arrived in three streams – from the federal Civil Service of Pakistan trained in the British- run Civil Service before independence, from the judicial services of the subordinate judiciary which was also fused with the provincial executive bureaucracies, and from lawyers and barristers, often trained in the United Kingdom.[48] The table below shows the professional and educational backgrounds of the Supreme Court judges appointed from 1949 to 1966. During this

[47] Interview No. L-3, May 22nd 2017.
[48] The lower courts of the subordinate judiciary were staffed by officers from the judicial service, a provincial bureaucracy.

period, 45% of judges were previously lawyers, but the majority of judges were appointed from executive-run bureaucracies, and only 36% of the judges were educated exclusively in South Asia, while the majority gained educational and professional experience in the UK, indicating they belong to elite networks that had access to a British education. [49]

Table 3.1: Professional and Educational Backgrounds of Supreme Court Judges (1950-1967)[50]

Judges	Profession	Education
Justice Sir Abdul Rashid	Lawyer/Bar	UK education
Justice A.S.M. Akram	Judicial Service	UK education
Justice Muhammad Sharif	Lawyer/Bar	Local education
Justice Muhammad Munir	Lawyer/Bar	Local education
Justice Alvin Cornelius	Civil Service	UK education
Justice Muhammad Shahabuddin	Civil Service	UK education
Justice S.A. Rehman	Civil Service	UK education
Justice Amiruddin Ahmed	Civil Service	UK education
Justice Fazl-e-Akbar	Judicial Service	Local education
Justice Badi-uz-Zaman Kaikaus	Lawyer	Local education
Justice Hamood-ur-Rehman	Lawyer	UK education

A majority of judges were coming from the bureaucracies: the judicial services of the lower courts that were fused with the provincial civil services, and the federal civil service of Pakistan, and thus belonged to the social and professional network of bureaucrats. The civil service bureaucracies had been the primary cadre of administrators under the British, and the British had paid the closest attention to their grooming and training, as British officers molded the structures and attitudes of the higher bureaucracy. Those recruited for the civil service by the British "usually came from families of some distinction or status derived either from wealth, learning or hereditary tribal leadership (Braibanti 1967, 378)." British bureaucrat officers remained in the high courts after independence, right till the 1960s, with 9 British judges in 1947 which fell to 2 British judges by 1961. British officers espoused the "values of an elitist cadre" and this disposition and these values were shared by

[49] Foreign education is a reliable indicator of elite socio-economic status in a country where the majority did not have access to foreign education.

[50] One judge missing is Justice Abdul Rehman, for whom I was unable to get information. A complete list of all Supreme Court judges from 1950 to 2007 is provided in Appendix 2.

Pakistani members who were also educated at Oxford and Cambridge (Braibanti 386). Thus, in the early years, members of Pakistan's federal civil service bureaucracies, who typically began their careers in the Indian Civil Service before independence, were typically from elite families, educated abroad, and trained with the values and ruling practices of British colonial rule: executive discretion with limited accountability.

The experience of these judges within the civil services or within the subordinate judicial service made them more deferent to executive authority. Justice Cornelius described this training:

> "in the last years of British rule, there was much political agitation with its crop of detention and arrests, followed by petitions in the nature of habeas corpus…in nearly all cases the question was reduced to whether or not there had been compliance with the Defence of India Act (a repressive statute designed to maintain law and order and suppress political agitation) …and no concept of human rights (Cornelius, 1981, 185)."

This pro-executive training for judges from the bureaucracies was not unique to just British rule, as one former judge explained to me, but has persisted through Pakistan's history in the provincial judiciary bureaucracy.

> "Civil judges spend 20-25 years in the judicial services before being appointed to the High Courts, dealing with very petty complaints, and when they are promoted to the High Court they maintain their mindset as district bureaucrats, and when dealing with constitutional claims, they don't trust litigants, deny relief, and side with the state a lot more."[51]

Thus, judges from the bureaucracies worked and trained in a social and professional network that favoured executive discretion and was disdainful of populism and partisan politics. Justice Cornelius, exemplified this cadre of civil judges, and his speeches give us indications about the attitudes and preferences of these judges. He stated in a speech, "the price of democracy is partisan politics and the citizen must develop immunity to that insidious poison (Braibanti 1999, 250)." Similarly, in his description of British imperial rule, he stated

[51] Interview No. J-19, April 23rd, 2017.

> "the Foreign officers in the (British) administration, from the Governor-General down, acted for the most part with due regard for the general good and the requirement of justice…the laws were made with circumspection…Only under the stress of World War 2 did peremptory rules and defense rules become the order of the day…to cloud the aspect of benevolence that had earlier prevailed (Cornelius, 210)."

Cornelius, in his conception of the benevolence of British imperial rule, and his disdain for popular democracy, exemplified the values upheld by the bureaucratic elite, which actively supported the military as it rose to power and forced political parties out of the system.[52]

The other stream of judges were the lawyers. The legal community was organized into active but small bar associations, led by western-trained lawyers seeking to become judges.

> "Historically the bar has not been homogenous in the sense that you could place lawyers in 3 categories. First the "professionals of first choice." These were elite lawyers who had the privilege to choose the legal profession for reasons other than material concerns, and they controlled constitutional litigation They were built up with the colonial mentality. This was a product of education but more a product of the mindset presiding in their community. The second category were the "have-nots" for whom law was not a profession of first choice, but one by default. They were compelled to work hard on real cases of litigation, including recovery suits and labour cases. The third were the "absentee lawyers" whose real vocation was politics. But they could bring political cases to the court. So this was not a vocation for them but an extension of politics. Earlier on, the "professionals of first choice" were the most influential within the bar associations."[53]

Another senior lawyer and bar association leader explained to me that during the 1950s and 1960s:

> "It was a very small bar at the time. It was understood that the bar has nothing to do with politics. The earlier tradition was that bars should have people of all political leanings. By and large, the bar had some prominent political figures, but the bar platform was not used for political purposes. We proposed a resolution in the Lahore High Court Bar Association condemning the martial law in 1958. Martial Law sabotaged the constitution so it directly concerned the bar. But it was quite difficult to get the bar involved. The president of the bar at the time was a reluctant leader of the Bar. The leaders were people willing to work with the government, and the leadership was pro-establishment. We did not have a cadre for democratic activism at the time."[54]

[52] In his writings Cornelius also praised the Basic Democracies System, Ayub Khan's presidential system under the 1962 Constitution, and presidential discretion in judicial appointments (Cornelius).
[53] Interview No. L-42, April 1st, 2017.
[54] Interview No. L-9, December 4th, 2016.

These two accounts provide insight into the legal profession at the time, and the motives and mindsets of the lawyers who went on to become judges. Much like their counterparts from the bureaucracy they also belonged to the established elite. The lawyers' community was probably the "most powerful elite group, outside government service" and the most accomplished elite lawyers who were most likely to be nominated as judges, were barristers trained in the Inns-of Court in Britain, or lawyers who had served as prosecutors for the colonial government (Braibanti, 113). These elite lawyers came from the same elite social networks that included the bureaucratic and military elite of the time, and often shared a similar colonial training and worldview.

Justice Munir was an Advocate-General for the British government before being appointed as a High Court judge. His own writings and actions outside the judiciary indicated that he sincerely shared the same values as the military and bureaucratic elite, including disdain for politicians, and support for Ayub Khan's dictatorship. In his writings after retirement, Munir exclusively blamed the politicians for the end of civilian rule in 1958, stating "thus was destroyed the common man's faith in the efficacy and suitability of parliamentary democracy and the warring and self-seeking politicians were digging the grave in which they and the nation were about to be buried (Munir 1978, 91)"[55] He praised Ayub Khan for saving the state, writing that during the four years of martial law, "The general rot that had set in was arrested and many a reform…was introduced (Munir 92)." Munir, a former lawyer and the most powerful judge on the Supreme Court during the 1950s, shared the values of the military, bureaucratic and legal elite, both on and off the bench. All in all, the elite of Pakistan's legal community came from the same cluster of elite social networks of beneficiaries from the latter years of colonial rule and were at the forefront of a professional network that continued to imbibe colonial norms and preferences and reject mass politics.

[55] He also defended Ayub's ban on political parties, stating "the reason for the ban being that the politicians had misbehaved in the past and were not expected to behave in the future. (Munir 97).

Both the bureaucratic and legal elite emerged from pre-existing established elite networks that were also the primary beneficiaries of military and bureaucratic rule. Thus, the judiciary and the military continued to share strong normative interlinkages during this period. Jalal writes that the system of rule and policy-making under Ayub Khan, was designed to "disenfranchise the more volatile sections of urban society – industrial labour and the intelligentsia especially" and grant political privilege to "sections of already dominant socio-economic groups" who did not have provincial bases of support (thus excluding nationalist politicians) (Jalal, 296). Thus, opposition and resistance to military rule was muted from these quarters.

These were the authorities and social and professional networks that formed the key audiences for judges seeking to build a career and develop a reputation: the military and military-appointed chief justices, the western-educated bureaucratic elite of the civil services, and the western-trained legal elite. Under this system, anti-military judicial activism could hardly be expected or condoned. Those who desired to be appointed or promoted had to have the approval of the military, and those who desired to build a reputation as judges within the legal and bureaucratic elite had to present their distance from partisanship and redistributive politics and support for the maintenance of law and order.

> "These judges and lawyers were the new colonial masters. For them the role of the court was a carry-over of the British court. More of a court that stressed law and order and stability, like a colonial judge. The judge of the superior courts thought the executive and state were synonyms. The principle of the separation of powers was not present in the mindset of the judge. Even after the enactment of the constitution, the courts represented the interests of the military class."[56]

The revolving door between the judiciary and the executive during this period demonstrated the lack of any meaningful separation between the two branches of government. Justice Amiruddin Ahmed served as governor of East Pakistan while a High Court judge. Justice S.A. Rehman held a

[56] Interview No. L-42.

string of important administrative and judicial appointments both before and after Partition (Dawn 1976). Justice Munir served briefly as Ayub Khan's Law Minister after the promulgation of martial law (Munir 1978). Perhaps Justice Manzoor Qadir epitomized the nexus between the military and judicial elite and this revolving door. Educated in Britain, with a knighted father, Manzur Qadir went on to serve as Ayub Khan's Foreign Minister from 1958 to 1962, after which he was directly appointed by Ayub Khan to the West Pakistan High Court and served as the Chief Justice of the West Pakistan High Court under the 1962 Constitution, that he himself had helped to design (Dawn 1974). Given that he served in executive, judicial and legislative functions under Ayub Khan, he could hardly be expected to be impartial in matters pertaining to the regime.

Thus, the military and military allies, thanks to close utilitarian and normative interlinkages with the judiciary, were critical audiences in shaping the internal norms and preferences of the judiciary. Judges were recruited by the military and its allies and were recruited from social and professional networks affiliated with and supportive of the military regime and its priorities. For this reason, this was the era of the loyal court, as the judiciary developed norms and preferences that were supportive of the military.

There were certainly some dissident judges, such as Justice M.R. Kayani, who were more critical of the regime, and judges did not entirely approve of the repressive nature of the regime, and the limitations on their jurisdiction and formal legal authority between 1958 and 1962. And judges were certainly weary of the power of the military in the political system and the risks associated with challenging the military. But by in large, the internal consensus was that the judiciary would collaborate with the military regime, and consolidate its executive authority, while carving out a place for the judiciary within the political order as a venue for upholding procedural rights. It was this consensus that primarily explained the judiciary's decision-making that did not just acquiesce to military dominance but served to legitimize and sustain it.

In 1968, when Ayub Khan celebrated his "decade of development and progress in law" amidst widespread protests about rampant inequality and the repressive nature of his regime, the elites in attendance were bureaucrats and judges who spoke highly of his regime.[57] These judges thus were part of the alliance of interests collaborating to uphold the regime. "These judges did not have to be pressured to support the military…they were independent-minded but colonial judges."[58]

Section II: Pakistan's Democratic Interlude 1973-1977

From Military to Civilian Rule

After 1965, an opposition movement started developing against Ayub Khan, and by 1968 these opposition parties had taken to the streets as frustrations grew. Clashes between activists and police, student unrest, labour unrest and political party mobilization rose and ultimately Ayub was unable to suppress the movement against him and he opted to step down (Shah 2014b). The movement against Ayub Khan was primarily led by two major political parties, the Awami League that represented the interests of the especially disgruntled population of East Pakistan, and the newly formed Pakistan People's Party or PPP, a left-wing populist party recently formed in West Pakistan. Young junior lawyers got involved in the opposition movement, although they did not take leadership roles. "The Bar did not involve itself initially in the protests against Ayub Khan. We did not take to the streets as an institution, but groups of young lawyers did engage in the protests."[59] The pro-democracy movement against Ayub Khan was a first taste of political activism for many young lawyers in Pakistan at the time.

[57] Bar Associations took exception to the participation of the Honourable Judges in the celebrations as mass opposition grew against the regime at the time (Sidhwa 1989).
[58] Interview No. L-94, March 18th, 2017.
[59] Interview No. L-9.

Ayub Khan was replaced by Yahya Khan, another general, who instituted an even more repressive martial law in order to bring stability to the state, but his regime had a time-limit since he announced plans for a new election. Between 1969 and 1971, Yahya Khan abrogated the 1962 Constitution and ruled under a repressive Legal Framework Order but received little opposition from the judiciary or from the bar (Dawn 1969b; Patel 2000). The elections, the first free and fair elections in Pakistan's history, proved to be explosive, as the Awami League, demanding autonomy for the Bengali province of East Pakistan swept all elections across the province, winning the largest number of seats overall, while the PPP swept most of the seats in West Pakistan. The military government was unwilling to accept a Bengali nationalist party taking power at the center, and violent confrontations broke out between the center and the Bengali province, which escalated into civil war in East Pakistan, as the disgruntled Bengali population demanded independence. The tragic war in East Pakistan was especially brutal and ended with the secession of East Pakistan (now Bangladesh), and the surrender and humiliation of the Pakistan army, which not only lost the war, but lost many soldiers who were taken as prisoners-of-war. By the end of the war, Yahya Khan stepped down, and Zulfiqar Ali Bhutto, the leader of the PPP, became the President and civilian martial law administrator, before the promulgation of the 1973 Constitution, a new constitution for a state undergoing reconstruction and reorganization. Bhutto took over as Prime Minister, as the first elected civilian leader of Pakistan. After the war, there was widespread disillusionment with the era of military rule that had produced such a disastrous outcome (Shah).

In 1973, the elected national and provincial assemblies passed a new constitution that has remained Pakistan's operational constitution since then, although it went through a series of suspensions and amendments. Under the 1973 Constitution, Pakistan was made a parliamentary republic, and the status of the President was diminished to largely a figure head role, while the elected Prime Minister became the primary executive post. The Constitution articulated a list of

protected fundamental rights and Article 8 of the constitution also declared void all laws contrary to fundamental rights.

The military during this period went through an important transition. The military's resounding defeat during the war and Bhutto's overwhelming electoral victory gave the PPP an opportunity to finally establish civilian control over the armed forces and reduce its political clout. The military continued to protect its institutional autonomy and the chief of army Staff displayed "thinly veiled contempt for Bhutto and his ministers," and often resisted Bhutto's orders (Shah, 121). After Bhutto learned of a potential coup conspiracy within the military, Bhutto publicly sacked and denounced the officers involved, and then purged the military of thirty senior officers. Under the new Constitution the military ostensibly fell under the Ministry of Defense, in an attempt to build civilian control over the military (Shah). Bhutto also created a special civilian arms organization, the Federal Security Force, that gained notoriety for pursuing his political opponents, and ran parallel to the military. The purges, public denouncing, civilian oversight and parallel institutions all created resentment within the military towards the PPP government. At the same time, as Bhutto pursued his political opponents, he came to increasingly rely on the military, particularly as an insurgency grew in the province of Balochistan after Bhutto dissolved the opposition-led provincial government there. Far from cutting the military's powers and bringing it under civilian oversight, the government allowed the military to recover its autonomy and involvement in internal affairs and politics.

The Judiciary under the 1973 Constitution

Prior to the promulgation of the Constitution in 1973, the Supreme Court made two critical decisions. The first major decision was *Asma Jilani* (1972), after Bhutto took power, where the Supreme Court had to revisit the revolutionary legality doctrine used to bestow validity on Ayub

Khan's coup and decide whether it applied to Yahya Khan's assumption of power in 1968 and his legal framework. The Court returned with a decisive verdict against Yahya Khan, determining that he had usurped power, that his action was not justified by the revolutionary legality doctrine and therefore his regime had been illegal.[60] The judges shared the popular disillusionment with military rule at the time, as Justice Yaqub Ali stated "the history of the constitutional mishaps which befell Pakistan between 1953 and 1969 bringing ruination...forms the overcast background against which the court is required to answer the questions." Yaqub Ali went further to state that the secession of East Pakistan was directly attributable to the assumption of martial law by the military, and Chief Justice Hamood-ur-Rehman declared that the doctrines of necessity and revolutionary legality could not be used to justify Yahya Khan's usurpation of power. *The Asma Jilani* decision gave the court an opportunity to reflect on its past collaboration with the military and claim its separation from a humiliated military at a time when government by political party was in ascendance. However, the Court refused to bury the doctrine of necessity.[61]

Further, its support for executive discretion persisted. In the landmark *Zia-ur-Rahman* (1972) decision, the Court had to decide the validity of the arrest and trial of journalists and political workers who had demonstrated against Yahya Khan's martial law, before a specialized court, out of the high court's jurisdiction.[62] The Court ruled that since the order had been passed under the provisional constitution of the time, it remained valid, as the same provisional constitution had also provided for free and fair elections and further he said, this arrest and trial order "could be condoned on the basis of necessity." Thus, even while declaring Yahya Khan's takeover illegal, the Court upheld his provisional constitution and his actions on the grounds of necessity. Hamood-ur-Rehman stated it

[60] *Miss Asma Jilani v The Government of the Punjab and another and Mrs. Zarina Gauhar v the Province of Sind and two others*, PLD 1972 SC 139.
[61] Even as the Court determined that Yahya Khan's usurpation of power did not meet the standards of 'necessity', they did not reject 'necessity' as a potential justification for interventions.
[62] *The State v Zia-ur-Rahman and others*, PLD 1973 SC 49.

was not the jurisdiction of the judiciary to examine the politics of the legislation passing the law under question that created the specialized courts, because that was a question outside the ambit of the judiciary and would take the judiciary into the arena of politics and policy. He argued that the role of the judiciary is simply accountability, to examine whether the executive is abiding by governing laws, but not questioning the laws themselves. Thus, the judiciary continued to act cautiously in dealing with executive power, invalidating the regime of Yahya Khan once Yahya Khan's regime was already disgraced and out of power, but still maintaining a space for the 'doctrine of necessity,' and limiting the scope of its own power to deal only with executive actions that transgressed the executive's self-determined authority.

The 1973 Constitution provided the judiciary with its first experience of democratic constitutionalism. The new constitution recognized the autonomy of the judiciary and authorized the separation of the executive from the judiciary. This meant that now federal civil servants could not be made judges, a key demand of the lawyers' community for some time now, who saw it as essential to ensuring the judiciary was independent from the executive.[63] From now on, judges either came from the lawyer's bar or from the subordinate judiciary. The subordinate judiciary was also meant to be separated from the executive and brought under the exclusive control of the judiciary, as part of the process of separating the two institutions, but this process was continually delayed and remained incomplete until the 1990s (Dawn 1976b). Nevertheless, the norm now became that about 2/3rds of judicial appointees to the High Court came from the bar, and 1/3rd from the subordinate judicial bureaucracy, and the proportion of civil servants remaining in the high courts was set to decline (Leader 1995).[64] The appointment process still remained largely in the hands of the executive

[63] The Executive Committee of the High Court Bar Association called upon the government to drop the proposal for an increase of the CSPs share in the posts of the High Court judges. It asked the government to lay down for the future that posts of the High Court judges shall be filled from among the deserving members of the bar committee. The committee went onto to say bring to the office that independence of spirit and mind and the respect for the law which is a prerequisite for dispensation of judge between individual, and the State and the citizens (Dawn 1969a)."

[64] Interview No. J-19.

branch, and the executive institutions continued to use discretion to appoint judges from the bar who could be expected to defer to or uphold executive interests, but the pool from which judges were being recruited was changing, and this changing professional network of the judges would have important effects that will be discussed in more detail in the next chapter.

The judiciary's jurisdiction also expanded. Alongside the writ jurisdiction of the courts, under Article 199 the high courts were now also given the jurisdiction to enforce the observance of fundamental rights by the government. Finally, the Supreme Court's original jurisdiction was expanded, as, under the Article 184(3), the Court had the power to make orders on questions that the Court deemed of public importance with reference to enforcement of fundamental rights. The Constitution substantially expanded the role of the superior judiciary in the enforcement of fundamental rights. The era of democratic rule in the 1970s placed the judiciary in a position to arbitrate the contradiction between the promise of constitutional democratic rule and the quasi-authoritarian limitations on constitution rights perpetuated by Bhutto's PPP government to pursue its ambitions through a strong, unchecked executive branch.

However, Bhutto did little to ingratiate himself with the judiciary and the legal community. Just as the Constitution provided the judiciary with an expanded new role in the political system, the PPP government quickly sought to amend the new constitutional and legal framework to weaken the judiciary and limit its constitutionally mandated role (Dawn 1976a). The government maintained a state of emergency, under which the government continued to curtail fundamental rights, including widening the scope of preventive detention. Under the 4th Amendment the government restricted the power of the courts to grant interim relief to detainees. The 5th Amendment declared all laws passed pursuant to the emergency proclamation to be validly made and thus not subject to judicial scrutiny. The government also created special tribunals with exclusive jurisdiction over offenses punishable under the Defence of Pakistan Rules. Thus, Bhutto's government raised the expectations of the

judiciary and legal community, by separating the judiciary, guaranteeing fundamental rights, and expanding the role of the judiciary, and then disappointed these raised expectations by expanding the powers of the executive branch, and undermining the newly granted rights and judicial review, in order to deal with its political opponents.

Beyond restricting the newly granted judicial powers, Bhutto also took a high-handed approach with the judiciary and legal community, more generally. Typically judges to the high courts were appointed initially for a probationary period as ad-hoc judges before their tenure was confirmed as permanent judges. Bhutto picked his favourites among judges for promotion and tried to abuse the ad-hoc system appointing high courts judges on an ad-hoc basis place and refusing to confirm their tenure so they remained deferential as their tenure remained unconfirmed and dependent upon his discretion (Khan 1994). This irked the judiciary and the legal community that had come to expect differently from a democratic constitutional government (Dawn 1974b). The bar associations were also frustrated by the perpetuation of the state of emergency given its impact on their work as litigators in fundamental right cases (Dawn 1974b). But Bhutto treated their concerns with derision. In a speech to the bar associations Bhutto bluntly accused them of undermining the security interests of the country, stating:

> "Are you then suggesting that, contrary to my deepest and most sincere conviction, I play straight into the hands of the enemies of the State by withdrawing this effective deterrent which the Constitution has provided my Government with? Do you think it preferable to endanger the country rather than extend the state of emergency (Dawn 1974b)?"

Bhutto made few allies within the community of judges and senior lawyers, as he tolerated little dissent, expecting all branches of government "to be committed to the goals of the government (Khan 1994)."

Judicial-Military Interactions During Democratic Rule

Bhutto's government started by curbing the role of the military before expanding it, and similarly, by expanding the role of the judiciary before curbing it. Both strategies ensured that Bhutto did not enjoy good relations with either institution. During Bhutto's regime between 1973 and 1977, the high courts were still populated by judges appointed during the period of judicial-military collaboration in the 1950s and 1960s, thus the judiciary still retained the institutional norms and preferences that had developed during that period. However, over the course of the 1970s, the number of bureaucrats in the judiciary steadily declined as civil service judges retired and no new judges replaced them, and the judiciary had been granted jurisdiction over fundamental rights. Thus, the judiciary was starting to separate itself from the executive, and executive institutions including the military, but this separation was very gradual, and the norms of loyalty to the military still remained entrenched in the upper echelons of the judiciary. This provides the necessary context in which to understand the judiciary's military-related jurisprudence.

Between 1973 and July 1977, there were only 31 reported judgments from the High Courts that dealt with military prerogatives, as the high courts accepted few military-related cases during this period. The table below shows that in the first two years after the introduction of the new constitution the judiciary challenged the military's prerogatives in a greater proportion of cases but in the last two years of the regime, this proportion decreased. We also see that during this period, the judiciary decided almost no salient cases in the first two years, but in the second period, as the number of salient military-related cases increased, the proportion of decisions against the military decreased,

indicating the judiciary was less likely to contest the military in more salient decisions.[65] Initially, as the judiciary was exercising its new powers, it was more willing to check the actions of executive institutions including the military, but after those initial two years, as the government restricted the powers and jurisdiction of the judiciary, the courts were less willing to challenge the military.

Table 3.2: Summary of decisions in military prerogative cases, 1973-1977

	1973-1975	1976-1977
Decisions Against the Military	6	8
Salient Decisions Against the Military	1	4
Total No. of Decisions	11	20

This data only tells us about the downward trajectory in judicial decisions against the military but does not provide us with a complete picture of the judiciary's approach towards the military during the democratic interlude. I discuss three military-related decisions that help shed light on the judiciary's approach during this period. I select these cases because they directly concern questions about the judiciary's relationship with and jurisdiction over the actions of the military. These decisions show that even as the judiciary started separating itself from the executive, and asserting its own role in the political system, it still continued to uphold the interests and prerogatives of the military, as the norms developed during the period of judicial-military collaboration largely remained in place

The first and most influential decision in defining the separate spheres of civil and military jurisprudence under the new constitutional framework was the foundational judgement, *F.B. Ali v The State* (1975).[66] Under Article 199(3), the jurisdiction of the courts was ousted for a member of

[65] By salient decisions, I mean decisions that involved questions of significant political and legal importance. The chief justice of the court would appoint a bench of three or more judges for any case that was deemed to deal with a question of sufficient political and legal importance. Thus, the dataset of salient decisions includes all cases where the deciding bench included 3 or more judges (Chandrachud 2014).

[66] *F.B. Ali v The State*, PLD 1975 SC 506.

the Armed Forces "in respect of his terms and conditions of service, in respect of any matter arising out of his service, or in respect of any action taken in relation to him as a member of the Armed Forces."[67] Instead, for such offenses, members of the armed forces were subject to the court martial proceedings of the military itself as instituted under the Army Act. In this case, retired military officers were accused of fomenting a conspiracy against the state, by seeking to seduce current members of the armed forces from their allegiance to the military. They were tried by the military court martial, and they filed a writ petition in the High Court challenging court martial proceedings against them, given that they were retired, and hence, civilians. In this decision, the Court had to decide whether civilians who have retired or been dismissed from the army could be held liable for crimes under the Army Act, thus ousting the jurisdiction of the civilian courts over them.[68]

The Court ruled in favour of the military arguing that "it does not matter if those who have been accused have no nexus with the army as long as their activity sought interference with the army or the discipline of the army." Where this was the case, the military had the discretion to decide which forum the accused would be tried in, civilian courts or military court martial proceedings. Further these decisions could not be appealed to the civilian courts on procedural grounds. The Court was clear to reiterate the nature and extent of the jurisdiction of the civilian courts, including its responsibility to examine the constitutionality of laws, such as the Army Act. But once it decided that the Army Act was a competent and constitutional law, it interpreted that the Act extended not just to military offenses, but to certain types of civilian offences. Thus, the judiciary set an important precedent in allowing the extension of military court martials to civilians, and ousting its own jurisdiction, highlighting the continued deference of the judiciary to the military, particularly in matters relating to questions of military justice and security threats.

[67]Jurisdiction of the High Courts, Article 199, Constitution of 1973.
[68] The Army Act is the governing legislation for the army's organization and procedures, including the rules governing court martial procedures.

In another salient decision, *Sh. Karamat Ali v State* (1975), the Court upheld the decisions made by military courts during the martial law era.[69] During the martial law era, military courts dealt with a wide range of civilian criminal offenses.[70] The Court had to decide in this case, whether a case that had been decided by military courts during the martial law, but for which sentencing and confirmation had not been carried out, could now be challenged in civilian courts. The Court determined that unless it was clear that the military courts had acted out of jurisdiction or their intentions were *malafide*, the decision could not be challenged. Thus, even though the judiciary had ruled against the invocation of martial law by Yahya Khan, the courts were unwilling to revisit decisions and actions taken by the military courts and martial law administration during this period.

In 1977 Bhutto decided to call an early election to reaffirm his political standing and mandate. In response, nine political parties opposing Bhutto gathered together to form the Pakistan National Alliance (PNA). The PNA generated an unexpected level of support among those disgruntled with Bhutto's policies. When the elections happened, the PPP won the elections comfortably, but the PPP had been threatened by the PNA, and allegations grew that Bhutto had rigged the elections to ensure a PPP victory. In response, the PNA launched a nationwide agitation movement, demanding that the PPP government step down and a new election be held. Bhutto's PPP responded to the PNA's campaign with heavy-handed repression.

By this time, the politics of the period had affected the bar associations, where these political debates were playing out as well (Dawn 1977a). Leaders of several high court bar associations, which belonged to the more conservative urban middle class that was opposed to Bhutto's populist alliance of rural landholders and the working class, openly allied with the PNA joining their protests (Dawn

[69] *Sh. Karamat Ali v The State*, PLD 1976 SC 476.

[70] These are different from the military court martials. Military court martials are courts composed of military officials that deal with internal military affairs. Military courts during martial law are courts composed of military officials that deal with civilian criminal cases outside the military.

1977b). When Bhutto responded with arrests and detentions of these bar leaders, the Lahore High Court Bar Association hardened its stance against Bhutto (Dawn 1977c). By May 1977 Bhutto took the dangerous step of declaring localized martial law in the areas that had seen the greatest disturbances, namely the big cities of Lahore, Karachi and Hyderabad. Bhutto called in the military into these cities to enforce the law and curb the agitation movement. In doing so, be suspended all fundamental rights and authorized the establishment of specialized military courts ousting the jurisdiction of the civilian judiciary in these areas. Thus, by May 1977, Bhutto had brought the military back to the center of the political arena, turning to it to help bring the PNA movement under control, and regularly bringing the military's Corps Commanders into meetings to plan and organize tackling the PNA agitation (Rizvi 2000).

The introduction of localized martial law and the suspension of the jurisdiction of the civilian courts raised important issues for the High Courts. In two separate cases, the Lahore High Court and the Sindh High Court had to decide if the new localized martial law and the ouster of high court jurisdiction in favour of military courts was constitutional.

In *Niaz Ahmed Khan* (1977) the Sindh High Court (SHC) had to decide whether the declaration of martial law and the actions taken in the context of the establishment of martial law were legal.[71] The SHC tried to strike a difficult compromise in its decision. The court upheld the declaration of martial law as consistent with the emergency powers of the government, arguing that this declaration of martial law was meant to aid civil power not replace it. But the court also held that the courts did not lose their jurisdiction, stating if the military remained within its designated authority to act in aid of civil power, the courts had no jurisdiction to hold it accountable for its actions, but if it transgressed these boundaries, then the judiciary had the jurisdiction to challenge its actions. Under this ruling, the court's role was to determine when the military's actions exceeded the

[71] *Niaz Ahmed Khan v The Province of Sind and others*, PLD 1977 Karachi 604.

powers granted by the government's authority and hold it accountable for that. Thus, the Sindh High Court deferred to executive authority and upheld the expansion of military control, while still attempting to maintain its role and relevance,

In *Darwesh M. Arbey* (1977), the Lahore High Court went further than the Sindh High Court in challenging the government and the military.[72] The decision was made a month before the end of Bhutto's government, and the written judgment was issued after another military coup ousted Bhutto in July 1977. The court did not validate the supremacy the military was being given over civil power, and stated "such sweeping arrangements, bringing the entire civil population of the province, within the ambit of the Pakistan Army Act…is totally against objects and reasons for which the Army Act is enacted." The Court both held the declaration of martial law to be invalid, and rejected the ouster of its jurisdiction, stating that the government could not divest the judiciary of all the judicial powers. The court stated "the present Constitution neither envisaged the imposition of martial law nor the exercise by the Armed Forces of any judicial function assumed by them at present." *Darwesh Arbey* could be seen as a court assertively defending constitutional democracy and opposing martial law, but the court also stated, "if the Constitution is abrogated, set aside or placed in state of suspension, animation or hibernation, it might be possible to impose Martial Law outside the constitution. Such an action may or may not be justified by the doctrine of necessity." The words of the court were consequential and ominous. The Lahore High Court had stated that martial law was not possible during a period of civilian rule under a constitution, but it left an opening for an extra-constitutional intervention outside the Constitution, justified by the doctrine of necessity. The court had therefore, in the same judgement both invalidated the possibility of martial law under a civilian government and left open the possibility of martial law under an extra-constitutional military government.

The detailed written judgement was issued a month after the court had made its decision, by

[72] *Darwesh M. Arbey, Advocate v Federation of Pakistan through the Law Secretary and 2 Others*, PLD 1980 Lahore 206.

which time a military coup had taken place, and General Zia-ul-Haq ousted Pakistan's first elected civilian government.

Thus, we see the beginning of a slow transition in the judiciary's role in the 1970s. The new constitutional arrangement had given the judiciary new autonomy from executive institutions and an expanded role it had not previously enjoyed, and when the elected executive branch sought to restrict that role the courts opposed those efforts. However, at the same time, the decisions discussed above show that the judiciary continued to uphold executive discretion, safeguard the 'doctrine of necessity', preserve the autonomy of the military, and uphold its prerogatives. This was a judiciary gradually developing an identity separate from the executive institutions, but a majority of judges were still appointed during the heyday of judicial-military collaboration, and thus were still willing to uphold military autonomy, discretion and powers of intervention.

Conclusion

In sum, the reason that the Pakistani high courts upheld military dominance within the Pakistani political system in the 1950s and 1960s was that the military and affiliated elites were critical audiences influencing the internal workings of the judiciary, both through engagement with the process of judicial appointment and promotion processes, and ties with the networks from which judges were being recruited. The judges who advanced their careers and built a reputation with their networks therefore were those who supported military rule and cooperated in upholding it. Thus, the norms and preferences that were entrenched during this period in the judiciary, helped ensure the judiciary collaborated with the military. This was not a judiciary hamstrung by limited authority or the reality of military dominance, but a judiciary that used its powers to legitimize and strengthen military rule. In the 1970s, during Pakistan's first period of civilian rule, we see how the new

constitution disrupted this arrangement, and began the separation of the judiciary from military. This started having an initial but limited effect on the jurisprudence of the courts during this period, but growing antipathy between the judiciary and the civilian government, and continuing ties between the judiciary and military ensured the judiciary was more willing to use its authority to challenge the civilian executive than the military.

Chapter 4

A JUDICIARY IN TRANSITION 1977-1999

Introduction

In this chapter I describe and explain changes in the Pakistani judiciary's behavior towards the military between 1977 and 1999. The chapter is divided into two sections. The first section discusses the trajectory of judicial-military relations during this period. It is divided into two phases: i) 1977 to 1988, Pakistan's longest uninterrupted period of direct military rule, and ii) 1988-1999, the period of constitutional democratic rule. In each period, I discuss the prevailing political situation, the position and interests of the military and the judiciary's relationship with the military as demonstrated through its jurisprudence. Through this period, I show that the judiciary gradually shifted towards staking out a more independent position from the military, preserving and cautiously expanding its own role and jurisdiction.

In the second section of this chapter, I seek to explain the trajectory outlined in the first section. I first show that regime-related factors, namely the prevailing political configuration and the authority and influence of the military, all did play a role in shaping the judiciary's jurisprudence, but they cannot alone explain the incremental shift that was evident in the approach of the judiciary over the course of this period, and the transformation of the role the judiciary sought to play in the political system. I then argue that the incremental shift in the judiciary towards increased independence from the military and expansion and protection of its own jurisdiction was linked to a

change in the audiences that shaped judicial norms and preferences during this period. The military's institutional interlinkages with the judiciary diminished, and the judiciary's interlinkages with the politically active bar of professional lawyers grew, which reshaped the norms and preferences of the judiciary. It is important to point out that this shift took place gradually over the course of this period, and thus there was an institutional lag before the effects of this shift would be fully realized, which will become apparent in the subsequent chapter. However, without understanding these shifts it would be difficult to explain the changing approach of the judiciary towards the military over the course of this thirty-year period. I use a combination of sociological data on judges, archival information on judicial appointments and bar association politics, and interviews with judges and lawyers to trace this gradual but impactful shift.

SECTION 1: From Collaboration to Control to Cautious Autonomy – A Judiciary in Transition

1977 to 1988: A Decade of Military Rule

Pakistan's brief Interlude of constitutional civilian government came to a dramatic end in July 1977. The Chief of Army Staff, General Zia-ul-Haq stepped in, ousting Bhutto's government and declaring martial law. Federal and provincial governments were dismissed with national and provincial assemblies were dissolved. The constitution and fundamental rights were suspended under the new Laws (Continuance in Order) Order of 1977, the primary governing instrument of the new regime. The country was divided into five martial law zones, each with a Martial Law Administrator (MLA), directly responsible to the Chief Martial Law Administrator (CMLA) Zia-ul-Haq. Under this new political arrangement, the military was indisputably in control (Shah 2014b).

Initially, Zia described the coup as a temporary intervention to restore stability to the political system. Zia said he only wanted to restore law and order and hold free and fair elections and then transfer power to the elected representatives, ideally within 90 days. He banned political activity but pledged this was only a temporary action while the regime brought stability and created conditions conducive to free and fair elections (Rizvi 2000). But it soon became apparent that the new military government was more interested in consolidating power than handing it over.

In October 1977, Bhutto was re-arrested after being released on bail, and he was tried for murder, and executed in 1977. Zia also carried out a countrywide crackdown against the PPP. Martial Law Order (MLO) 12 empowered law enforcement personnel to arrest persons who were working

against security, law and order or the smooth running of martial law (Aziz 2014a). Under this order, the MLAs were granted wide discretion to arrest and detain civilians, and PPP officeholders, members and activists were arrested around the country. The regime used the pretext of the need for stability and accountability to repeatedly postpone elections, while issuing a host of Martial Law Orders that gave the regime widespread powers to control and repress political opposition, journalists and civil society around the country (Aziz 2014a).[73]

Zia's regime exceeded both the Ayub and Yahya regimes in the extent to which the military infiltrated the civil administration and the economy. Under Zia the military's intelligence apparatus greatly expanded, as the Inter-Services Intelligence's (ISI) S-directorate became deeply involved with the war against the Soviets in Afghanistan abroad, and its political cell disrupted and weakened the regime's political rivals at home. Zia appointed an unprecedented number of senior officers as ambassadors, secretaries and heads of autonomous public corporations (Shah 2014b). In 1980, the military reserved a statutory quota of 10% in the three important civil services for itself, thus replacing the military-bureaucratic collaboration of the Ayub era with the militarization of the bureaucracy (Shah). Outside state institutions, the military's interventions into the economy assumed an unprecedented scope and scale. General Zia expanded and institutionalized Ayub Khan's practice of allotting agricultural and urban residential and commercial land to military officers, and the military's subsidiaries became monopolies (Siddiqa 2007).[74]. Military welfare foundations such as the Fauji Foundation and the Army Welfare Trust, expanded into industrial conglomerates, investing in real-estate, fertilizers, sugar mills, oil and gas and cement (Siddiqa 2007). Thus, within the first few years of Zia's regime a new more expansive and repressive military-led political order was

[73] The regime was bolstered by the onset of the Russo-Afghan War, as it became a critical ally of the Reagan government in dealing with Russia's into Afghanistan, receiving American money and weapons to coordinate anti-Soviet resistance in Afghanistan by an assembly of Islamic militant groups known collectively as the Mujahideen.

[74] One example was the National Logistics Cell, specializing in cargo transportation, which, with government support, became the primary business in cross-national cargo transportation (Siddiqa 2007).

established in Pakistan. The promise of elections was never realized, and the military pursued its political opponents, and consolidated its grip on the state and role in the economy.

By early 1981, Zia's regime abandoned all pretense of transience. In February 1981, Zia banned political parties including the PPP and the parties in the now disbanded PNA united under the banner of the Movement for the Restoration of Democracy (MRD), which called for the withdrawal of martial law and the holding of free and fair elections. In March 1981, the Supreme Court had accepted an appeal against Article 212-A and was conducting hearings challenging the legislative powers of the regime. At the same time, a Pakistani International Airlines flight was hijacked and taken to Kabul, allegedly by a terrorist group, Al-Zulfiqar, composed of former members of the PPP. Zia used the hijacking as an opportunity to claim that drastic measures were required to "maintain the integrity and sovereignty of Pakistan (Newberg 1995, 180)." Accordingly, Zia introduced a new Provisional Constitutional Order (PCO), that was offered as a substitute constitution. It placed virtually all power in the hands of the military government, placed no limits on military rule, and gave the President retrospective power to amend the 1973 constitution. Citizens were now subject to an ever-expanding list of martial law regulations and orders, resulting in the detention of thousands of civilians (Rizvi 2000). Political leaders could not travel between cities, and even indoor meetings were cause for arrest. Many political leaders, and civil society members left the country for fear of arrest (Rizvi). Harsh punishments including flogging and public hangings were meted out by military courts (Star 1985a; Star 1985b).

By 1985, Zia's regime began Pakistan's transition back to a civilianized system. Zia had already ensured his presidency was secured through a referendum that gave him a mandate to remain president for five more years. After securing his presidency, he then organized parliamentary elections for February 1985. The elections were carefully managed by the military. They were held on a non-party basis, and members of the political parties of the MRD alliance, including the PPP,

were detained around the country, and newspapers supporting the MRD were censored (Rizvi 2000).[75]

Zia's next step was to push through several constitutional amendments, which collectively came to be known as the 8th Amendment to the 1973 Constitution. The 8th Amendment made three significant changes to the constitutional order. First, under the new system executive power was decisively shifted from the directly elected parliament to the presidency. The president was given a range of discretionary powers with respect to the federal and provincial governments, including, the power to dissolve the elected assembles under Article 58(2)(b). Second, Articles 62 and 63 of the Constitution gave the judiciary the power to disqualify elected representatives and electoral candidates from political office for not meeting a vague moral standard of morality and sagacity. Third, Article 270-A validated all martial law regulations, laws and orders and all actions taken under these martial law orders, including the decisions of military courts between 1977 and 1985. Once Zia had ensured he wielded the most authority in the new system, the elected legislatures were weakened by unelected presidential and judicial checks, and all prior actions of the military regime were given legal cover, Zia was ready to restore the 1973 Constitution, and in 1986, a new civilian government took power under the 1973 constitution, with Zia as president. The ruling coalition formed a party under the leadership of the Prime Minister Mohammad Ali Khan Junejo, called the Pakistan Muslim League.

The Role of the Judiciary under Zia

During General Zia's regime, the shift of the judiciary from the military gradually became

[75] In the absence of political parties, most of the candidates were powerful local figures in constituencies with the prior wealth and name recognition to win an election (Mohmand 2014).

apparent. Initially, when Zia came to power, the judges of the Supreme Court were primarily appointed to the judiciary during the 1950s and 1960s, when the institutional interlinkages between the military and judiciary were strongest and the norms of loyalty to and collaboration with the military were still entrenched in the judiciary

When Zia seized power, he took several moves to ensure the judiciary's support, which were timed with his arrest of Bhutto on murder charges. He ended the state of emergency that had been kept in place by Bhutto since he came to power.[76] He also nullified all Bhutto's amendments to the Constitution "to the extent that they affected the integrity and independence of the judiciary," thus removing a significant source of tension between the government and the bar and bench during Bhutto's rule (Dawn 1977d). Nullifying Bhutto's interventions in the judiciary not only served to alleviate any concerns of the judiciary and the legal community about the new dictatorship but also ensured that judges who had been held back by Bhutto received their expected promotions.[77] Zia nullified the controversial extension Bhutto had given to the Chief Justice Yaqoob Ali, which served both to remove a judge who had ruled against the previous military takeover (See *Asma Jilani* (1972)), and promote judges whose elevation had been denied by Bhutto, and thus who harbored resentment towards the ousted Prime Minister. Zia also appointed the Chief Justices of the High Courts of each province as the governors for their respective provinces, underlining the close collaborative relationship Zia sought to initially build with the judiciary during this period. Finally, to consolidate the support of the judiciary, high court judges were asked to take a new oath, a measure by which each judge signaled recognition of the new regime (Dawn 1977d). Thus, in the early months of his regime, Zia established a collaborative relationship with the judiciary.

This collaborative approach soon yielded dividends for the military regime. When Bhutto and

[76] Lifting this state of emergency meant little, given that the constitution and fundamental rights had been suspended.
[77] After Zia lifted the amendments, the President of the Lahore High Court Bar Association which had opposed Bhutto, "expressed full support to the measures taken by the government to restore the dignity and jurisdiction of the superior court (Morning News 1977).

ten other party leaders were re-imprisoned in September 1977, and threatened with trial before military tribunals, Bhutto's wife Nusrat Bhutto filed a petition in the Supreme Court challenging the validity and legality of the martial law regime. In *Begum Nusrat Bhutto* v *Chief of Army Staff and Federation of Pakistan* (1977), the Court under Chief Justice Anwar-ul-Haq ruled in favour of the new regime, validating military rule.[78] The Court held that "the legal consequences of an abrupt political change should be judged, not by an abstract theory of law…but by a total consideration of the milieu in which the change is brought about." In considering the "milieu" in which Zia had seized power, the Court went through a list of failures of the Bhutto government, and determined that Bhutto's electoral rigging had a created a crisis that could not be resolved from within the Constitutional framework, which made it *necessary* for the military to intervene. The Court took Zia's claim in its written statement at face value, that he merely intended to stay in power for a short duration "to provide a bridge to enable the country to return to the path of constitutional rule (Newberg 1995, 164)." Thus, the Court resurrected the Doctrine of Necessity, validated the Zia regime's takeover as necessary to resolve the crisis that Bhutto had created, and empowered the regime to take whatever action were "necessary" to achieve the aim of returning the country to constitutional democratic rule.

The judgment outlined the relationship that the judiciary envisioned for the military and the judiciary under the new regime. The Court was prepared to give the military wide discretion to carry out its aims, but it was not prepared to lose all the gains it had made under the 1973 Constitution. It granted the CMLA powers to "perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the realm of necessity." The regime now had wide latitude to take executive and legislative actions, including even amending the constitution, as long as it could be demonstrated as being "necessary" to accomplish the aims of

[78] *Begum Nusrat Bhutto v The Chief of Army Staff and Federation of Pakistan*, PLD 1977 Supreme Court 657.

the regime.[79] However, the Court also ruled that the judiciary had to set the standard for what actions fell within the realm of 'necessity'. Further, the Court ruled that the 1973 Constitution was still the supreme law of the land, barring the parts of the constitution that the regime had suspended for the sake of necessity, which meant the judiciary maintained its powers of judicial review of the actions of the regime. Thus, the Court outlined a collaborative relationship, in which the military regime was provided wide discretion to take whatever actions were necessary to achieve its aims, and the judiciary had the power to determine the standard of necessity that these actions had to meet.

Perhaps the most important contribution the judiciary made to the new regime was in assisting the regime in eliminating the threat from Bhutto. The trial, conviction and execution of Bhutto for the murder of Mohammed Ahmed Khan Kasuri would go down as one of the darkest moments in the history of Pakistan's judiciary (Khan 2016). The trial of Bhutto was carried out in the Lahore High Court, where the Chief Justice was Maulvi Mushtaq, a judge who had been denied his expected promotion by Bhutto but elevated to the position of Chief Justice by Zia, and was known for his acrimonious relationship with the ousted Prime Minister (Iqbal 2006).[80]. The Lahore High Court ruled against Bhutto on all charges, including murder, and the case then was then appealed to the Supreme Court. The Court upheld the Lahore High Court verdict, as Chief Justice Anwar-ul-Haq held that "any omissions, errors, irregularities or even illegalities (during the proceedings)...were of such a nature as to not vitiate the trial (Schofield 1979)."[81] During the proceedings several judges who may have overturned the Lahore High Court decision were either retired or transferred from the bench, and new judges were promoted to the Supreme Court and to the bench on an adhoc probationary basis (Khan 2016). The military also applied pressure to ensure a favourable verdict, as

[79] Judges who decided this case, later came to regret granting the CMLA blanket powers to legislate and amend the constitution (Anwar ul-Haq 1993 ; Patel 2000)

[80] Bhutto's defence team repeatedly appealed to the Supreme Court that Mushtaq's bias against him was apparent during the proceedings, including shouting and hurling abuses at the Prime Minister, but their appeals to change the bench were dismissed (Dawn 1977e).

[81] Zulfiqar Ali Bhutto and 3 others v the State, PLD 1979 SC 38.

the son of one of the judges involved in the case told me "my father was prodded and coerced by military officers. He received pressure from several groups opposed to Mr. Bhutto."[82] At the end four judges, all former members of the Lahore High Court endorsed the decision of their junior comrades in the Lahore High Court, while the three judges from outside the Lahore High Court all acquitted Bhutto. With the help of the Chief Justice, Zia got the conviction he wanted through judicial manipulation, pressure, procedural irregularities and provincial and personal biases (Schofield 1979).[83] Thus the senior judges of Supreme Court, appointed during the 1950s and 1960s, continued to remain loyal collaborators with the military.

By the time Bhutto was convicted, Zia, who had now appointed himself President, proceeded to dismiss the veneer of collaboration with civilian partners. By July 1978, Zia started complaining about the need for "speedy dispensation of justice" which was a pretext to set up a parallel judicial system of summary and special military courts of military officers and magistrates to deal with a wide range of criminal cases.[84] Martial Law Authorities (MLAs) were given the power to transfer cases from civilian courts to military courts. Military court decisions could be appealed to the high courts, but in the absence of procedural requirements and a detailed evidentiary record, a successful appeal to the high courts would prove difficult. In August 1979 he promulgated Article 212-A to add to the constitutional framework, which expanded the jurisdiction of the Military Courts and stated that the jurisdiction of the High Courts to issue writs, orders, injunctions against Military Courts or tribunals 'shall abate' although this did not apply to the Supreme Court (Jafferlot 2015). The High Courts were also divested of their jurisdiction to issue writs against the orders of MLAs. Thus, the

[82] Interview No. L-10, April 10th 2017.
[83] Later one of the judges who upheld the charges against Bhutto described the decision as the biggest regret of his career (Shah 2002).
[84]The Summary Military court had only one judge, who did not have to have any legal training. Special military courts were made up of three people, a civilian magistrate and two ranking army officers. Full records were not made of the trials held in these courts, only summaries, and the accused were not entitled to be represented by a trained lawyer (Jafferlot 2015).

very power the Court had granted Zia to amend the constitutional arrangement was used to clip the powers of the judiciary.

If the judiciary was collaborating with the military, why did Zia curb the powers and jurisdiction of the judiciary? Unlike the 1960s, there was a growing divergence between the judiciary and the military on the role of the judiciary within Zia's new establishment, a divergence which was more apparent at the level of the High Courts. In *Nusrat Bhutto* the courts had preserved their right to determine whether actions taken by the regime were indeed necessary to achieve the regime's alleged aims. As the government grew more repressive, with MLAs increasing the number of detentions, and transferring more cases from civilian courts to military courts, there was a flood of petitions to the superior judiciary challenging the actions of the MLA's and the jurisdiction of the military courts (Newberg 1995). The High Courts took the responsibility placed upon them by the Nusrat Bhutto case seriously and sought to exercise their powers of judicial review over the orders of martial law authorities, to determine if these orders fulfilled the criteria of necessity.

The table below shows the clear difference between the Supreme Court and the High Courts. Between July 1977 and March 1981, the Supreme Court only accepted 13 petitions challenging actions taken by the military regime, of which it ruled in favour of the military 12 times, emphasizing its continued loyalty to the military. On the other hand, the High Courts accepted 122 such petitions, of which they ruled in favour of the military only 60 times, challenging the regime in more than half the decisions it made. This highlights the close collaboration between the Supreme Court and the regime, and the clear divergence between the judiciary and the regime, at the level of the High Courts.

Table 4.1: Proportion of High Court and Supreme Court Decisions Favouring the Military Regime – 1977-1981

	Supreme Court	High Courts
Executive Actions by MLAs	1/10	12/30
Legislative Actions by MLAs	2/2	13/13
Judicial Actions by Military Courts	9/10	35/79
Total Favourable Decisions	12/13	60/122

The High Courts and the military regime increasingly diverged over what actions were 'necessary' to achieve the regime's goals as outlined in 1978. Initially, in 1978 the High Courts upheld the jurisdiction of the military courts to deal with a wide range of questions, ranging from kidnapping and terrorism to hoarding and liquor possession.[85] However, by the 1979, as the martial law authorities expanded the scope of their powers, detained more political prisoners, and transferred more cases from the civilian to the military courts, the strain between the military and the High Courts became more apparent, and the courts started issuing judgements more critical of military power (Newberg 1995). The table below shows how judicial contestation of the military increased steadily with the High Courts challenging the actions of martial law authorities in 37.5% of reported judgments in 1978, and then in 57.5% of judgments in 1979.

[85] See *Nazeer Ahmed v Abbas Ali Khan*, PLD 1978 Karachi 777; *Nyganad Askari v State*, 1978 PLJ Lahore 519; *Manzoor Hussain v State*, 1978 PLJ Lahore 229; *Mohammad Afraaq Ahmed v Raunaq Ali*, 1978 PLJ Lahore 331.

Table 4.2: Proportion of High Court Decisions Challenging Military Regime by Year: 1978-1980

	1978	1979	1980
Executive Actions by Martial Law Authorities	9/18	7/9	2/2
Legislative Actions by Martial Law Authorities	0/5	0/6	1/1
Judicial Actions by Military Courts	12/34	16/25	5/9

Individual judicial decisions further emphasize the growing divergence between the military and the high courts. In *Mumtaz Ali Bhutto and another v Deputy Martial Law Administrator* (1979), the Sindh High Court objected to the detention of two former ministers in the PPP government, in a sweeping judgement that warned that the martial law authorities could not detain without any trial, insisted that the constitution did entitle citizens to some rights, and placed limits on state power to violate these fundamental rights beyond what was deemed as "necessary."[86] The court placed limits on the necessity doctrine saying that the courts have not conferred on the Martial Law Administrator "the power to do anything that he may think best and render the power of judicial review nugatory." The Sindh High Court went on to challenge several convictions under military courts in the following year, and other high courts followed suits, setting aside convictions where the high court held that the military court did not have any jurisdiction.[87] In *Satar Gul v MLA Zone B NWFP* Peshawar (1979), the Peshawar High Court voided the transfer of cases pertaining to possession and smuggling of drugs from the civilian to military courts, questioning whether such actions met the standard of 'necessity.'[88] The regime was not prepared to accept these limitations placed on its authority and responded by tightening restrictions on the superior judiciary through new legislation and constitutional amendments, and expanding the powers and autonomy of the military courts.

[86] *Mumtaz Ali Bhutto and another v. The Deputy Martial Law Administrator, Section 1, Karachi and 2 others*, PLD 1971 Karachi 307.
[87] *Syed Essa Noori v Deputy Commissioner, Turbat and 2 others*, PLD 1979 Quetta 189.
[88] *Satar Gul and another v Martial Law Adminsitrator, Zone B N.W.F.P, Peshawar and 2 others*, PLD 1979 Peshawar 119.

Thus, as indicated in Table 4.2, by 1980, the courts issued far fewer judgements relating to the actions of martial law administrators and military courts. However, the response from certain judges was to start challenging the legislative powers of the military regime, a question on which the courts had largely deferred to the regime. In *Yaqoob Ali v Presiding Officer, Summary Military Court (1980)*, the Sindh High Court upheld Zia's constitutional amendments and his power to amend the 1973 Constitution and remove the judiciary's powers of judicial review, but Justice Mirza issued a famous dissenting opinion, in which he argued "on no principle of necessity could the power of judicial review vested in the Supreme Courts…be taken away."[89] The Balochistan High Court went further, ruling that Article 212-A was void because it was inconsistent with the judgement in the *Nusrat Bhutto* case, and simply did not meet the test of necessity.[90] Thus, the courts were now openly debating the legislative powers of the regime which had been used to weaken the judiciary.

The period between 1977 and 1981 was a time of political transition. The military regime took power, ostensibly aiming to remain in power for only a short period of time and collaborating with civilian partners to restore stability and constitutional democracy to the state, a consensus that was outlined and upheld in the *Nusrat Bhutto decision*. However, over time this consensus began to unravel, as the regime, backed by the Supreme Court, sought to use that consensus as a stepping stone towards greater executive discretion and consolidation of military authority, while the High Courts worked to keep General Zia's actions within the limits of the consensus outlined in *Nusrat Bhutto*.

The Supreme Court was primarily comprised of judges appointed during the 1950s and early 1960s when the institutional interlinkages between the judiciary and the military were at their highest, and the norm of collaboration between the two institutions was most entrenched. Thus, it was

[89] *Yaqoob Ali v. Presiding Officer, Summary Military Court, Karachi*, PLD 1985 Karachi 243.
[90] The regime was not happy with the decisions of the Balochistan High Court and had attempted to use coercive measures to prevent the judiciary making this decision (Marri 1990)

not surprising that the Supreme Court remained loyal to the military. At the High Court level however, judges were increasingly appointed from outside the civil service, from bar associations that were increasingly politically active. Thus, the younger generation of high court judges enjoyed fewer institutional interlinkages with the military, and therefore diverged from the military. For four years the high courts subjected the actions of the regime to serious scrutiny, reminding the regime of its commitment to reestablishing constitutional democracy. The consensus between the two institutions finally fell apart in 1981, when Zia introduced a new Provisional Constitutional Order that consolidated all political authority with the military and slashed the jurisdiction of the judiciary.

The PCO's effect on the judiciary was devastating. The PCO drastically weakened the judiciary and reshaped its composition to weed out all judges who would challenge the regime. All orders and actions taken by the regime were now considered to have been validly made and could not be called into question in any court on any ground. Members of the armed forces, who occupied most leadership roles, were made fully immune to civil prosecution, and the courts would not hear cases pertaining to preventive detention or challenge any actions by the military courts (Newberg 1995). The judiciary was robbed of most of its jurisdiction, as military courts and martial law administrators now ran the country only answerable to the President.

Zia completed the subordination of the judiciary by ordering judges to take a new oath under the PCO. They were expected to pledge as follows: "…I will discharge my duties and perform my functions honestly, to the best of my ability and faithfully in accordance with Provisional Constitutional Order, 1981, and the law" (Jaffrelot 2015). By taking such a pledge, judges were forced to recognize the PCO and the reduction of the judiciary's authority, or risk being removed from their positions as judges. Those judges who refused to take the oath, or who Zia refused to administer the oath to, were automatically removed from the judiciary. Most judges were willing to take the oath and keep their jobs. In total, 15 judges of the Supreme Court and the High Courts did

not take the oath or refused to take the oath, which included 4 out of 12 judges in the Supreme Court, and 8 out of 25 judges in the Lahore High Court (the largest high court) (Hasan 1981; Khan 2016). Zia justified the actions against the judiciary, saying "he had great respect for the judiciary" and had only taken this action because, "for the purpose for which the military took over, it was necessary that the country was administered in a particular form (Dawn 1981)." He criticized the judiciary saying "it should be held accountable for its actions (Morning News 1981)" and emphasized that the judiciary "is held in high esteem but changes were required to make justice easily accessible to the masses (Morning News 1981)."

From 1981 to 1985, the superior judiciary largely surrendered to military control. One senior lawyer I spoke to told me:

> "when Zia appointed the new Chief Justice, Justice Haleem, he asked Justice Haleem: "What is your view about the political situation in the country?" Haleem responded "I am not a politician. I do not want to be political. Let me do work for the ordinary people, focus on socio-economic issues." Zia was happy with his answer."[91]

Thus, Zia chose a Chief Justice who he expected would stay away from politically salient issues. Over the course of these five years, there were only 38 reported judgments in total pertaining to military prerogatives, a far cry from the number of reported judgements between 1977 and 1981. Out of these 38 judgements only 13 dealt with the actions of the martial law administrators and military courts. Further, very few of these cases dealt with salient constitutional questions. Khan (2016) writes that very few cases of constitutional importance were brought before the Lahore High Court during this period, and those raising important constitutional questions were returned by the office and were never fixed for hearing before the judges.[92]

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[91] Interview No. L-10

[92] There were some important exceptions such as *Fauji Foundation v Shamim ur Rehman*, PLD 1983 SC 457. In this decision the Court had to decide whether a legislative instrument issued during a martial law era that was designed to provide special privileges to an army-run sugar mill to prevent its dissolution was constitutional. In this landmark decision the Supreme Court outlined a very limited conception of judicial power, holding that it did not have the power to determine if a legislative instrument was passed in a mala fide way or not, and therefore could not overrule or reconsider

This was the era of the *Controlled Court* in Pakistan, and the judiciary remained largely silent on the actions of the military regime.[93] The judiciary would seek out the advice of the government's lawyers on the powers of the judiciary, and whether there were any challenges to the actions of the martial law authorities that it could even accept for hearing (Star 1983). In one particularly egregious case a suspect had been sentenced by a military court in absentia for a crime that had been committed by someone else, in a case in which no evidence had been presented, and in which the convicted suspect had also been a victim (Dawn 1985b). A veteran lawyer highlighted the powerlessness of the judiciary during this period, stating:

> "if someone had been arrested or detained, as a young activist lawyer I would to go the judges seeking relief from the courts. Informally, they would request the Advocate General or Assistant Advocate General for relief for the detainee, but they would refuse to hear these cases."[94]

Thus, Zia responded to the gradual divergence between the military and the judiciary by weakening the judiciary's authority and extending his control over the appointments and careers of judges. Even as the bar of professional lawyers from which judges were being recruited grew politically mobilized and directly opposed the military regime, Zia maintained tight control over the judiciary through his authority over judicial careers. By controlling the judiciary, Zia ensured that judges who were appointed were cautious and would acquiesce to military authority and avoid checking or challenging military supremacy, whether they supported the military or not.

Zia finally restored the constitution at the end of 1985, ending Pakistan's longest spell of unchecked military role, and closing what is widely considered the darkest chapter in the judiciary's history (Khan 2016). With the resumption of constitutional rule, the judiciary sought to regain its jurisdiction and relevance after years of silence. Military courts were wound up, cases pending before

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a legislative instrument even if it was not passed through any parliamentary procedure. Thus, the Court during this period outlined a very restrictive role for the judiciary.

[93] As outlined in Chapter 4, in the Controlled Court, the military shapes the judiciary's attitudes and actions by maintaining tight control over the careers of judges, i.e. through close utilitarian interlinkages.

[94] L-11, November 26th 2016.

military courts were transferred to civilian courts, and the courts resumed their writ jurisdiction (Star 1985). In this period of three years, the courts were flooded with petitions challenging actions that had been taken by the military courts and martial law administrators between 1977 and 1985, and *habeas* petitions against political detentions after the restoration of the constitution. The key challenge before the judiciary was whether the decisions made by the military courts and actions taken by martial law administrators between 1977 and 1985 could be challenged. The newly inserted Article 270-A created an effective ban on re-evaluation of past actions by the military. Senior lawyers and bar leaders called upon the judiciary to show more activism after years of silence and reopen decisions by the military courts (Frontier Post 1985; Khan 1988). At this time most of the judges had taken oath under the PCO in 1981, acquiescing to Zia's direct control over their careers. Chief Justice Haleem had only recently been confirmed as Chief Justice, and many high court and Supreme Court judges remained unconfirmed as additional and ad-hoc judges (Iqbal 2006).

The table below shows that, initially the judiciary avoided taking on the actions, privileges and immunities of the military leadership, martial law authorities and military courts. However, by 1987, the force of numbers of petitions "took its toll on the courts (Newberg 1995, 193)". By 1988, the high courts issued several important judgements chipping away at Article 270-A and paving the way for past actions and rulings of the martial law authorities to be challenged.

Table 4.3.: Judicial Decisions Pertaining to Martial Law Administrators and Military Courts (1986-1988)

	1986	1987	1988
For the Military	4	2	0
Against the Military	2	3	5
Proportion Contesting the Military	33%	60%	100%

I discuss a few judgments pertaining to Article 270-A that provide a more complete picture of the judiciary's approach towards the military during this transitional period. The gradual increase in

judicial assertiveness over these the years is illustrated by the shift in the judiciary's approach across these three decisions. In 1986, the Sindh High Court had to rule on the validity of a Martial Law Order that ousted the jurisdiction of the civilian Services Tribunal in cases where Airport Security Forces had forced employees into retirement.[95] The court dismissed the petition and held that Article 270-A provided a blanket immunity ousting its jurisdiction for reviewing any martial law orders.

In 1987, in *Muhammad Bachal Memon v Government of Sindh* (1987), the Sindh High Court again revisited the scope of Article 270-A, to decide whether the court's jurisdiction under Article 199 was superseded by the immunity provided under Article 270-A.[96] In a unanimous order the court held that Article 270-A provided martial law orders immunity, but the judiciary retained its jurisdiction in certain cases, if it was shown that the judgments of military courts were completely out of jurisdiction or clearly mala fide. This set a very high bar for successfully challenging the orders and actions of martial law authorities but created the possibility for the courts to hear some petitions challenging these orders and actions. The court said: "In view of the score of challenges made by aggrieved persons on innumerable grounds against convictions by Martial Law Courts, it may have been more conducive to public confidence…if some sort of opportunity of hearing had been provided to the aggrieved parties to vent their grievances." Thus the Sindh High court made the first dent in Article 270-A by asserting its jurisdiction over a small set of cases, justified by the volume of people affected by the actions of martial law authorities.

Soon after the Lahore High Court accepted seven petitions challenging the judgements and sentences of special military courts, including one by a former PPP minister in Bhutto's government, and made a more far-reaching judgment in *Ghulam Mustafa Khar v Pakistan* (1987).[97] The prosecution in this case made the argument that the judiciary had given Zia's regime a mandate to

[95] *Nazar Muhammad Khan v Pakistan*, PLD 1986 Lahore 428.
[96] *Muhammad Bachal Memon v Government of Sindh*, PLD 1987 Karachi 296.
[97] *Ghulam Mustafa Khar v Pakistan*, PLD 1988 Lahore 49.

take what actions were necessary to achieve the short-term aims set out in the *Nusrat Bhutto* case, but the PCO of 1981 and subsequent actions, violated the requirements of necessity, and thus their immunity could not be upheld (Butt, 1987). The court was not willing to go as far as upholding challenges to all actions taken by the regime since 1981, but the court did expand the scope of the judiciary's power to entertain challenges to past decisions of military courts. The court held that it had jurisdiction to hear cases that betrayed malice by the military courts, were outside the jurisdiction of the military courts, or were *coram non judice* (held in the wrong venue for such a case). The decision allowed the courts to hear many petitions since many convicts had not been given fair trials by the military courts, and *Khar* was hailed as a major legal breakthrough (Nation 1987; Daily News 1987). Thus, the courts chipped away further at Article 270-A to expand their own jurisdiction, while still maintaining the broader immunity provided by the article. The Supreme Court upheld the Lahore High Court's decision in an appeal in 1988, but by this time, Zia was already dead, and the country was preparing for elections.[98] Importantly, this did not mean that the judiciary upheld many challenges against the actions of martial law courts, but the court expanded the jurisdiction of the courts to hear such challenges.

Perhaps the most significant case challenging Article 270-A was *Benazir Bhutto v Federation of Pakistan* (1988). During the martial law era, Zia had banned political parties from organizing and only permitted elections on a non-party basis. Once Zia dissolved Junejo's government and called for new elections, Benazir Bhutto, the leader of the PPP, petitioned the Supreme Court to revoke the martial law order banning political parties from running for elections. The regime claimed that Article 270-A protected this martial law order, The Supreme Court overturned Zia's restriction on political parties contesting elections, cleared the path for party-based elections, and narrowed the

[98] *Ghulam Mustafa Khar v Pakistan*, PLD 1989 SC 26.

scope of martial law orders protected by Article 270-A.[99] In supporting political parties against the regime, the judiciary attempted to create a "symbolic break with the past" of complicity with the military (Khan 2015). Beyond this, the Court reasserted its fundamental rights jurisdiction after years of silence, expanded its original jurisdiction to loosen the requirement of an aggrieved party in a case of public interest, and moved beyond the focus on procedural rights, in the interest of substantive "socio-economic justice (Jurisconsult 1988)" In a sweeping judgment, the Court had asserted its original jurisdiction over fundamental rights, overturned a significant martial law order, and articulated a broader role as a protector of procedural, political and socio-economic rights.[100] Thus, during this brief period, the judiciary sought to reassert its role and relevance in the new political order, quickly but carefully opening up spaces to challenge the actions of the military regime through the judiciary.

Thus, the trends in jurisprudence during Zia's regime made the gradual divergence and changing priorities of the judiciary apparent. The judges appointed during the heyday of judicial-military collaboration dominated the courts at the beginning of this period but became a minority over time. As judges were increasingly recruited from outside networks closely tied to or dependent on the military, the role of the military as an audience shaping judicial norms and preferences reduced. The judiciary sought to carve out a more independent role, and judges sought legitimacy with the network of professional lawyers that increasingly opposed the military and advocated for the judiciary to play a more active role protecting rights in the political system. The changing norms and preferences of the judiciary became more apparent once Zia died and democracy was restored in 1988.

[99] *Benazir Bhutto v Federation of Pakistan*, PLD 1988 Supreme Court 416.

[100] According to one interviewee, "The Chief Justice got a call from Zia who was very unhappy with the judgment and wanted to discuss the cases' impact. Zia had only one question for Haleem. How did this happen?" Interview No. L-10.

1988-1999 - Unstable Multi-Party Democracy

The period from 1988 to 1999 was the longest stretch of democratic rule in Pakistan's history. But the civilian political parties did not win democracy from the army or force the army to retreat to the barracks. Instead, the military chose to permit the resumption of democratic rule, and never entirely returned to the barracks. The army exerted an effective veto on all matters of foreign and defence policy.[101] The ISI maintained a political cell that continued to interfere in the political affairs over the state, manipulating political coalitions and institutional arrangements to its advantage (Talbot 2000). Zia's constitutional arrangement was also maintained ensuring that the unelected branches, particularly the presidency, continued to exercise power over the elected branches. The presidency was in the hands of Ghulam Ishaq Khan, a member of Zia's cabinet, and a close bureaucratic ally of the military. Thus, the military, even while out of power, maintained considerable control and influence over the new political dispensation, and it sought to keep the elected governments in line with their policies and priorities.

When Benazir Bhutto's PPP took power in 1988, and she became Prime Minister, she faced a powerful army allied with a bureaucracy, and the opposition of several political parties that depended upon military support and patronage.[102] The country was essentially ruled by a troika of the President, Prime Minister and the Chief of Army Staff. Bhutto sought to bring the military's intelligence agencies under some sort of control, replacing its leadership and trying to carry out an internal investigation, which created resentment in the ISI (Rizvi 2000). She clashed with the President over who had power to appoint officers to senior positions in the armed forces. The army

[101] Benazir retained Zia's foreign minister as her own, indicating the military's continued dominance of foreign policy (Talbot 1998).

[102] She was the daughter of the former Prime Minister Zulfiqar Bhutto, who had been executed by Zia.

jealously guarded its professional domain and was not willing to tolerate any civilian interference in its hierarchy. By 1990, Bhutto had alienated the military, and the Corps Commanders of the military conveyed their dissatisfaction with Bhutto to President Ishaq (Talbot 2000). Within a month the President used his powers under Article 58(2)(b) to dismiss Bhutto's governments and dissolve the national assembly, on charges of corruption, political horse-trading, and failure to enforce law and order and discharge legislative functions.

The presidential dissolution of elected governments became a recurring occurrence during the 1990s. Once elected governments sought to exercise power independently and play a role in shaping foreign and defence policy, they fell out of favour with the military and the presidency and faced presidential dissolution. Whether it was Bhutto's PPP or the right-wing Pakistan Muslim League led by Nawaz Sharif, they both met the same fate. Finally, by 1999, with the growing economic crisis, international isolation, and military opposition to government policies and interference within the military, the military under General Musharraf carried out a coup bringing an end to eleven years of democratic rule.

During this tumultuous period there were four key themes that ran through the politics of the time, which ensured the military's continued supremacy in the state. First, political parties adopted an approach of perpetual confrontation, always seeking to undermine and delegitimize each other, and turning to the military and judiciary to assist or validate efforts to bring down the opposing parties. Thus, the political parties helped weaken the democratic system by turning the judiciary and military into unelected arbiters of their political conflict.

Second, was the growing problem of political and administrative corruption in government institutions, exacerbated by the weakness of the leading political parties and their continuing conflicts that helped entrench negative impressions of the political class, and also led to growing reliance on the military for routine administrative tasks. Particularly after 1997, the army was deployed to carry

out the census, root out ghost schools, deliver educational services, build roads, and take over key policing roles. (Talbot 2000) Thus, just as the public grew increasingly disillusioned with civilian governments, given the persistent maladministration, corruption and the regular dissolutions and elections, the military's increased presence and visibility in administrative affairs increased.

Third as the governments pushed an agenda of economic liberalization to revive a flagging economy and dysfunctional public sector, the governments encouraged the military's assumption of the work of the public sector and the expansion of its commercial interests. The government provided special benefits, exemptions and privileges for the military's expanding commercial and landed ventures. The military's companies came to monopolize highway transportation and road construction. The military also expanded its commercial operations into new areas of business activity such as banking, finance and insurance, real estate, travel, the energy sector and education (Siddiqa 2007). By 1999, Nawaz Sharif recognized just how vast the military's economic empire had grown and sought to bring an end to the tax breaks provided to its welfare organizations, a move that furthered the military's antagonism towards Sharif's government (Siddiqa 2007).

Fourth, the civilian governments had to confront a steadily worsening law and order situation, with increasing sectarian and ethnic violence around the country, particularly in the commercial capital, Karachi. By the mid-1990s, Karachi entered a state of virtual civil war, which led to mounting criticism of the government's handling of the law and order situation. In this environment, the government came to increasingly rely on the military to handle internal policing responsibilities as well. In 1997, the Anti-Terrorism Act was introduced to provide a basic legal framework for counterterrorism, which established a new system of anti-terrorism courts and gave law-enforcement agencies, including military and paramilitary forces, special discretionary powers at the expense of certain fundamental rights. In 1998, Nawaz Sharif went even further, declaring a state of emergency and ordering the military to establish military courts to tackle the problem of terrorism in an

expedited manner. Thus the law and order situation also led to the further empowerment of the military to take on roles and responsibilities far beyond their purview of external security.

Hence, with the military arbitrating political affairs, managing administrative tasks and internal policing, and expanding into the primary economic actor in the state, there was little doubt that the military remained the most powerful institution in the state, and this ultimately set the stage for the military's return to direct power in 1999.

Judicial-Military Relations During the Democratic 90s

With the resumption of constitutional democracy, the polity was characterized by a deep dissonance both between the elected and unelected branches of government, and between the leading political parties, a dissonance that was exacerbated by the new constitution, not overcome by it. This placed the judiciary in a position of unprecedented relevance to navigate the dissonance, interpreting the new constitutional framework to resolve the regular conflicts that plagued the state during this eleven-year period. During this democratic period, the military's role as an audience for the judiciary continued to decrease. As section 2 of this chapter will discuss in detail, judges were recruited from the independent and activist bar associations, and the role of executive institutions in determining judicial appointments and promotions was significantly reduced. The judiciary remained cautious in challenging the military, particularly in the early years of democracy, but over time, as the military's influence over the judiciary's norms and preferences gradually decreased, judges increasingly asserted their independence from executive institutions, and asserted their jurisdiction over a wider range of military prerogatives.

In the aftermath of Zia's dictatorship, the judiciary had to deal with the legacy of the regime, particularly the actions of the late dictator, and the large number of petitions that came before the

courts challenging the actions of military courts during the martial law era, after the judiciary opened the door to accepting such petitions in 1989.

After Zia's death, before Bhutto won the elections, the judiciary was first called upon to determine the constitutionality of Zia's exercise of power under Article 58(2)(b) to dissolve the assemblies. In *Haji Saifullah* (1988), the Court found President Zia's dissolution order to be illegal.[103] The majority opinion stated that the power of dissolution can only be used by the President in a narrowly circumscribed set of objectively extraordinary situations. However, surprisingly, the Court did not grant the relief of the restoration of the Assemblies, saying that "interrupting the election process was politically infeasible (Newberg 1995, 221)." Given the strong stance the Court took against Zia's dissolution of the assemblies, the Court's decision not to resurrect the assemblies was unexpected. One lawyer familiar with the proceedings stated "12 judges were to announce the judgment and PM Junejo was invited by the Court by the CJ himself to be in the courtroom for the final announcement. We all took this as an indication that Junejo would be reinstated."[104]

Some years later, the former Chief of Army Staff Aslam Beg publicly claimed at the Lahore Press Club that he had pressured the Court not to reinstate the assemblies (News 1993a). Beg said that he had sent a message to the Chief Justice that if the Court wanted democracy to return, then the Court should not restore the assemblies. Beg's admission highlighted that even after Zia's death the military continued to be able to wield pressure and influence over the Court. The Court's response to Beg's statement in 1993 also emphasized how concerned the judiciary was about appearing to be susceptible to military pressure. The Court issued a contempt of court notice to Beg and summoned the former Chief of Army Staff to appear before the Court. During the Supreme Court proceedings judges criticized him for his statements and defended the judiciary. During the proceedings Chief

[103] *Government of Pakistan v Muhammad Saifullah Khan (Haji Saifulllah),* PLD 1988 Supreme Court 43.
[104] Interview No. L-1, May 15th 2017.

Justice Zullah lashed out at Beg with strong words, complaining that "although Beg has said he had spoken the bold truth, but in fact he had only dropped innuendos…What a strategy of the general, of a warrior. We are very sorry for handing over the defence of our country to someone like him (News 1993b)." However, after using this opportunity to defend the Court' image against Beg's public statements, the Court chose not to punish Beg but only to reprimand him.[105] The saga of the *Haji Saifullah* case demonstrated both the continued leverage of the military over the judiciary, but also the judiciary's deep concern with its own legitimacy as an independent institution.

The judiciary accepted several petitions challenging military court decisions during the martial law era. There were 18 reported judgements during this period dealing with military court judgements from Zia's martial law era, out of which the high courts overturned the military court judgements in 10 cases. Initially, the courts were more cautious in overturning such judgements. In *Nazir Ahmed Saleemi v Province of Punjab* (1991) , the Lahore High Court did not reconsider the sentence imposed by the military courts deeming it to be constitutionally protected, and in *Khadim Hussain v Government of Pakistan* (1992), the Lahore High Court avoided reconsidering the military court decision, due to the misplacement of part of the record of the case.[106] But overtime, as the era of martial rule grew more distant the courts were more willing to open these past cases to greater scrutiny. In *Sabur ur Rehman v Government of Sindh* (1989), the Supreme Court ruled that civilian courts could assess the factual proceedings of a past military court case, if the concern was that the military court had made the decision in the absence of evidence.[107] Thus, in *Sabur ur Rehman*, the Court moved beyond the *Mustafa Khar* decision, allowing the courts to also interfere in past military court decisions when it was alleged that evidence was not considered in the proceedings. As time

[105] *Contempt of Court Proceedings against General Mirza Aslam Baig*, PLD 1993 SC 310(e).
[106] *Nazir Ahmed Saleemi v Province of Punjab*, 1992 ALD 141; *Khadim Hussain v Government of Pakistan*, 1992 PCr LJ 1623.
[107] *Sabur ur Rehman v Government of Sindh*, PLD 1996 SC 801.

passed and Zia' s era faded into history, the courts grew emboldened to scrutinize the decisions made by military courts during that period.

As the military's economic interests expanded during this period, decisions pertaining to the military's economic prerogatives generated the largest proportion of military-related jurisprudence. As the table below illustrates, the judiciary remained largely deferential to the military on questions of economic prerogatives through most of this period, with little change between the first half and the second half.

Table 4.4: Judicial Decisions Pertaining to the Military's Economic Prerogatives (1990-1999)

	1990-1994	1995-1999
For the Military	34	45
Against the Military	20	28

The judiciary in general upheld the special exemptions and privileges granted to the military's land and commercial ventures. In 1992, the government sought to withdraw a special exemption enjoyed by the Army Welfare Trust Sugar Mills on excise duties payable on sugar. The case came before the Supreme Court and the Court ruled in favour of sustaining the Sugar Mill's exemptions.

Similarly in 1993 and again in 1998, the judiciary upheld the special status of military-owned companies and military-affiliated institutions, deciding that their special status of being connected to the armed forces exempted these companies from respecting workers' rights. In Wah Cantonment (a military owned housing scheme that formerly only housed members of the military but now included substantial civilian populations and private businesses), a union of sanitation workers of the Cantonment Board applied to be registered as a trade union, but were refused by the Registrar of Trade Unions.[108] While the right to form a union is a fundamental right under the Constitution, the exercise of this right can be restricted on reasonable grounds, when it pertains to the members of the

[108] *Aman v Federation of Pakistan*, 1993 SCMR 1837.

Armed Forces for the "maintenance of public order." The Supreme Court chose to read this exception very broadly, arguing that since the Cantonment is "connected with the Armed Forces" and their upkeep is a "service which is directly concerned with the Armed Forces" therefore this "public order" exception applied to the Cantonment and its employees. The Court went on to argue that, if Cantonment workers were allowed to unionize, they would be able to call for strikes and disrupt services required by the Armed Forces of Pakistan and thus compromise public order. Therefore, it was reasonable for the Cantonment authorities to reject the unionization of these sanitation workers. The Court upheld the special status of military-affiliated commercial institutions to deny their civilian employees their fundamental rights.

This was further reaffirmed in 1998, when workers at the Army Welfare Trust Cement Plant in Nizampur sought to form a trade union. The management of the plant held that, since the company was directly connected with and incidental to the Pakistan army, it could deny the workers the right to unionize. The appellate court held in favour of the management, stating that the Industrial Relations Ordinance, which entitled employees to form unions, did not apply to employees of the defense services, and since the Army Welfare Trust was established to serve the interests of members of the defense services, the Industrial Relations Ordinance did not apply to its holdings either. Thus, the judiciary held that the hundreds of thousands of people employed in factories and mills around the country that were connected to the military, were not permitted to enjoy the same workers' rights that were enjoyed by employees in the rest of the economy.

This is not to say that the judiciary always decided in favour of the military on economic matters during this period. However, a majority of the decisions where the courts decided against the military dealt with were procedural matters, such as where the court intervened in the administration of the property of landholders and tenants in military cantonments, to ensure the administrators

fulfilled notification and hearing requirements (Dawn 1988).[109] Thus, the courts did play a role in enforcing some rules and procedures for the conduct of the military as it administered and expanded its real estate and commercial holdings. But for the most part the military's economic prerogatives were upheld by the judiciary.

However, by the second half of the 1990s, the judiciary grew more willing to take assertive decisions challenging the military in salient cases. As we see from the table below, the Supreme Court challenged the military more often after 1995 than before.

Table 4.5: Supreme Court Judgements Pertaining to Military Prerogatives (1990-1999)

Supreme Court		
	1990-1994	1995-1999
For Military	11	8
Against Military	7	12

This increase in assertiveness was especially apparent in the judiciary's increased efforts to protect judicial power. The judiciary's jurisdiction had expanded during this period and the courts resisted any efforts to fragment their authority. During this period, with the growing law and order crisis and the rise in terrorist attacks, the executive established new court systems to provide speedy convictions in cases of violence, kidnapping and terrorism. Each time the executive sought to carry out such actions, the judiciary pushed back.

In *Mehram Ali and others v Federation of Pakistan* (1998), the Supreme Court weighed in on the validity of the new Anti-Terrorism Act promulgated in 1997.[110] The Act gave civil and military forces new discretion in carrying out security operations and raids, including relaxing rules about use of force during operations. The Act also established a parallel judicial system of anti-terrorism courts that operated outside the judiciary, where rules of procedure including rules of evidence were relaxed in order to provide speedy convictions in terrorism cases. The Court in a landmark judgment upheld

[109] *See National Bank v Islamic Republic of Pakistan, 1992 SCMF 1705.*
[110] *Mehram Ali v Federation of Pakistan*, PLD 1998 SC 1445.

the Anti-Terrorism Act but made a series of amendments to the Act. In particular the Court imposed restrictions on the armed forces' discretion in detentions and the use of force, placed the new anti-terrorism courts under the purview of the high courts, vested appellate power in the high courts, and staffed the new courts with judges from the lower courts rather than executive officers.

Subsequently, in 1998, in *Liaquat Hussain v Federation of Pakistan* (1998), the Court went further to affirm its judicial power resisting any fragmentation of its authority from allied civil and military institutions.[111] After Prime Minister Sharif declared a state of Emergency in 1998, under the new emergency proclamation, the government put out an ordinance amending the Pakistan Army Act to expand the purview of military field martial courts to try civilians charged in several offenses including kidnapping and terrorism, and also give the military the power to assist Anti-Terrorism Courts in the processing of cases. These amendments would ensure that the entire anti-terrorism infrastructure, from the security operations to the detention and conviction of suspects, would be managed and supervised by the military. The Court ruled decisively against this measure, deeming it unconstitutional, and held that the creation of any parallel judicial system that fragmented the authority of the judiciary would be deemed unconstitutional. The Court held that no institution other than the judiciary can carry out the judicial function, and therefore the military could not replace the judiciary in carrying out its functions. Therefore, the ordinance was declared void and the military courts disbanded.

The key feature of the jurisprudence in the 90s, particularly during the second half, was that the judiciary worked to expand its jurisdiction over prerogatives of the military, even as it remained cautious about making decisions against the actions and interests of the military.

[111] *Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law Justice and Parliament*, PLD 1999 SC 504.

On the one hand, the courts made very few decisions holding military officers accountable for their actions. Major Amir of the ISI who was accused of using his office and government money to help over throw Benazir Bhutto's first government was exonerated by the courts, even though he went on to state "if he had to overthrow a PPP government he would do it again,", and Brigadier Imtiaz who had also participated in attempting to sabotage the PPP's first government was also exonerated (Rehman 1997). In 1994, the judiciary accepted a petition alleging that the ISI's political cell had financed the parties of the IJI to help them win the election against the PPP in 1990. General Aslam Beg himself acknowledged that the ISI had interfered in the election (Dawn 1993; News1993a). After conducting a series of hearings between 1994 and 1996, the Supreme Court effectively dropped the case without any decision.[112]

On the other hand, the courts accepted an increasing number of petitions for the redressal of grievances from those affected by security operations. The Sindh High Court relaxed its procedure for accepting petitions in the mid-1990s, accepting applications against detentions, enforced disappearances and torture by security forces that were not formal petitions but were moved through telegrams and hand-written letters addressed to the chief justice, who then converted these into constitutional petitions (Amin 1993). The court also called in government officials to explain why people had been detained by the military during operations (News1993c). Even though the judiciary rarely took formal actions overturning the actions of the military or holding military and paramilitary soldiers accountable, the courts opened themselves up as forums for people to bring grievances against the military and ask difficult questions of security officials. Thus, the judiciary carefully expanded oversight over the actions of the military.

Thus, when it came to protecting and expanding the power and jurisdiction of the courts the judiciary grew more assertive, especially in the second half of the 1990s, even if that entailed

[112] Interview No. L-62, May 26th 2017.

asserting itself against the military. The jurisprudence of the period indicated how the judiciary continued to gradually diverge from the military and assert its independent role, as a new set of norms and preferences took root in the judiciary. The judiciary expanded its jurisdiction, and relaxed its procedural rules, to hear cases pertaining to the military courts of the Zia era, and petitions from victims of security operations, and also protected itself from any fragmentation of its authority in favour of the military and law enforcement agencies. Courts were cautious about using their powers to make decisions that *overruled* actions of the military, but they worked to expand their jurisdiction over the actions of other institutions including the military.

1977-1999: Summary of the Evolution of the Judicial-Military Relations

This section provided a lengthy history of the different phases the judiciary moves through from the imposition of martial law in 1977 to the imposition of martial law in 1999. The judiciary begins by collaborating with the military regime and then seeks to expand its own role within the structure of the military regime and finds itself at odds with the military. After a period of imposed deference, control and fragmentation by the military, the judiciary seeks to claim its legitimacy, independence, expand its role, and preserve its judicial functions. How do we explain the direction the judiciary has taken over the course of this period, from collaborating with the military to cautiously expanding its jurisdiction over and preserving its autonomy from the military? As I will detail in the second section of this chapter, the judiciary's norms and preferences gradually diverged from the military, as the institutional interlinkages between the military and judiciary diminished, making it harder for the military to ensure that judiciary would collaborate with or be controlled by the military.

SECTION 2: A Change in Audiences - Explaining Judicial Behaviour towards the Military from 1977 - 1999

Regime-Related Explanations

Hilbink (2007) writes, when explaining variation in judicial-military interactions, the first hypothesis is that regime-related factors, i.e. the nature of the state's political power structure and the space available to the judiciary to assert itself within this power structure, can explain judicial behavior. Courts act more assertively against other state institutions, when the political system is more fragmented, raising the cost of repealing judicial decisions or reducing judicial authority for the other political actors (Chavez 2004; Ferejohn et al. 2007; Rios-Figueroa 2007). Conversely, when political power structure is more unified and political authority is unconstrained, such as during a military regime, then the courts would accordingly act deferentially. Judges will act assertively based on their understanding of the political environment and how other political actors can and will exercise their authority. Therefore, if judges believe that a regime's authority is declining and the regime is likely to be replaced, then they might strategically act assertively against the outgoing regime to gain the favour of the incoming regime (Helmke 2005). Similarly, when the judiciary is initially granted authority and formal powers, it will tend to act with restraint, in the expectation that the recently gained authority might also be lost to more entrenched political actors, and judgments will only grow more assertive over time (Ginsburg 2003). These regime-related factors all did play a role shaping the patterns of assertiveness during this period.

The initial rupture between the judiciary and the military could be explained by the centralized nature of Zia's military regime. When Zia came to power, the judiciary expected the new regime to operate with the same power structure used by previous dictators. Under previous military

regimes, the military leadership stood at the apex of the political structure, but the military did not try to rule alone, as the bureaucracy and the judiciary were integrated into the same power structure, and political parties were permitted to compete for power in elections within a regulated representative framework. Thus, judges simply assumed they would play the same role they had played in the previous military regime, upholding the broad structure of the praetorian state, but carving out a space within this system as a venue to uphold procedural rights and check the dangers of arbitrary rule. Chief Justice Anwar ul Haq and Maulvi Mushtaq, for example, two judges who had played a key role in collaborating to uphold Zia's political agenda in the early years, expected that Zia would share power with them, in exchange for their collaboration. As one lawyer explained to me "Anwar ul-Haq was ambitious and was even interested in being Zia's President."[113] However, Zia was more interested in centralizing control within the military and did not seek alliances with civilian institutions, rather he sought to capture or control civilian institutions, and eliminate any political threats. This power structure could not accommodate civilian institutions like a judiciary with an independent jurisdiction, and therefore even collaborative judges like Anwar ul Haq and Maulvi Mushtaq were removed, and the consensus between the two institutions unraveled.

The changing nature of the regime was also a factor in explaining the silence of the judiciary between 1981 and 1985 during Zia's most repressive era, and in explaining its expanding role after 1985 with the resumption of constitutional rule, and then after 1988 with the resumption of democracy. Between1985 and 1988, when the judiciary shifted towards opening up the past orders and actions of the military regime to legal challenges, the political opening created by the restoration of the constitution and a new civilian government, created an opportunity for the judiciary to expand its jurisdiction. The historic *Benazir Bhutto* decision, issued in the last year of Zia's regime which upheld the right of political parties to participate in elections, overturning the orders passed by Zia's

[113] Interview no. L-10.

regime, indicated that the judiciary was flexing its muscles in response to a changing political environment. As one lawyer who was involved with the *Benazir Bhutto* decision explained "In 1988 Benazir Bhutto had been back for 2 years, Junejo (Zia's Prime Minister) had allowed her back and allowed her to set up her party. For the first time you could think of a future without Zia. That must have emboldened the judges."[114]

Finally, the gradual and cautious pace of the judiciary's increasing assertiveness, which only accelerated during the late 1990s can be explained by the duration of the democratic regime. A judiciary seeking to gradually entrench its power and avoid retaliation from other political actors would accordingly act deferentially towards the most powerful incumbent political actors, which, in this case was the military (Ginsburg 2003). Accordingly, the judiciary would only act more assertively over time as the constitutional framework grew more entrenched, creating more space for the judiciary to act more assertively. Therefore, initial judicial restraint and gradually increasing judicial assertiveness can be explained simply by the judiciary's response to the increasing entrenchment of the constitutional democratic system. Thus, through this period, from the initial divergence between the two institutions, to the complete deference during the PCO era, and then the gradual increase in assertiveness after the resumption of constitutional democratic rule, we see variation in the judiciary's assertiveness towards the military can be explained by variation in the nature of the regime and the judiciary's expectations about how the military would operate in that political environment.

However, these regime-related factors do not provide a complete explanation for the judiciary's actions during this period, as the jurisprudence of this period shows the judiciary was not only responding to regime-related factors in deciding whether to act assertively. The content of the decisions shows that over time the judiciary was steadily seeking to play a different and more

[114]Interview No. L-62.

expansive role in the political system. A simple comparison of *Dosso* from 1958 and *Nusrat Bhutto*from 1977 highlight this evolution. In *Dosso*, the Court unequivocally accepted the abrogation of the constitution and the restrictions on fundamental rights and its own jurisdiction on the grounds of revolutionary legality. In *Nusrat Bhutto*, however, the Court outlined a more expansive role for the judiciary, maintaining that the 1973 Constitution continued to operate, barring certain sections, and the judiciary had the jurisdiction to review the actions of the military-run executive, to assess if they met the standards of 'necessity.' In the High Courts, several judges sought to play a broader role than what was set out in *Nusrat Bhutto*, asserting jurisdiction over the executive's detention powers, and even challenging the regime's legislation and constitutional amendments. Not only did the military regime of the 1960s differ from the Zia regime, but the judiciary of the late 1970s appeared to differ from the judiciary of the 1960s, in terms of the role it sought to play. These changing judicial norms became even more apparent by the late 1980s, particularly in the *Benazir Bhutto* decision. In *Benazir Bhutto*, the Court made a judgement favouring political parties, but also used the judgement to open up the possibility of public interest litigation. In public interest litigation, the courts could relax key procedural rules and restrictions to uphold public interests in cases of fundamental rights. The Court articulated the judiciary's new role enforcing socio-economic rights and improving access to justice, all of which had little to do with the key question of the ban on political parties in the case. Thus, the judiciary was not simply responding to an opening up of political space to make more assertive decisions, it was also defining a new role for itself in the political system, an evolving role that cannot be explained purely through regime-related factors.

During the democratic era, the judiciary was not simply growing gradually assertive over time with the entrenchment of the democratic system, it was also recalibrating its role in the political system, by expanding its jurisdiction and relaxing procedural rules, and staking its legitimacy on asserting independence from the military and other executive authorities. Therefore, this changing

articulation of the role of the judiciary emphasizes that the judiciary was not simply responding to changes in the regime but also to changes within the judiciary itself. Regime-related factors certainly played an important role in explaining variation in the judiciary's assertiveness towards the military, but this explanation is incomplete without also considering changes in the judiciary that could explain its changing role in the political system and assertion of independence from the military.

Judicial Quest for Legitimacy

After 1977, there was a growing divergence between the Supreme Court and the High Courts on the question of the power of the courts to check the actions of the military regime. The judges of the Supreme Court differed from some of the younger more activist High Court judges. In 1977, the Supreme Court was mostly composed of more senior judges appointed to the High Courts during the 1950s and early 1960s during the heyday of judicial-military collaboration. On the other hand, new judges were joining the High Court after the fall of Ayub Khan, and these judges were more assertive towards the military. Any explanation for the change in judicial behavior must explain what made the attitudes of these high court judges different from their senior counterparts?

Judicial decision-making is also shaped by the need to acquire and maintain legitimacy. Legitimacy is conceptualized as diffuse support (Caldeira & Gibson 1995), which means that there is a public commitment to defending the institutional structure and authority of the judiciary, regardless of the outcomes of individual decisions (Staton 2010). Scholars hold that when a judiciary carries legitimacy then other branches of government cannot pressure or induce decisions or avoid compliance with decisions (Milner 1971; Mondak 1991; Caldeira and Gibson 1995; Gibson, Caldeira, and Baird 1998). Legitimacy is ultimately seen as deriving from perceptions that the judiciary is fair and impartial (Tyler 2009; Staton 2010). Judiciaries that are perceived as susceptible

to political influence suffer from a lack of legitimacy (Kapiszewski 2012). Therefore, judges seeking to build legitimacy as a bulwark against attempts to defy or undermine judicial authority would be keen to appear fair and impartial.

Khan (2015) argues that, in expanding its jurisdiction and altering its role in the political system, after the restoration of the constitutional democracy in 1988, the judiciary was guided by a need to reclaim legitimacy that had been lost during the years of being subordinated under the Zia regime. One former judge who had been a lawyer representing the government in the *Mustafa Khar* (1989) decision described an interaction in the court to me during the case. He said the judge asked the Attorney General: "If tomorrow the government passed a law saying all bald people will be put to death, then you are saying the law is protected, Mr. Attorney General, how can you sleep at night?? To this the Attorney General said "If you people have been sleeping for eleven years, how can you sleep now?"[115] This was the label the court was seeking to move away from, as it sought to reclaim its legitimacy after being seen as first a collaborator and then a silent spectator during the repression of the Zia era. Thus, the judiciary's changing approach to the military was also motivated by a need to gain legitimacy.

However, a quest for public legitimacy can only explain so much in a country with limited media outlets, and even more limited court reporting, where the public had little access to judicial decisions or understanding of judicial procedure. Judges would seek legitimacy first and foremost, from those groups who paid the most attention to judicial decisions, who judges interacted with the most, and who informed the public about the content of judicial decisions, shaping public understanding and approval of the courts. The groups that paid closest attention to judges and provided them the most feedback on their actions and their authority are the fellow members of the legal complex, especially the lawyers populating their courts. As I will show in this section, the

[115] Interview No. J-44, November 28th, 2017.

network of professional lawyers became the primary audience for judicial-decision-making, and it is in seeking legitimacy from this audience, that the judiciary articulated norms of independence from the military, and socio-political judicial activism.

A Change in Judicial Audiences

I argue that an audience-based explanation is best suited to explaining the shift of the Pakistani judiciary over this period, from collaborating with the military to carefully establishing its independence from the military. From 1973 to 1999, three processes unfolded concomitantly that incrementally reshaped the internal norms and preferences of the judiciary – the indigenization of Pakistan's judiciary, the politicization of the bar from which judges were recruited, and the separation of the judiciary from the executive. The result of these three processes was to alter the relationship with the military, reducing institutional interlinkages between the two institutions and the military's ability to shape the institutional norms of the judiciary. In short, the military gradually stopped being a critical audience for the judiciary.

Instead, the judiciary over this period drew closer to the bar of professional lawyers, which developed both utilitarian and normative interlinkages with the judiciary, thus altering the judiciary's norms and preferences.[116] These gradual changes had incremental effects on the jurisprudence of the judiciary and its relationship with the military. Prior to this period the judiciary was loyal to the military, integrated into the collaborative power structure of the military, bureaucracy and judiciary. Over the course of this period, the judiciary shifted out of the orbit of the military and drew closer to a politically mobilized bar of professional lawyers that emphasized political activism, an expanded

[116] By utilitarian interlinkages, I mean the military is in a position to impose material costs and benefits on judges, specifically by shaping their career trajectories. By normative interlinkages, I mean the military is in a position to impose reputational costs and benefits on judges.

role for the judiciary, and opposition to military rule, which became a critical audience shaping the norms and preferences of the judiciary. I discuss the three processes discussed above and explain the impact these processes had on the institutional interlinkages of the judiciary with other institutions on the norms and preferences within the judiciary. To conclude I discuss how the changes in the judiciary best explain the evolution of the court's military-related jurisprudence during this period.

Indigenization of the Judiciary:

During the 1950s and early 1960s, the majority of Pakistan's judiciary emerged from the western-educated bureaucratic elite and the lawyers who were either trained as barristers in the United Kingdom or worked as lawyers for the British Empire in the Indian sub-continent. However, over time this changed. Firstly, after 1973, no judges came from the bureaucratic elite of the civil service, although this practice had already reduced during the late 1960s. This removed one significant network of western-educated elites from the ranks of the judiciary.

Secondly, as Pakistan's economy evolved so did the professional incentives for Pakistan's elite barristers to become judges decline. Under Ayub Khan, Pakistan's private economic sector advanced and commercial law and litigation developed in response (Asian Development Bank 2008). As private commercial law and litigation started blossoming, the compensation available to lawyers working in private litigation firms quickly outpaced the salaries available for judges, and money became a growing incentive for joining the legal profession. A gap emerged between younger lawyers who joined the profession for monetary reasons, and older judges who were drawn by the privileges and perks of being a judge. A senior judge in the early 1970s, Justice Sajjad Ali Jan admonished the new generation of lawyers, warning them that "money should not be the only consideration for advocates as they had to fulfill their onerous duties towards the nation and towards the country (Muslim 1976)."

Judges' salaries did not keep up with the monetary advantages of being hired by a leading law firm, affecting the attractiveness of becoming a judge. Justice Ajmal Mian writes in his memoirs, that when approached to become a judge of the Sindh High Court in 1977, he said he found it "a very difficult decision as at that time all my children were of school-going age….and providing education in good institutions for five children was not an easy task." (Mian 2004, 43) He described how his clientele as a lawyer included major banks who paid very well, which he left to become a judge. Thus, professional lawyers were concerned about the monetary sacrifice that they had to make if they chose to be judges.

This disparity in compensation increased during the 1980s since the judiciary lagged other state intuitions in terms of institutional reform, and private law continued to become more profitable, particularly as the drive towards privatizing and liberalizing the economy accelerated in the late 1980s and early 1990s, and foreign investment in the economy increased (Asian Development Bank 2008).

A young lawyer, after passing the bar exam, at the age of 21 or 22, worked with a senior partner for several years. A lawyer with about only 4-5 years' experience and qualifications could be offered remuneration on the basis of sharing legal fees in addition to salary. After several years he or she could choose to branch out and start his own firm, or become a partner in that firm. It took typically about 8-10 years to reach the level of a partner. Major multinational companies also typically hired lawyers with 5-10 years of experience (News 1995). Lawyers with multi-national companies and senior partners in leading commercial law firms earned very well. There was no limit on remuneration for senior partners (News 1995).

On the other hand, a lawyer could only be appointed a High Court judge after the age of 45, once he or she had at least 10 years of work experience as a high court lawyer. By this point in his or her career, a successful lawyer was likely to be a senior partner in a law firm, or working with a

major multi-national organization, making a significant income from cases. As a judge, he or she would be a government employee and not entitled to private practice with all its associated compensation. There were advantages to the perks associated with becoming a High Court judge but these did not compare to the wealth and privileges afforded to a successful senior partner at a law firm. Further, the judiciary's financial resources were dependent upon the budget provided by the federal government, which, particularly during Zia's era, were kept limited. Ali (1991) writes that "the Chief Justice could not incur even a small expenditure without the beggings of the Finance and Interior Ministry." Newspaper reports from the early 1990s described the state of neglect in the courts, with limited money, resources, and staff. Thus, there were opportunity costs associated with choosing a career as a high court judge over a career as lawyer in the private sector.

This difference was exacerbated for lawyers who went to study abroad. An education in the UK was steadily going out of reach for most potential judicial appointees. There were no more judges from the federal civil service with a government-funded foreign education. By the 1980s, Justice Patel said "becoming a barrister had become so expensive because the cost of living in England was now very high…As a result, few Pakistanis living in Pakistan could afford to become barristers," and those who could would look for careers that compensated them for the investment made in education in the UK (News 1995). Another leading lawyer of the era Khalid Ishaque also said that that going abroad will give lawyers "training specially for the commercial world (News 1995)" These elite lawyers would then be offered jobs at the most lucrative commercial law firms on their return, either through their personal family networks or by virtue of their increasingly rare and sought-after credentials. Thus, lawyers who gained an expensive foreign education belonged to an elite with easy access to the rewards of commercial law and litigation and were more interested in pursuing careers in commercial law, than pursuing judicial careers.

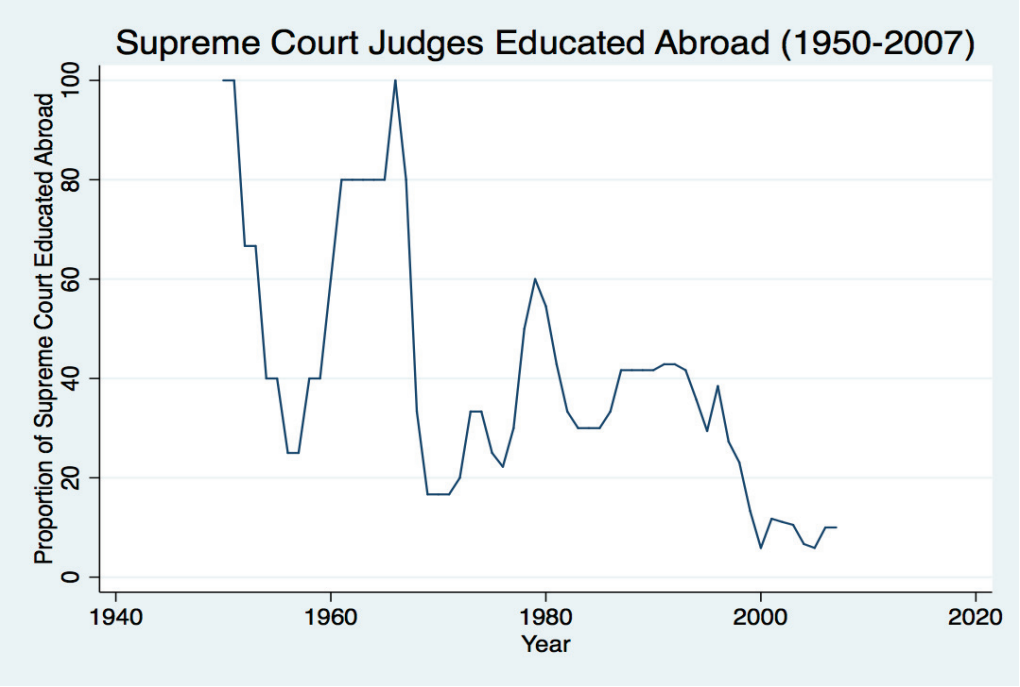
This disparity has been further exacerbated since the 1980s and 1990s. In my interviews I

learned, that by the time a foreign-educated lawyer engaged in commercial law and litigation is 45, if he was approached to become a judge he had to choose between the limited steady income of a judge or the high compensation he already got used to in commercial law and litigation. A retired judge explained to me that:

> "The problem is salary in private practice is very good. I had a successful practice as a tax lawyer. When I became a judge I had to take out of my savings. A judge would make maybe Rs. 1- 1.2 million per year. However, a lawyer at a good firm can make Rs. 4-5 million per case. And successful lawyers were unwilling to sacrifice this. As a judge I offered the judgeship to several senior partners of leading law firms in Karachi multiple times but they all refused."[117]

Thus, with the growth of commercial law, the increasing cost of foreign education, and the growing monetary disparity between private practice and judgeship, elite lawyers with a foreign education were increasingly drawn towards private commercial law. This trend is clearly indicated in the table below:

Figure 4.1: Proportion of Supreme Court Judges Educated Abroad (1950-2007)[118]



[117] Interview No. J-65, March 14th 2017.
[118] There is a complete list of judges provided in Appendix 2.

So who replaced them in this vacuum? As the number of law schools and law colleges in Pakistan grew, the bar rooms filled up with locally educated lawyers. Between the 1970s and 1990s bar associations rapidly grew in size. A former President of the Karachi Bar Association said, "KBA had 100 members in 1947, and by the 1980s it had 1700 members and today (2017) it has over 10,000 members."[119] There was a large influx of lawyers during this period, most of whom could not get jobs in the elite commercial law firms. These locally educated lawyers were primarily from middle-class backgrounds for whom the salary and perks of a high court judgeship still promised considerable social mobility and economic stability. Thus, as the elite lawyers increasingly gravitated towards the promise of commercial wealth, middle class lawyers were drawn to the mobility provided by the judgeship. This is not to say that elite lawyers with a foreign education never became judges, but a decreasing proportion of such lawyers were drawn to the judgeship, while there was a growing pool of locally educated lawyers available for judicial recruitment. The changing sociology of the bench was encapsulated by one former high court judge from the 1990s who said:

> "I did not like the lifestyle…Those who stay on the bench now are those who have a different lifestyle from me. In the earlier years you had a westernized elite. It was a colonial leftover. As times changed and the political situation changed, the atmosphere of courts has changed. Thus, a different order of people emerged in the bench. And the majority were not westernized now. Judges mostly spoke in Urdu."[120]

There were two consequences of this change. First, the close network of western-educated military, bureaucratic and judicial elites fragmented, as judges now came from a wider pool of middle-class locally educated lawyers. The legal and judicial elites of the 1950s and 1960s were beneficiaries of the late colonial order, and subsequently of bureaucratic and military rule, and thus were willing supporters of the established autocratic political order of the period, as discussed in the previous chapter. However, this younger pool of lawyers did not have the same elite ties with the

[119] Interview No. L-42, April 1st, 2017.
[120] Interview No. J-60, April 18th, 2017.

military and bureaucratic elite, nor had they enjoyed the same benefits from military rule. Hence, they were not natural collaborators with the military.

The second consequence is more counterintuitive but equally significant. As the number of law schools and law colleges churning out lawyers increased, the standard of the legal education has dropped. A former Supreme Court judge who taught in law schools for 25 years told me that "in the 1960s the education was good enough and if you had that education you could be a competent lawyer, but since the 1960s, the quality of legal education deteriorated."[121] Siddique (2014) explained that lawyers and legal practitioners dominate the law schools. The Pakistan Bar Council, the national elected organization of Pakistan's lawyers that regulates the profession also primarily regulates legal education. The result of the control of practicing lawyers over the legal education is that there is no dedicated legal academia, as professional lawyers largely determine academic curricula and set standards and teach. Given these lawyers are already quite busy, they tend to teach in their spare time, giving only limited time and attention to their teaching responsibilities. The approach to teaching law is very vocational, teaching law students about the laws pertaining to claims of the litigants, with little to no training in broader themes of constitutional law, legal doctrine and judicial procedure that inform the work of a high court judge. Ghuman (1992) points out that the university education is usually spread over a period of only two years, taught in short classes by legal practitioners, which means the actual class time does not exceed three hours a day, spread over a total of ten months. After qualifying, lawyers have to complete a six-month compulsory apprenticeship but they find that they can maneuver to have a certificate of training without undergoing it (Ghuman 1992). There are also no credible bar examinations governing entry into the legal profession, leading to an overpopulation of lawyers lacking basic legal skills (Siddique 2014). Thus, the standards of legal training in Pakistan have been steadily declining since the 1970s, as the number of law school

[121] Interview No. J-15, April 1st, 2017.

graduates has exponentially increased.

The indigenization of the judiciary meant that locally educated judges with limited legal training did not have the same extensive training in positive law and civil and criminal procedure that their counterparts attained from the British. What this has meant is that judges, less familiar with procedure, also feel less bound by procedure. Therefore, there has been an increasing emphasis on outcomes as opposed to procedure in the jurisprudence of the court. Judges care more about the development of their reputation in the courtroom, and without the same procedural training possessed by judges of the previous era, the judges focused on outcomes as a way to develop a reputation. As one former judge explained to me, in the absence of adequate training in procedure, these judges compensated by attempting to appear "effective and bold among the lawyers in their courtrooms."[122]He said:

> "Judges' standards have dropped. Judges who do not consider themselves bound by procedure promise to do substantive justice. The concept comes from the judges' own weakness in training…You put on a show. You have to be seen to know. Judges were playing to an audience, creating an impression, building a reputation."[123]

Thus, the indigenization of the judiciary meant that judges, locally educated as lawyers within an educational system run by the local bar that was steadily declining over time, were increasingly concerned about building a reputation within the bar through outcomes that were popular with the lawyers populating their courts. This process increased the normative interlinkages between the bar and the bench, as lawyers were able to impose reputational costs and benefits on judges. As the former Supreme Court judge pointed out to me,

[122] Interview No. J-33, March 21st, 2017.
[123] Interview No. J-33.

> "To get a better education. Some go abroad. these people represent the elite class, they are not the common people. They may be considered to be competent as judges, but they do not have that kind of compassion for the masses."[124]

The locally educated judge was more attuned, if not to the concerns of the masses, then at least, to the middle-class networks of lawyers from which he came, and with which he sought to build a reputation.

Thus, as judges were increasingly recruited from the locally-educated non-elite segments of the bar, the distance between bar and bench decreased, and the normative interlinkages between the judges and the bar increased. Judges increasingly sought to build a reputation with the lawyers by loosening procedural restrictions and making decisions they deemed would be well-received and popular among the lawyers of the bar.

Politicization of the Bar

As more judges were recruited from networks of locally educated lawyers, and the normative interlinkages between bar and bench increased, the norms and preferences of the bar developed greater importance in the decision-making of the bench. The next question is: what were the norms and preferences of the bar?

Pakistan's legal profession was organized with two leadership structures: bar councils and bar associations. The Bar Councils are the regulatory bodies of the legal profession, established under the Legal Practitioners and Bar Councils Act, 1973. Each province has a provincial Bar Council elected by the advocates across the province, and the Pakistan Bar Council, the primary regulatory body is elected by the members of the provincial bar councils. The leading government lawyer of each province, the Advocate General, functions as the official Chairman of the Bar Council, and the

[124] Interview No. J-15.

Attorney General, functions as the Official Chairman of the Paksitan Bar Council, but they are merely figureheads uninvolved with the activities of the Bar Council, and the real authority lies with the Executive Committee of elected lawyers. Thus, the Bar Council is largely independent, ensuring that the profession is largely self-regulated.

The bar associations are the professional associations of the lawyers. In Pakistan, these bar associations are elected bodies, autonomous and controlled and managed by the lawyers. Hundreds of bar associations exist at the level of each administrative level: tehsil, district, and provincial, and bar associations representing particular professional interests within the law also developed, such as the tax bar association. These bar associations represent the professional interests of the lawyers. The major provincial capitals had especially large bar associations, including the Karachi Bar Association, and the Lahore High Court Bar Association which represents the lawyers of Punjab and is the largest Bar Association in Asia. The Karachi Bar Association and the Lahore High Court Bar Association form the primary focus of this discussion of the bar.

As explained in the previous chapter, in the early years Pakistan's bar associations were small, and the major urban bar associations were still led by elite lawyers with close ties to the government who aimed to become judges or executive officers. Thus, even though there were certainly politically active lawyers throughout Pakistan's history, the bar associations rarely took organized political stands, or led the way on political issues.

This began to change, first with the wave of popular mobilization against Ayub Khan, and then with the democratic dispensation after 1972. The political activity of the period also swept up the bar associations. "With the new political dispensation, the bar got divided along more political lines. Few issues transcended political and partisan divisions. The Bar got involved in politics individually but not institutionally."[125]

[125]Interview No. L-9, December 4th 2016.

The political opposition to Bhutto made concerted efforts to win over the urban bar associations in their campaign against Bhutto. By 1977, this yielded dividends, as leading bar associations in urban capitals took organized stands against Bhutto's allegedly rigged re-election in March 1977, and even mobilized in opposition. In Lahore, when Bhutto's government arrested and detained agitating lawyers, the Lahore High Court Bar Association demanded the Government and the Election Commission resign at once, and new elections be held (Dawn 1977c). Between March and May 1977, the Lahore High Court Bar Association repeatedly issued resolutions against the actions of Bhutto's government, and even removed members of the bar association who had been elected to political office as members of the PPP (Sidhwa 1989). When Zia finally ousted Bhutto, these bar associations supported the military's intervention, especially after it initially removed some of the curbs that Bhutto had placed on the judiciary (Muslim 1978). The Lahore High Court Bar Association "expressed full support to the measures taken by the interim (Zia) government (Morning News 1977)." Thus, during the 1970s, the bar associations grew more engaged with political issues, and were more willing to agitate for political causes.

However, the critical juncture in the evolution and politicization of the bar associations was in the early years of Zia's military regime, which led to the entrenchment of an activist anti-military norm within the bar. When Zia came to power, he initially banned all political activity. He made repeated pledges that he was merely paving the way for free and fair elections, but he spent his first eight years focusing on minimizing political activity as he depoliticized the state. In March 1978, Zia made a limited concession to political activity, as he lifted the ban on elections to professional bodies, which included bar associations. It is unclear what his motives for lifting the ban were (Dawn 1978a, Dawn 1978b). Perhaps, at this time Zia was interested in maintaining a collaborative relationship with civilian allies, and leading bar associations had opposed Bhutto's government, so he probably did not foresee any threat from the ranks of the bar associations.

The resumption of political activity in the bar associations had two unexpected affects. First, bar associations became one of the few venues available for political activity, and bar association elections were one of the few opportunities that political lawyers had to adopt leadership roles. Bar associations increasingly attracted the interest and attention of political lawyers. In 1979, the Lahore High Court Bar Association resolved to restore the membership of lawyers who also had membership in the PPP after their membership was cancelled in 1977. Thus, politically active lawyers, including those belonging to the PPP and opposed to Zia, grew more engaged with the bar associations.

Second, bar association elections received increased interest and attention being one of the few elected political positions in the country. By the early 1980s, bar association elections in the major urban centers became widely publicized and hotly contested (Muslim 1983; Pakuistan Times 1984a). Newspapers reporting on the elections to the Karachi Bar Association described the electoral activity at the time.

> "The Karachi Bar Association is gripped with election fever. The air is thick with passionate claims, pledges and declarations of the grand variety. These elections take place under the scenario of the country's political problems, all this unrest and frustration has surfaced and hit the KBA like a whirlwhind. (Nigar 1982)."

In another report, the same newspaper reported:

> "In all fairness one should say that it is commendable living as we are in an age of apathy and indifference that organizations such as the KBA should continue to rekindle the electoral flame (Nigar 1984).

Thus, the bar association elections drew considerable attention and interest, during a time of otherwise limited political activity.

By this time bar associations were much larger than they were in the 1950s and 1960s. One former judge pointed out "When Pakistan came into being, the legal profession was a gentleman's profession. Now it was not a profession of choice for the majority of lawyers, it was a profession by

default."[126] The elite character of the urban bar associations had clearly faded. And this affected the way elections were fought in the bar, and the issues upon which they were fought. One veteran bar leader from the 1980s explained, most lawyers in the bar "were now more concerned with what was happening in their neighbourhoods or with the masses, as they did not have much of a stake in the legal system."[127] Thus, political issues became more important for organizing campaigns, mobilizing support and winning bar elections, than purely professional issues.

By 1980, there was growing opposition to Zia's rule within the legal fraternity, given the regime's growing reliance on military courts. "Military courts were seen as a direct threat to the legal profession itself" as it reduced the litigation in the civilian courts where they practiced.[128] Lawyers in Karachi and Lahore and other urban centers started protesting the military regime, in a series of demonstrations against Zia's regime (Dawn 1980). By 1981, with the PCO consolidating Zia's control over the judiciary, opposition within the bar grew stronger.

However, a veteran bar leader explained that:

> "Bar members were not united. In the bar there were activists and there were opportunists and careerists who were not necessarily principled and were more interested in gaining government approval to move forward in their careers. Therefore, to get people united on issues, we had to form a group that kept fighting and winning elections, as the different groups in the bar would follow the bar's leadership."[129]

Groups of lawyers allied against Zia around the country held a National Lawyers' Conference in 1981. One of the organizers of the conference said "we spoke against martial law and then we took a procession out against military rule."[130] The Lawyers' Conference also provided politicians banned by Zia a platform to speak out against military rule. After the Lawyers' Conference, lawyers

[126] Interview No. J-19, April 23rd 2017.
[127] Interview No. L-42.
[128] Ibid.
[129] Interview No. L-9.
[130] Ibid.

opposing the military regime formed political groupings in their respective bar associations and campaigned to win bar elections.

Thanks to the changing size and demographics of the bar, the increased political interest in bar elections, and the need for a platform for challenging the regime, bar elections now became centered around support for and opposition to the military regime. In the Lahore High Court Bar Association, Karachi Bar Association, and other bar associations, groups of politically active lawyers opposed to Zia's regime were able to secure victories (Dawn 1982a; Dawn 1982b). With anti-Zia activists winning bar elections, the bar became a platform for opposing the military regime.

Presidents of the bar associations, including Abid Hussain Minto and Hafeez Lakho, held meetings with defunct political parties, student and trade union leaders, and asked them to back their opposition movement against Zia and "join its struggle for the restoration of democracy and the 1973 Constitution (Dawn 1982c; Dawn 1983b; Star 1982a; Muslim 1983). The Movement for Restoration of Democracy (MRD), an alliance of banned political parties opposing Zia, allied with bar associations, rallying in their support and using the bar as a venue to speak out against the regime.[131] Efforts against the regime were coordinated across bar associations around the country by the Pakistan Lawyers' Coordination Committee (Dawn 1983b; Muslim 1983).

Zia responded by cracking down on the autonomy of the legal profession. The 1973 Legal Practitioners and Bar Councils Act was amended to remove peer review from the licensing of lawyers, thus reducing the bar council's power to regulate the entrance of lawyers into the profession (Newberg 1995). The regime also cracked down on the bar associations arresting and detaining bar leaders around the country, who protested the amendments to the Legal Practitioners' Act (Dawn 1982c; Star 1982b). Lawyers protested these amendments by walking out of courtrooms, carrying out processions wearing black arm bands, courting arrest and organizing hunger strikes to challenge the

[131] Interview No. L-42.

regime (Malik 1982; Dawn 1984a; Muslim 1985; Star 1985a). Judges who refused to sign Zia's PCO became heroes within the bar and were invited to speak before the bar, while lawyers who opted to join Zia's rubberstamp parliament were expelled from bar associations (Muslim 1982a).

There was a clear generation gap within the bar. Some senior lawyers and former leaders of the Bar Associations supported the governments' reduction in the autonomy of the legal profession stating "There is no precedent or practice...permitting political activity in a Bar Association" and condemning the fact that "Bar Associations had been providing platforms to politicians" (Dawn 1982c; Business Recorder 1982). But the younger generation of bar lawyers were actively engaged in politics and mobilized against the military dictatorship (Dawn 1985c). Opposition to the military establishment continued to be the platform upon which lawyers ran for bar elections and won (Dawn 1984b). Over time the same groups winning bar association elections then went on to organize and win elections in the Bar councils as well, thus placing the regulation of the legal profession in the hands of politically active judges who opposed the military regime. The 1984 elections to the presidency of the Lahore High Court Bar Association clearly highlighted the shift within the bar, as outlined in these newspaper reports:

> "All the three Presidential candidates have announced their support for the 1973 Constitution and the immediate restoration of democracy in the country. However, lawyers who call themselves 'progressives' have announced their support for Chaudhry Khalid Mahmud (Pakistan Times 1984a)."

> "Khalid Mahmud was appointed a judge of the High Court in 1977 but he resigned within six months of his appointment. He stands for the restoration of the 1973 Constitution and an undiluted democracy (Pakistan Times, 1984b).

Khalid Mahmud, a former judge who refused to serve under Zia, and had proven his pro-democracy credentials, won the high court bar election, an election that demonstrated the consensus across the electorate in opposition to military rule. This new consensus was not just evident in Lahore but across bar associations around major urban centers. As one newspaper report stated about the Karachi Bar Association, "The Karachi Bar no longer carries on the traditions of the Bar and has become a melting point for all kinds of anti-establishment groups and views (Nigar, 1984)."

Thus, in the early 1980s, a combination of i) changing size and demographics within the bar, ii) increased public and political interest in bar elections, and iii) regime actions against the judiciary, all helped create the opportunity for politically active lawyers opposed to the military regime to take leadership roles within the bar associations. This led to the mobilization of the bar associations against the regime, and the entrenchment of norms of political activism and opposition to military rule within the major bar associations in the country. At a time when the judiciary and the bar were developing closer normative interlinkages, the bar was developing a new normative consensus actively opposing collaboration with the military.

By the end of Zia's regime in 1988, and the resumption of democratic rule, bar associations had embraced political engagement and activism, but this did not mean that the legal community was necessarily supportive of rule by Pakistan's political parties. Pakistan's political parties had been decimated by Zia's regime and its active suppression of political activity. After years spent in the wilderness, when democratic rule resumed, these political parties were weak with few direct connections to voters, and dependent upon autonomous local actors ranging from landlords and tribal leaders, to clientelist exchanges through brokers, kin groups and local party leaders (Mohmand 2014). In this system, therefore, elite corruption, in-fighting and governance failures plagued the political governments during the 1990s.

After the resumption of democracy, political parties recognized the importance of gaining the support of bar associations. Just as pro-democracy lawyers had used the bar as a platform to oppose military rule, political parties supported groups within bar association elections in order to ensure those groups used their platform to speak in support of that political party and in opposition of their political rivals.[132]

[132] In 1995 for example, when the Lahore High Court Bar Association election was won by a lawyer with the support of the Pakistan Muslim League, soon after the High Court Bar association put out resolutions criticizing the government of the Pakistani People's Party and calling for its dissolution and reelections in the province of Sindh (Sheikh 1995; Dawn 1995a).

However, while political parties got increasingly engaged with the activities of bar associations and solicited the support of groups of lawyers, the bar associations still prioritized maintaining distance and autonomy from political parties (Dawn 1996a). There was a clear distinction between those members of the legal profession who opted for politics as their careers and those who were still lawyers by profession (News 1992b). In the 1992 elections for the Lahore High Court Bar Association, each of the candidates emphasized how they were not agents of any political parties and maintained distance and detachment from those parties, as close ties to political parties were seen as detrimental within professional associations that strongly guarded their autonomy. Thus, even as bar associations grew more politically active and engaged, they maintained a degree of autonomy from the political parties.

The urban middle-class lawyers of the bar associations were disdainful of what they saw as the corruption and incompetence of elite-driven political parties. Bar leaders during the 1990s regularly spoke out against the perceived corruption of political parties. In 1992, Hamid Khan, the President of the Lahore High Court Bar Association said in a speech:

> "Corruption in the ranks of the government has exceeded all imaginable proportions. The country has been rendered into a cauldron of hate and prejudice. The stories about bribery, graft, commissions and other methods of corruption can put to shame the worst during the the Byzantine Empire. The main concern of legislative members is the transfers and postings of their favourites with the evident motive of making money and to use such favourites for oppressing and tyrannizing their opponents (News 1992b).

In 1995, the Vice Chairman of the Pakistan Bar Council attempted to throw himself into a cage of lions protesting unemployment, corruption and lawlessness, and chided the judiciary for not intervening in this state of affairs (Dawn 1995).

Thus, in the late 1980s and 1990s, the bar associations expanded their political priorities beyond democratic rights to speak out and mobilize on all matters of state, including foreign policy, economic policy, and welfare, and they distrusted the intent and capability of elected state institutions (Leader 1991; Khosa 1995; Lodhi 1996). The consensus view that had developed within the bar was

that political parties were corrupt and did not act in the public interest, at least as understood by the members of this urban middle-class profession, and further that the bar was uniquely positioned to advocate for the interests of the public. As a senior lawyer reminded his bar association "the purpose of the bar association should not be to promote the interests of the lawyers but to advance the public interest (Frontier Post 1991)."

For many leading members of the bar, only the institution with which they had the strongest linkages, the judiciary, could rescue the state from its decline. Justice Khosa, a current Supreme Court judge, who was a lawyer in the 1990s famously wrote "legislators passed their time passing motions about breaches of privileges, and the judiciary had to arrest this repugnancy (Azeem 2017, 224)." The National Lawyers' Conference of 1993 resolved that "the judiciary, particularly, the superior courts, at this critical juncture should serve as a symbol of liberty, equality and social justice… if the judiciary of Pakistan remains a silent spectator, its death as a lifeline of society could be inevitable (Lodhi 1993)." Dr. Khalid Ranjha, a prominent lawyer and bar association leader from Lahore said:

> "The courts can take *suo moto* (self-moved judicial actions without a petitioner moving the courts) action in the affairs pertaining to political corruption to save the system…Courts should take *suo moto* of all the corruption of the political culture and take those to task who conduct themselves in breach of political ethics (Nation 1995)."

Thus, these politically active bar associations wished to see the judiciary play a broad expansive role in the political system, intervening in the affairs and actions of other state institutions and rule on a broad range of political and socio-economic issues, in order to remove corruption and ensure the state acted in the public interest. The President of the Sindh High Court Bar Association articulated this consensus most clearly when he stated in 1999:

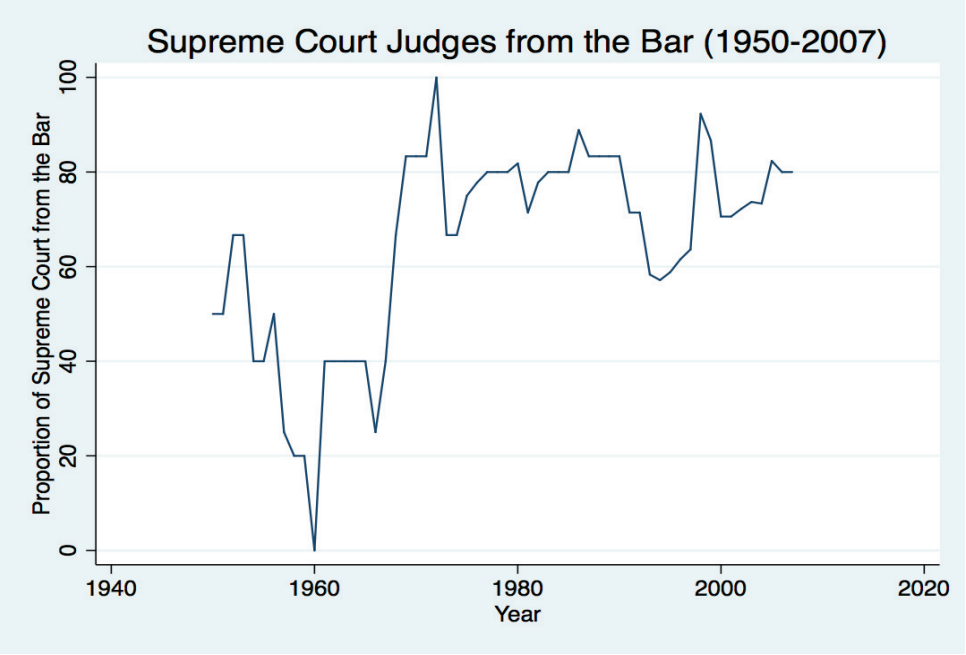
> "The edifice of our democratic system is built upon the foundations of illiteracy and ignorance...promises of just governance have become fairy tales...We need to structure a judiciary to even strike down laws which in its considered opinion are harsh, unjust...or counterproductive (Dawn 1999a)."

Thus, the bar associations had evolved considerably since the 1950s and 1960s, to become large associations teeming with lawyers from less affluent and privileged backgrounds, with less of a stake in the established political order and more attuned to the political and socio-economic concerns of the middle-class communities to which they belonged. In the absence of alternate political venues, politically active lawyers turned the bar associations into a vehicle for challenging military rule and helped entrench a norm of anti-militarism and political activism within the bar. With the end of military rule, this political activism was translated into a broader agenda of socio-economic and political reform that was to be realized through an active and judiciary with an expansive role in the political system. By the 1990s, this consensus of political and judicial activism was entrenched through the bar associations in the major urban centers of the country. As judges were increasingly recruited form and socialized in the bar, and developed closer normative interlinkages with the bar, they became more attentive to the norms and preferences for independence and political and judicial activism that developed in the bar.

Separation of Judiciary from the Executive

By the 1990s, the military's normative interlinkages with the judiciary had been gradually diminished. The 1973 Constitution began the process of separating the judiciary from the bureaucracy and ended the recruitment of judges from the executive branch, and most judges were now recruited laterally from the bar of practicing lawyers, and only a minority were promoted from the judicial bureaucracy of the lower courts.

Figure 4.2: Proportion of Supreme Court Judges Recruited from the Bar of Professional Lawyers[133]



Further, with the indigenization of the judiciary, the judiciary was now recruited from the network of middle-class lawyers that was distant from the military and bureaucratic elite, and with the politicization of the bar, judges, in the interest of building a reputation, became more responsive to the anti-military activist norms that were developing in the bar. However, even as the normative interlinkages changed, the military continued to maintain utilitarian interlinkages with the judiciary, i.e. the military remained in a position to impose material costs and benefits on judges. Between 1973 and 1994, no government facilitated the constitutionally-mandated separation of the judiciary from the executive, as the executive branch still had control over judicial appointments and transfers and the judicial budget. Under the ideal system of judicial appointments, as explained in the previous chapter, a list of nominations for judgeships was prepared by the relevant high court's Chief Justice, and the nominations went through a series of tiers of executive and judicial consultation before the President made the final decision on the nomination after completing consultation. In practice

[133]The full list of judges is provided in Appendix 2.

however, the president had the discretion to abuse this process and appoint judges unilaterally, without going through any meaningful consultation.

This was clearly highlighted during Zia's regime. Under Zia, politicians lost all influence in the matter of appointments of judges, and nearly all judges appointed under Bhutto had either resigned or been removed (Khan 1994a). The recruitment of judges was primarily in the hands of General Zia and a handful of judges, serving or retired, and a few other influential men such as Zia's Attorney General Sharifuddin Pirzada and Chief Secretary Ghulam Ishaq Khan, who had a close relationship with General Zia and his junta.[134] Lawyers had to stay in the "good books of the generals in power" in order to become judges (Khan 1994a). The safest pathway to become a judge was being appointed as a government lawyer for the regime. The offices of the Attorney General, Advocate General, or Additional Advocate General, became nurseries for appointment to the superior courts (Khan 1994a). Thus, even as judges were increasingly appointed from the bar of practicing lawyers, the military selected lawyers who were politically conservative and unwilling to "rock the boat" and had proven this through their time as government lawyers.[135]

Zia enforced his control over the judiciary during this period through his powers to confirm and transfer judges. Justice Ilyas was elevated as a judge of the Lahore High Court in 1977, but after Zia seized power he transferred him back down to the subordinate judiciary (Nation 1996b).[136] Only once a judge is confirmed is his or her tenure secured. The intended practice was that a judge was appointed as an additional judge to the High Court or the Supreme Court before being confirmed after a year or two on ad-hoc status. However, Zia's regime routinely violated this expectation, maintaining the ad-hoc status of judges. Chief Justice Haleem was appointed the acting Chief Justice of the Supreme Court in 1981 but was not confirmed until late 1984, over three years later. Zia used

[134]Interview No. L-3, May 22nd, 2017.
[135] Interview No. L—3.
[136] Similarly, in 1985, Zia transferred and demoted the acting Chief Justice of the Balochistan High Court, for allegedly passing an order that displeased the military authorities (Dawn 1985).

the same tactic with the Chief Justices of the High Courts, appointing a senior judge as the acting chief justice, but "only confirming him as Chief Justice in the last month or so of his appointment (Jan 1995)". This was done with the expectation that an acting chief justice would be more obedient than a confirmed chief justice, given that his tenure remained insecure. Ali (1991) described this practice:

> "What can a judge do when the sword of confirmation hangs over his head? An Adhoc judge needs a lot of courage, sense of duty and high degree of idealism...to risk his job by annoying the powers that be, who can send him home."

Thus, the military-led executive maintained utilitarian interlinkages with the judiciary, and those who moved forward in their judicial careers were lawyers and judges who were willing to acquiesce to military dominance within the political system. This was the era of the *controlled court* in Pakistan, where a norm of submission to the will of the military dominated the internal culture of the military. Justice Javed Iqbal, the acting Chief Justice of the Lahore High Court typified this norm of avoiding any confrontation in the controlled judiciary, stating in 1982 that "the judiciary in Pakistan currently enjoyed as much power as was necessary in a civilized…Islamic society (Muslim 1982b)". A senior lawyer explained: "During Zia's time judges would always be concerned about the military's reaction. The judges were concerned: what does the military want? We do not want to offend the military?"[137] The controlled court under Zia differed from the more loyal and collaborative court under Ayub. Under Ayub's regime the judiciary used its power to support the military, while the judiciary under Zia accepted that it was powerless to challenge the military. Justice Iqbal described the judiciary during his tenure under Zia as "helpless (Iqbal 2007)."

After Zia's regime ended, the civilian governments sought to build the same utilitarian interlinkages with the judiciary, seeking to control the judiciary in the same way that Zia had. Bhutto

[137] Interview No. L-5, May 15th, 2017.

did not have the opportunity to appoint any new judges in her first term. Nawaz Sharif, in his first government, made no improvement in the appointment process. Khan (1994b) explains that appointments under Sharif remained arbitrary, "as the politicians and the Chief Justice appointed their favourites." One senior lawyer explained "During the 1980s and early 1990s, you had to be close to the establishment or to a political party and you became a judge."[138] Further, Nawaz also maintained Zia's practice of maintaining the adhoc status of senior judges, and in 1993, the high courts of three provinces had adhoc Chief Justices and over a third of judges for the Supreme Court were also adhoc appointees (Dawn 1992b; Lodhi 1993).[139]

However, the bar associations had become more politically active and vocal than they had been before. After the restoration of democracy, leading lawyers and the bar associations started criticizing the judicial appointment system, advocating for the separation of the judiciary from the executive and a new judicial appointment system (News 1987; Morning News 1989). In 1992, the President of the Lahore High Court Bar Association Hamid Khan openly criticized the judges that had been appointed in recent years stating that "some of the judges appointed were not even known as advocates and the majority of lawyers practicing in the High Court learnt about them when they were already judges (News 1992b)." The bars of the Lahore High Court and District Courts through an unanimously adopted resolution in 1992 resolved that "the method of appointment of judges be restructured so that persons of doubtful and suspect character and conduct should not be appointed to judicial posts" and in an unprecedented move boycotted the oath taking of newly appointed judges who they did not deem qualified for the posts (Dawn 1992a; Frontier Post 1992a; Muslim 1992b)." A new consensus had also emerged within the bar that where judges do not enjoy security of tenure and

[138] Interview No. L-42.
[139] It is noteworthy that by 1994, the judiciary had gained financial autonomy. In *Government of Sindh v Sharaf Faridi* (1994), the Supreme Court ordered the "immediate separation of the judiciary from the executive branch" including guaranteeing financial autonomy. See *Government of Pakistan v Sharaf Faridi*, PLD 1994 SC 105.

are not protected against arbitrary executive action, in matters relating to their appointment the judiciary cannot function independently (Ash'ar 1992; Lodhi 1993). Instead, the Presidents of the Bar associations recommended that the practice of appointing adhoc judges be brought to an end, the executive be given minimal say in judicial appointments, and the Chief Justice of each High Court consult with the Bar about the competence and reputation of a person before appointing the individual (Frontier Post 1992a).

When Benazir Bhutto took office a second time, the PPP was convinced it had to appoint judges to the high courts that would favour them. Given that the judiciary upheld Zia's coup, the execution of Bhutto and the dissolution of Benazir Bhutto's government in 1990, many members of the PPP believed that a strong institutional bias against the PPP was locked into the judiciary. A lawyer affiliated with the PPP explained to me the party's belief that:

> "between 1988 and 1999 there was a compact between the judiciary and the army against the PPP. The Court was anti-Benazir and the PPP. Judges who had convicted and hanged Bhutto (Benazir Bhutto's father) were serving judges on the (Supreme Court) bench."[140]

Bhutto's government sought to reshape the bench by appointing judges from networks of lawyers and legal practitioners who belonged to the PPP. In 1994, "Benazir sought to appoint 20 judges all chosen by her for the Lahore High Court and nine judges were chosen for the Sindh High Court, without any input from the judges" which judges feared would "change the entire face of the court."[141] Questions were raised about the credentials and capability of these judicial appointees as they were "people who had not even seen the High Courts ever."[142] One of these appointees was simply a PPP party member who had run for a seat in the previous election and lost, before Bhutto granted him an appointment as a High Court judge.[143] Bhutto also promoted judges who she believed

[140] Interview No. L-1, May 15th, 2017.
[141] Interview No. L-88, June 5th 2017.
[142] Ibid.
[143] Interview No. J-19.

would favour the PPP and demoted judges who she felt would undermine the party's interests, and the Supreme Court was packed with as many as seven adhoc judges, almost half the total strength of the Supreme Court bench (Khan 2016). [144] Bhutto's attempts to pack the courts with loyalists generated widespread condemnation from the bar associations and opposition parties.

The Supreme Court granted leave to an appeal against Bhutto's appointment of twenty judges to the Lahore High Court to consider the constitutionality of such appointments in *Al-Jehad Trust v Federation of Pakistan* (1996).[145] The oral arguments over the next several months in the Court dealt with fundamental questions about the role and independence of Pakistan's judiciary. The government lawyers argued that executive involvement in the process of judicial appointments did not undermine the independence of the judiciary, and that judicial independence commenced with a judge's oath-taking, after which the executive could not interfere in their judgements (News 1996b). However, the opposing counsel, a prominent lawyer and bar leader Akram Sheikh, vehemently opposed this contention stating that even if judges suddenly became impartial and unbiased after being taking the oath "How will that change the public perception of the judge firmed up over the years (News 1996b)?" Thus, the opposing counsel outlined a position held within the legal community, that judges appointed through executive interference lacked credibility and legitimacy.

In a landmark decision, that came to be known as the *Judges'* judgement, the Court declared the government's appointments to the Lahore High Court illegal and drastically reduced the role of the executive in judicial appointments. On the question of ad-hoc judges, the Court held that the appointment of ad hoc judges in the Supreme Court was unconstitutional, high court Chief Justices could only have an acting position for a period of 50 days and additional judges must be confirmed within a short period of time. On the question of judicial backgrounds, when recruiting judges from

[144] Not only did she appoint Chief Justice Sajjad Ali Shah, who had been one of the dissenters in the Court's decision to uphold the presidential dissolution of the PPP government in 1990, over a more senior judge, she also demoted the highly respected Chief Justice of the Sindh High Court, Justice Nasir Aslam Zahid (Khan 1994).
[145] *Al-Jehad Trust v Federation of Pakistan*, PLD 1996 SC 324.

among advocates of the High Court, a record of actual experience as an advocate was necessary during the mandatory period of ten years of practice to qualify for judicial appointments, thus preventing the government from simply appointing political loyalists as opposed to experienced lawyers as judges. Finally, on the question of the process of judicial appointments the Court altered the consultation process that had been in place since the 1950s, by reinterpreting the "consultation" between the executive and the Chief Justices on judicial appointments to be binding on the executive. Under this new framework, the president still appointed the judges, but the opinion of the Chief Justice of Pakistan and the Chief Justice of the relevant High Court as to the fitness and suitability of a candidate for judgeship was entitled to be accepted, unless there were very strong reasons for the President to disagree, and these reasons must pertain to the candidates' judicial capabilities. Thus, the Chief Justices of the High Courts and Supreme Court now had the primary say in judicial appointments, and the executive was expected to accept their choices unless they had very compelling reasons to oppose the choices made by the Chief Justices. The historic decision had decisively reduced the utilitarian interlinkages that executive institutions maintained with the judiciary. Now, judicial appointments, promotions, transfers and confirmations were primarily in the hands of the Chief Justices (Jahangir 1996; Nation 1996a; News 1996a).

Bar associations around the country celebrated the verdict of the judiciary, and pushed for its rapid implementation, opposing any delay or compromise by the executive in this regard, even refusing to appear in the courts of judges whose appointment had been deemed unconstitutional in the *Al-Jihad* decision (Dawn 1996b; Dawn 1996c; News 1996c). Initially the PPP government opposed the decision and refused to implement it. However, combined pressure from the bar associations, political opposition and even the president, finally forced the PPP government to

comply (Dawn 1996c; Dawn 1996d; Frontier Post 1996b; Nation 1996a; News 1996d). In September 1996, Bhutto de-notified the judges who had been laid off by the *Al-Jihad* decision.[146]

The decision placed the Chief Justices in firm control of the judicial appointment process. The Bar sought a formal role in the consultation process (Dawn 1996e), but even though this formal role was not granted the decision opened an informal role for the bar to play in judicial appointments. The Pakistan Bar Council announced that it would keep a vigilant eye on the process of review and regularization of newly appointed judges in high courts (Muslim 1996). One former judge explained the change produced by the Al-Jihad decision. He said that before the judgment, there were three important considerations for becoming a judge: "where (which law firm did you start as a junior? Did you make a name (with judges) in the courtroom? What kind of contacts in uniform, and in executive office did you have?"[147] He added: "Uniformed and bureaucratic contacts were useful through the mid-90s, but the Al-Jihad decision changed this." After this the development of a "professional reputation as a lawyer" gained importance in the selection process, which meant building a reputation with High Court judges, especially the Chief Justice, and with senior bar lawyers and bar leaders became crucial. The judge explained further:

> "Reputation in the bar room is very important. You cannot hide your conduct from the bar room. Problems can be created for unwanted judicial appointments Disruptions in the court, whispering campaigns against him. I have seen this happen as a judge."[148]

Another senior lawyer explained to me why the bar associations advocated so strongly for the implementation of the decision, stating "Through this decision the bar was becoming a stakeholder in the appointment process. Before *Al-Jehad* they were not stakeholders."[149]

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[146] On the question of seniority in appointments, in *Malik Asad v Pakistan*, the judiciary held that the senior-most judge of each High Court and the Supreme Court should be appointed as the Chief Justice of each court, ending executive discretion in selecting Chief Justices. See Malik Asad Ali v Federation of Pakistan, PLD 1998 SC 161.
[147] Interview No. J-19.
[148] Ibid.
[149] Interview No. L-10.

Now that judges were the primary appointing authorities, they could not pass the blame for poorly made appointments on the executive, and faced considerable pressure from the legal community to which they belonged if they made controversial choices, unpopular among the leaders within the legal community. Being former lawyers themselves, judges were also more willing to take the advice of senior lawyers in appointing judges. After *Al-Jihad*, one experienced lawyer explained:

> "If you go only by quality of appointments made, it would not be inaccurate to say quality of appointments improved. 1997-1999 appointments of judges were those who should have been judges, They were all successful lawyers, with a reputation in the bar. The CJ was in a position where he had to take full responsibility for judicial appointments before the bar."[150]

Thus, by 1996, the transition of the judiciary away from executive authorities including the military was largely complete. Not only had the normative interlinkages between the judiciary and the military been broken, but with the *Al-Jihad* decision, the utilitarian interlinkages between the judiciary and executive authorities including the military had greatly diminished. On the other hand, the bar had not only developed normative interlinkages with the judiciary it had also developed utilitarian interlinkages with the judiciary. Thus, over this period of thirty years, the bar of professional lawyers had become a critical audience for judges, both in shaping their careers and their reputations.

Audiences Shaping the Judicial Transition

The three processes – indigenization of the judiciary, politicization of the bar, and separation of the judiciary from the executive, all served to break the interlinkages between the judiciary and the military, while gradually building new interlinkages between the judiciary and the bar, which, in turn shaped the institutional norms and preferences of the judiciary. This institutional transition provides

[150] Interview No. L-50, May 18th 2017.

the best explanation for the gradual changes in the jurisprudence of the courts outlined in the previous section.

Beginning in the late 1970s, we witness the difference between the senior judges on the Supreme Court who had been appointed during the 1950s and 1960s and the junior judges in the high courts who had been mostly appointed in the late 1960s and 1970s. As the judiciary was separated from the executive, more high court judges were being recruited from outside the executive. These judges came from a bar that was less distant and detached from mass politics compared to their predecessors. Further, for these judges, the initial years of experience on the bench occurred under the empowering 1973 Constitution and was spent resisting Bhutto's efforts to undermine their constitutionally granted powers. These judges differed from their seniors on the question of the political role and independence of the judiciary.

The biographies of the senior most judge of the Supreme Court and the junior most judge of the Supreme Court at the time of the introduction of the PCO in 1981 help highlight the change in the judiciary. Justice Anwar-ul-Haq, the Chief Justice, was a former civil servant educated at Oxford University, who had been a member of the Civil Service under British rule and continued to serve in the bureaucracy until he was appointed a High Court judge in the Lahore High Court during Ayub Khan's regime. On the other hand, Justice Fakhruddin Ebrahim, who had just been promoted to the High Court in 1981, a few months prior to the introduction of the PCO had studied at SM Law College in Karachi and went on to become a successful lawyer, before briefly becoming Attorney-General in Bhutto's government for a year, after which he was elevated to the Sindh High Court in 1973. Thus Justice Ebrahim served as a young lawyer when Ayub Khan fell, and became a judge under the 1973 Constitution, appointed by an elected civilian government.

Justice Anwar ul Haq, as Chief Justice, most actively sought a collaborative relationship with the Zia's regime. As the author of the *Nusrat Bhutto* decision, he gave Zia wide discretion, and then

in subsequent judgments authored by him, he further augmented that discretion. He also devised the oath that all judges were expected to take in 1977, carefully removing any mention of the 1973 Constitution from the oath, to ensure that judges, by taking the oath, recognized Zia's new political and constitutional order (Patel 1997). Under Anwar-ul-Haq the Supreme Court rarely challenged the military regime. He did not conceal his bias against the populism of Bhutto and the PPP, asking senior lawyers in 1978 to "educate the people so they do not repeat the mistake of electing the wrong representatives in the general election (Dawn 1978a). Anwar-ul-Haq sought to establish the close collaborative relationship with Zia, that Cornelius and Munir had enjoyed with Ayub Khan.

On the other hand, Justice Ebrahim, as a Sindh High Court judge, was one of the judges who authored the *Mumtaz Bhutto* decision that restricted the detention powers of the military regime, placing the judiciary in a position to check the military regime's actions. He had been appointed by Bhutto, and thus, given both his professional background and his appointing authority, Ebrahim had fewer linkages with the military. By 1981, Justice Ebrahim and several other judges who had been involved in jurisprudence at the High Court level that sought to place some checks on the martial law administrators were in line to be elevated to the Supreme Court, indicating the movement of the Court away from a collaborative approach to the military. Ebrahim refused to take an oath under Zia's PCO in 1981 and became an outspoken critic of the military regime in subsequent years.

The two biographies show how judges who were primarily recruited from the bar of locally-educated lawyers that had grown more politically active, sought to play a more active and less collaborative role as judges than their predecessors. Thus, the internal culture of the judiciary was beginning to shift and this shift started in the High Courts, slowly percolating up to the Supreme Court, as judges moved from the High Court to the Supreme Court, which explains the contrasting approaches taken by the Supreme Court and High Ciourts during this period.

It is important to state here though, the changes in the judiciary were still only limited. Most

judges were still unwilling to actually challenge the laws promulgated by the regime, and the majority of judges still took the oath under the restrictive PCO of 1981 to preserve their careers.

During the period from 1981 to 1985, we see no increase in contestation of the military from the judiciary, but this was a period where the judiciary was under the tight control of the military, with its jurisdiction narrowed, making it very difficult for the judiciary to challenge the military. However, when this period ended, the judiciary faced a crisis of legitimacy. With a politically active bar now opposing the military, judges recruited from the bar grew increasingly concerned about their reputations with the bar. Justice Iqbal, who had served as Zia's Chief Justice in the Lahore High Courts articulated this legitimacy crisis in his retirement speech.

> "During General Zia's dictatorial rule the superior judiciary was irreparably damaged…Judges were required to take repeatedly the oath of allegiance, which made each judge a controversial functionary. Those judges who continued to serve in the courts were accused of being collaborators of dictatorship. Those judges who were ejected from the judiciary claimed to be Shaheed (martyrs), and those who resigned called themselves Ghazi (warriors) (Iqbal 224)."

Justice Iqbal's speech highlights the reputation crisis faced by judges who had chosen to serve under Zia's PCO, while judges who did not serve under Zia became heroes in the bar. This legitimacy crisis faced by judges helps explain the judiciary's approach after the resumption of constitutional democracy. The decisions in the late 1980s, opening up military courts to legal challenges, striking down the martial law ordinance banning political parties, and articulating a new socio-economic role, were all significant breakthroughs after the dormancy of the previous few years. Khan (2015) argued that these decisions of the court were spurred by a need to reclaim legitimacy for the courts, but the question left unanswered was: who did the courts require legitimacy from? This legitimacy was sought from the bar, the community of lawyers from which judges emerged, which judges went back to after retirement, and which populated the courtrooms in which these judges worked. The landmark decisions the judiciary took were in line with the growing consensus within

the bar that favoured opposition to the military courts during Zia's martial law regime and a broader political and socio-economic role for the judiciary after the regime ended.

During the 1990s the court cautiously expanded its role and jurisdiction, even over affairs of the military. During this period, bar associations not only called for the courts to play a more active, expansive role, but they also openly criticized and protested against judges viewed as puppets of the executive institutions. In this environment, it became increasingly important for judges to establish their independence from other institutions in order to maintain their reputations. We also see that the judiciary's assertiveness towards the military increased after 1996, once the judiciary established its separation from the executive, and cut the remaining interlinkages with the executive institutions. After this, the judiciary started expanding its role across the political system. The courts initiated *suo moto* (self-moved, without a petitioner) proceedings to look into the deteriorating law and order situation in the state, (Haider 1997), working conditions for school teachers (Dawn 1999a), and political appointments to government bureaucracies (Frontier Post 1996b), among other issues. This expansion and preservation of jurisdiction was also directed towards the military. Whether it was addressing detentions and torture during security operations or opposing the establishment of parallel military-run judicial systems, the courts were more assertively expanding their jurisdiction towards the latter half of the 1990s. This was especially true once the institutional interlinkages tying the judiciary to the military and other executive institutions had been largely severed, and the bar and the bench had drawn a lot closer.

In the late 90s, we see the close nexus between the bar and the bench, and the important and growing role the bar was playing in the affairs of the bench. When a conflict emerged between two groups of judges on the Supreme Court, it was leaders of the bar associations who intervened to mediate the dispute between the two factions and help resolve the issues (Khan 2016). After the *Al-Jehad* decision the bar began closely monitoring judicial appointments and the conduct of judges

(Dawn 1999b). As a Supreme Court judge from the late 1990s told me, "Who is a judges' audience? It is basically first the lawyers, second the media. And then it is the political groupings."[151]

Justice Wajihuddin, the junior most judge on the Supreme Court in 1999, exemplified the change that had taken place in the judiciary over the course of this period. Justice Wajihuddin had graduated from SM Law College in Karachi, and was a practicing lawyer during the 1980s. He was the President of the Karachi Bar Association in 1981, when the Karachi Bar Association was mobilizing in protest against Zia's regime. He went on to become a high court judge in 1988, and became Chief Justice of the Sindh High Court, before being elevated to the Supreme Court in 1998, a year before the next military coup. Justice Wajihuddin was a bar leader and practicing lawyer during a time when an agenda of political activism was being promoted in the bar. When he became Chief Justice of the Sindh High Court, this activism travelled with him, as he conducted the largest number of *suo moto* actions during the 1990s. In the elevation of Wajihuddin from the bar to the bench, we see the transmission of the same activist ideals from the bar to the bench. Justice Wajihuddin's understanding of the judiciary was best exemplified in a speech he gave in 1997, when he said "*suo motu* and public interest litigation initiated by the superior courts are the hall mark of our judicial activism…And it is the legal community, the lawyers, which ultimately must come to man the judiciary and judicial offices (Frontier Post 1997b)." Thus, for Justice Wajihuddin, a close relationship between the bar and the bench, and an expansive role for the judiciary were cornerstones of his judicial philosophy.[152]

The changing approach of the judiciary towards the military can therefore be best explained by a change in norms and preferences within the judiciary. Over time a consensus developed in the judiciary favouring a more independent court with a more expansive role in the political system that

[151] Interview No. J-15, April 1st 2017.
[152] Justice Wajihuddin also refused to take oath under the next military dictatorship in 2000.

did not collaborate with the military. From the increased assertiveness under Zia's regime in the late 1970s, to the independent path struck by the judiciary after the restoration of the constitution in the late 1980s, to the cautious expansion of the judiciary's authority and jurisdiction in the 1990s, we see that the judiciary's gradual evolution can be explained by the increased significance of a politically active and oppositional bar as an audience shaping the norms and preferences the judiciary. Importantly, this transition was only complete by the end of the 1990s, and thus the full impact of this evolution would only be seen in subsequent years after 2000, which will be discussed in the next chapter, but this evolution of the judiciary is the best explanation for the variation in the judicial behaviour towards the military during this period. As a senior lawyer I spoke to explained:

> "Reputation with the bar matters because, 1: if you are accepted well with the bar, then your appointment is likely to be less to be controversial. 2. The judges want legitimacy from the bar as well...for their legacy…In short, lawyers are the constituency of the judge."[153]

Conclusion

To summarize, the judiciary shifted from active collaboration with the military to growing more independent from the military and seeking a more expansive role and wider jurisdiction over the period from 1977 to 1999. The military continued to wield considerable influence over the judiciary through much of this period, and sought to control the courts, and the waxing and waning of military power played an important role in explaining the variation in judicial behavior towards the military. However, my argument is that the changes in the longstanding institutional interlinkages between the judiciary and other institutions best explain the changes in the norms and preferences of the judiciary. As the military's interlinkages with the judiciary diminished it seized being a critical

[153] Interview No. L-42.

audience for the judiciary, while the politically active bar of professional lawyers became an increasingly effective audience in the development of both the reputations and, later, the careers, of judges. This change in audiences best explains the change in norms and preferences within the judiciary, and as I will show in the next chapter, its impact was fully realized in the judiciary's behavior towards the military after the turn of the century.

Chapter 5

THE TRANSACTIONAL COURT – 1999-2015

The Judiciary Challenges the Military

Introduction

In this chapter I describe and explain the judiciary's increasing assertiveness and clashes with the military during the period from 1999 to 2015. The chapter is divided into two sections. The first section discusses the trajectory of judicial-military relations during this period. It is divided into three phases: i) 1999 to 2005, the early years of Musharraf's rule when the judiciary remained cautious, ii) 2005 to 2008, when Justice Iftikhar Chaudhry became Chief Justice and the judiciary and military clashed leading to the suspension of the constitution and the fall of the military regime, and iii) 2008 to 2015, the period of constitutional democratic rule. In each period, I discuss the prevailing political situation, the position and interests of the military, and the judiciary's relationship with the military as demonstrated through its jurisprudence. Through this period, I show that the judiciary adopted a more transactional and assertive approach towards the military, beginning cautiously with the military's economic prerogatives, and gradually shifting to challenging the military's political agenda and undermining the foundations of the military regime, before seeking to supplant the military as the overseer of Pakistan's democratic political order.[154]

[154] By transactional, I mean developing interests and preferences independent from the military, and only supporting the military when these interests aligned, and confronting the military when these interests clashed.

In the second section of this chapter, I seek to explain the judicial-military relationship outlined in the first section. I first show that regime-related factors, namely the prevailing political configuration and the authority and influence of the military, did play a role in shaping the trajectory of the judiciary's jurisprudence, but they cannot alone explain the emergence of judicial assertiveness in the absence of meaningful political openings. I also show that an explanation based on the judiciary's interest in gaining media support and popular legitimacy does not tell us who the judiciary primarily sought support and legitimacy from. I then argue that the incremental shift in the judiciary towards increased independence from the military and growing institutional interlinkages with the politically active bar of professional lawyers, as described in the previous chapter, reshaped the norms and preferences of the judiciary. This process of changing audiences manifested itself in the activist and populist norms and preferences in the judiciary during this period. I use a combination of archival information on judicial appointments and bar association politics, judicial rhetoric on and off the bench, and interviews with judges and lawyers to demonstrate how the judiciary developed its norms and preferences in response to the bar as its key audience, and how the change in audiences discussed in the previous chapter best explains the judiciary's increasingly transactional and confrontational approach to the military during this period.

SECTION I: The Emergence of the Judicial-Military Confrontation

1999-2005: Consolidation of Musharraf's Regime

On 12th October 1999, the military seized power once more, ending the tumultuous democratic decade. In the year prior to the coup, the military had fallen out with the elected government of Nawaz Sharif. Sharif, in a bid to forestall the coup, forced the Chief of Army Staff, General Pervez Musharraf into retirement, while he was on a visit to Sri Lanka, and then, in a final act of desperation, sought to divert the plane carrying Musharraf back to Pakistan from landing as scheduled. However, by then it was too late, as the military took over the airport and other key state facilities, and, after Musharraf's plane landed, he announced the successful military takeover. Musharraf followed the template of previous coup d'etats, declaring a state of emergency, holding the constitution in abeyance, sacking the government, and suspending the national and provincial assemblies (Shah 2014b). He also issued a new Provisional Constitutional Order, the PCO No. 1 of 1999, as the primary governing instrument of the new regime.

However, Musharraf, perhaps concerned about his international legitimacy in a post-Cold War era where democracy had become a global norm, sought to give his regime a 'softer' and less militaristic image (Shah 2014b). Musharraf declared a state of emergency but refused to formally impose martial law and chose the nebulous and corporate title of 'Chief Executive' as opposed to the more authoritarian title of 'Chief Martial Law Administrator' used by previous dictators, stating "This is not martial law, only another path towards democracy (Shah)." Musharraf also kept fundamental rights intact and did not ban political parties. There was no blanket press censorship, and he promised to liberalize private television and radio channels.

Musharraf established three key institutions to further his ruling agenda. He created a military-dominated National Security Council, that was to advise him on all matters of governance and foreign policy. The National Security Council was served by a cabinet comprising of businessmen and technocrats without connections to political parties. Musharraf also created the National Accountability Bureau to reorganize the political order of the state. He made the drive against corruption "the centerpiece of his rhetoric" and blamed Pakistan's problems over the last few decades on the corruption of the political class (Shah). The National Accountability Bureau (NAB) was headed by a military officer and was given a broad mandate to investigate complaints of corruption. Dozens of politicians were fined or put out of action, particularly from the two leading political parties, Bhutto's PPP and Sharif's PML-N (Jaffrelot 2015). However, members of two institutions, the military and the superior judiciary were exempt from the jurisdiction of NAB, on the pretext that armed forces and the superior judiciary had procedures to deal with their 'bad eggs,' highlighting the selective accountability being practiced by the regime (Khan 1999). Nawaz Sharif was tried on charges of hijacking and terrorism for his fateful decision to divert the plane bringing Musharraf back to Pakistan, and after an eventful trial, that will be discussed in more detail in this chapter, he was sent into exile.

In spite of Musharraf's efforts to soften the image of the regime, he initially faced diplomatic isolation and sanctions. However, after the attacks of September 11th, 20001, the Pakistani military became a critical frontline ally in the US-led fight against Al-Qaeda (Shah 2014b). In return for Pakistan's cooperation, sanctions were lifted and large sums of western military and economic aid helped bolster the regime. With his political rivals out of the country, an improving economy, and good relations with the west, Musharraf's rule was consolidated, and the military planned out a long-term political arrangement with the military at the helm.

In anticipation of the resumption of constitutional rule, Musharraf followed the strategies used by his predecessors. He first ousted the figurehead President and appointed himself President, abandoning the designation of Chief Executive. In April 2002, he held a controversial referendum that was intended to legitimize his rule for five more years. The result predictably delivered him a resounding victory. In August 2002, he introduced a new package of constitutional reforms known as the Legal Framework Order (LFO) to restructure the parliamentary system. Executive power was shifted once more from the elected parliament to the presidency, the role of the National Security Council was formalized and Article 270-AA validated all actions taken by the regime since it seized power in October 1999. Having ensured his presidency for five more years and institutionalized the role of the military at the helm of Pakistan's constitutional order, Musharraf organized parliamentary elections in October 2002. Since he did not ban political parties, unlike his predecessor, Musharraf's elections were party-based. Having decided to allow political parties to run, Musharraf had to ensure that a party aligned with the regime's interests won the election. Musharraf founded the Pakistan Muslim League – Quaid or PML-Q just before the election, an amalgamation of local notables and politicians who defected from other political parties, primarily the PML-N. The new parliament was sworn in, and, the PML-Q, with a comfortable majority amended the Constitution in line with Musharraf's LFO, thus institutionalizing Musharraf's civilianized military regime.

During Musharraf's regime, the military's imprint on the Pakistani economy grew exponentially. By 2007 the army controlled about 12 percent of the arable land owned by the state, and this rural land was valued at over eleven billion dollars (Siddiqua 2007). The army also acquired highly valued urban real estate, as defense housing societies proliferated and expanded around the country, and the military got actively involved in the business of real estate development (Siddiqua). Military-run and affiliated companies were given vast funding by the government to expand their activities, and some companies expanded their commercial ventures abroad. Retired military officers

took up other roles in private ventures, on the boards of major private companies, and in administrative positions in universities (Shah 2014b). Under Zia the country saw the militarization of the bureaucracy, and under Musharraf, the country saw the militarization of the private sector economy.

By 2005, Musharraf's military regime was firmly established, as its political opponents had been exiled and Musharraf held both the offices of the President and the Chief of Army Staff, while the military's role at the helm of the state was formalized, and its role in the economy and society expanded.

Judicial-Military Relations under Musharraf's Regime

Initially when Musharraf took power, the judiciary proceeded cautiously. The Supreme Court (henceforth known as the Court) judges held a meeting two days after the coup and decided to preside the courts and continue business as usual (Iqbal 1999). Article 2 of the PCO maintained that the country would be governed as nearly as possible in accordance with the 1973 Constitution, and allowed the conditional functioning of the courts, as long as the enforcement of the constitution did not conflict with the PCO (Ahmad 1999). Chief Justice Saeeduzzaman Siddiqui had met with Musharraf who he claimed had given him an assurance that the judiciary would continue their role under the 1973 Constitution and would not be expected to swear a new oath under the PCO.[155] Musharraf even ordered judges to take oath under the original 1973 Constitution and before a person nominated under that Constitution in December 1999 (Zia 1999). Thus, the regime ensured the judiciary that its takeover was only intended to be temporary before a return to constitutional rule.

[155] Interview L-14, March 15th, 2017.

However, the judiciary could not postpone dealing with questions about the legality of the regime for too long, as two important petitions came before the Court: the arrest and trial of Sharif, and a petition by his party challenging the military's seizure of power (News 1999b). In a replay of Zia's takeover from 22 years earlier, the judiciary had to rule on the validity of the military coup, and the criminal guilt of an ousted Prime Minister. The Court accepted the petition challenging the coup and the PCO in December 1999 and scheduled regular hearings of the case from January 31st, 2000 (Frontier Post 1999a). The Court also issued notices to all the bar associations of the country, and the leading government lawyers in each province to appear before the courts and give their legal advice in the case (Dawn 1999d; Dawn 1999e; Dawn 1999f). On January 26th, mere days before the Court began its hearings, Musharraf reneged on his assurance to allow the judges to continue in office without taking a new oath. The government announced a new Oath Act under which judges were expected to swear an oath to the very Provisional Constitutional Order which was being challenged in this petition. The Text of the Oath of Office order stated:

> "Whereas in pursuance of the emergency, and the Provisional Constitutional Order No. 1 of 1999, as amended, the constitution of the Islamic Republic of Pakistan, has been held in abeyance. Whereas Pakistan is to be governed as nearly as may be in accordance with the Constitution and the Chief Executive has and shall be deemed to always have had the power to amend the constitution. …And whereas to enable the judges of the Superior Courts to discharge their functions, it is necessary that they take oath of their office (Dawn 2000b).

Why did the regime now require an oath from the judges? A retired judge explained that the government had been in discussions with Chief Justice Siddiqui about the petition challenging the legality of the regime, and Siddiqui had said:

> "Elections will have to be done in 90 days. If you do this we will dismiss all petitions (challenging the coup). There will be no PCOs. And no amendments to the Constitution which will be restored. But Musharraf said no."[156]

[156] Interview No. J-4, June 18th, 2017.

Musharraf used the Oath to force these judges to accept his new Provisional Constitutional Order (PCO) and purge judges who were expected to challenge the regime, as it would be difficult for judges to rule against a constitutional order to which they had sworn an oath. A majority of judges took the oath in order to preserve their careers (Ashraf 2000). Significantly, however, six justices of the Supreme Court including the Chief Justice refused to take the oath choosing to step down. The report that almost half of the judges of the Supreme Court including the Chief Justice did not take a fresh oath under the PCO "stunned the legal community and the intelligentsia throughout Pakistan (Nation 2000a)." At the High Court level several judges who the military saw as potential threats were refused the oath, and thus were automatically removed from the judiciary (Mumtaz 2000; Amir 2000). [157] Several prominent High Court judges were initially reluctant to take the oath, including Justice Jawwad Khawaja of the Lahore High Court and Justice Sardar Raza and Justice Nasir ul Mulk of the Peshawar High Court, but their colleagues convinced them to take the oath so they could stay on the bench (Mumtaz 2000; Frontier Post 2000). Thus, a majority of judges took the oath to preserve their careers, but the en bloc refusal by Supreme Court judges undermined credibility and legitimacy the military sought to gain from a favourable verdict from the Court. Musharraf had purged the judiciary of potential challengers and ensured the judiciary would uphold his coup, but the show of defiance by a large group of Supreme Court judges was unprecedented and demonstrated the growing independence of the judiciary from the military.

In *Zafar Ali Shah v Pervez Musharraf* (2000), the Court granted Musharraf the judicial validation he sought.[158] During the proceedings, the new Chief Justice Irshad Hasan Khan, criticized elected politicians, stating that politicians acted as dictators when in power and "they spoke of rule of law but scandalized the judiciary (Hussain 2000b)." When the counsels challenging the coup argued

[157] Justice Rashid Rizvi of the Sindh High Court, for example, was not called for the oath allegedly "because he was known to go after the Rangers (the military's paramilitary outfit) a lot in court." Interview No. J-65, March 14th, 2017.
[158] *Syed Zafar Ali Shah v Pervez Musharraf*, 2000 PLD SC 869.

that the Supreme Court had unambiguously buried the Doctrine of Necessity that had been used to validate previous military coups, in *Liaquat Hussain* (1999), Justice Irshad responded that "science had progressed to an extent that even the dead can be brought to life (Hussain 2000a)." There was hardly any uncertainty that the judiciary would uphold the coup. In April 2000, the Court upheld Musharraf's coup on similar grounds as had been used in the *Nusrat Bhutto* case over 22 years ago to uphold Zia's coup. The Court resurrected the Doctrine of Necessity once more, listing all the transgressions of the previous government and holding that the situation that had arisen did not have a constitutional solution, and necessitated an extra-constitutional intervention (Dawn 2000f) . The Court's decision gave Musharraf's regime far reaching powers, approving Musharraf's seven-point plan for Pakistan, providing him a generous period of three years before holding elections, and even granting him the powers to take whatever legislative actions he deemed necessary, in order to accomplish his aims.

But the Court held that the 1973 Constitution remained the primary legal instrument for the state, and the judiciary maintained its powers of judicial review and enforcement of fundamental rights. The Court went a lot further than the *Nusrat Bhutto* decision in articulating the role for the judiciary in the new regime. It held that the "judiciary is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals" and "foster appropriate legal and judicial environment where there is peace and security in the society of life, protection ad property, and guarantee of essential rights."[159] Justice Irshad stated that judicial independence is "conducive to economic growth and social development: and even claimed the Court would overturn any validly passed constitutional amendment which "could undermine the independence of the judiciary."[160] Thus, even as the Court granted Musharraf the discretion he asked for, it granted itself a far broader

[159] Ibid.
[160] Ibid.

role than previous coup-validating judgments had done. The judiciary had moved from an implementer of positive law in *Dosso*, to an enforcer of executive accountability in *Nusrat Bhutto*, to a policy-making institution safeguarding peace, economic growth and social development in *Zafar Ali Shah*.

The second critical verdict at the outset of the regime was the trial of Nawaz Sharif. Just as in Bhutto's trial twenty years ago, in the Plane hijacking case, the government once more sought the death penalty from the courts (Frontier Post 1999b). Sharif's trial was carried out before the same anti-terrorism courts he had created during his regime in the face of opposition from human rights groups (Nation 1999c). Military intelligence officials and members of the paramilitary force known as the Rangers were in regular attendance at the court to monitor the proceedings. Justice Shabbir found their presence disruptive and ordered the officials to leave the courtroom, and when they refused to vacate the courtroom, he referred the case to the court of the more senior Justice Jafri (News 2000; Amin 2000). Later, during the proceedings the court considered imposing a reporting ban when Sharif's defense team gave evidence which led to two of Sharif's leading lawyers stepping down from the case (McCarthy 2000). Most disturbingly, one of Sharif's defense lawyers was assassinated and his murder caused immense fear in his panel of lawyers (News 2011b). A lawyer involved with the case said "During the trial, with Iqbal Raad's assassination, who got the message? This was a pressure tactic, a message to the lawyers and the presiding judges."[161] After deliberations the Anti-Terrorism Court convicted Sharif on all counts, except attempted murder and kidnapping, but, unlike Bhutto, the court spared him the death penalty requested by the government, sentencing him to life imprisonment instead. The government appealed the decision to the Sindh High Court, asking for the death penalty to be given. The High Court upheld the decision of the lower courts,

[161] Interview No. L-84, November 26th, 2016.

including the life sentence, and Justice Osmany opined that the sentence should have been reduced to three years.[162]

These judgments highlight both the similarities and differences between the judicial-military relations during the early years of General Zia and the early years of General Musharraf. After the institutional changes in the judiciary over the past three decades (as discussed in the previous chapter) the institutional interlinkages between the judiciary and military had greatly diminished, and the judiciary was not loyal or subordinate to the military. The Court provided the military with the mandate to rule and legislate that it demanded, just as it did in 1977, but only after the Court was purged of several of its senior judges, and the Court upheld its power to overturn the regime's legislation if it undermined the judiciary. The judiciary also convicted the ousted Prime Minister, thus eliminating the regime's primary political opponent, but it did not acquiesce to the regime's demand for an execution. One lawyer I interviewed highlighted the change that had emerged in the court. "Even after taking the oath, this was not a kangaroo court, they did not give the death sentence. In Nawaz Sharif's appeal, Justice Osmany actually dissents and reduces the sentence. You will not get a judgement between 1981-1988 like that."[163]

Between 1999 and 2002, the judiciary, operating under Musharraf's PCO, remained cautious about challenging the military regime. As shown in the table below, just as in the four years under Zia's PCO, the judiciary only heard a limited number of cases pertaining to military prerogatives during this period and upheld the military's prerogatives in a majority of these cases. A High Court judge from this period explained the predicament of the judiciary: "During the Musharraf period, you had the burden of the PCO, powers had been drastically curtailed. The High Courts were particularly circumscribed."[164]

[162] *Muhammad Nawaz Sharif v State*, PLD 2002 Karachi 152.
[163] Interview No. L-94, March 18th, 2017.
[164] Interview No. J-2, November 25th, 2017.

Table 5.1: Reported Judgments Pertaining to Military Prerogatives – 1981-1985 and 1999-2002

	1981-1985	1999-2002
For the Military	21	28
Against the Military	17	21

The Court's decision-making on Musharraf's controversial referendum and constitutional amendments highlighted the judiciary's caution. The referendum was challenged before the Supreme Court as being unconstitutional. Three days before the referendum was held, in a short order, the Court rejected the petitions in *Hussain Ahmed v Pervez Musharraf* (2001) on the grounds that the petitions were premature and dealt with mere hypotheticals since the referendum had not happened and allowed the referendum to proceed.[165] Months later, after the referendum had taken place granting Musharraf an overwhelmingly favourable result, the Court ruled that an appeal to the popular sovereign of Pakistan was a democratic exercise, and upheld its constitutionality. The Court under Chief Justice Shaikh Riaz Ahmed was going out of its way to avoid challenging the regime, waiting to see how the referendum played out and what its political consequences and fall out were, and only making a decision once its outcome and impact were clear (Khan 2016). Similarly, in *Watan Party v Chief Executive, President of Pakistan* (2002), where Musharraf's constitutional amendments were challenged, the Court simply sidestepped dealing with the petition by declaring that the petition was non-maintainable as the petitioner was not affected by the amendments and therefore did not have legal standing to file the petition.[166] This Court, like its predecessor in the mid-1980s chose caution and deference when confronted with Musharraf's political agenda.

Yet the judiciary was more assertive when it came to protecting its own authority and independence. When Musharraf made complaints committees with serving members of the Pakistan army, to hear cases against public officials in the early days of the regime, the Lahore High Court

[165] *Hussain Ahmed v Pervez Musharraf,* 2002 PLD SC 853
[166] *Watan Party v Chief Executive, President of Pakistan,* 2003 PLD SC 74.

struck down these complaints committees declaring them unconstitutional.[167] Then, "even at the height of Musharraf's martial law, he could not put any martial law administrators, and he could not establish military courts, as this was unacceptable to the judges"[168] Chief Justice Irshad pushed to ensure that Musharraf did not install military courts as one former Supreme Court justice explained:

> "We had to protect our interests during that time. We had to come up with a smart strategy as Musharraf was very keen on bringing in military courts, because of the functioning of the courts…Musharraf had said: "before we take any action, let me meet Justice Irshad and talk to him." Justice Irshad anticipated his concerns, and when Musharraf asked him "Irshad sab, cases aren't happening? Work isn't happening? What happened with the Hakim Said cases and Nawaz Sharif cases?" Justice Irshad assured him that these cases had already been put on the Cause List (the list of cases up for hearing) and a press release had been put out, so there was no delay and no cause for military courts."[169]

Thus, the judiciary was not willing to broker any intrusion into its powers as the key venue for arbitration and dispute resolution or any fragmentation of its authority and was focused on preserving its institutional interests during this period.[170] The courts conceded to the military's broader political agenda but checked any attempt to circumvent its own authority and independence. Thus, even during the early years of the military regime when the military's strength and repression was at its highest, the judiciary was charting out a more independent course from the military.

In November 2002, Musharraf restored the 1973 Constitution, subject to several amendments that shifted the balance of power towards the presidency. The restoration of constitutional rule was partly prompted by the Court's decision in *Zafar Ali Shah* which had ordered elections in three years and international pressure for some movement towards democratic rule. But most importantly, the regime was confident that, in the absence of political opposition, this was a promising opportunity to establish a long-term constitutional regime with the military at the helm. With the return of the judiciary's jurisdiction, the high courts heard more petitions regarding the military's prerogatives.

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[167] Interview No. J-50, November 16th, 2016.
[168] Interview No. L-94.
[169] Interview No. J-16, June 6th, 2017.
[170] We also see a similar resistance to the fragmentation of its authority in *Khan Asfandyar Wali v Federation of Pakistan*, 2001 PLD SC 607.

The judiciary remained cautious about challenging the military's political prerogatives. In *Pakistan Lawyers Forum v Federation of Pakistan* (2004), the Court accepted petitions challenging Musharraf's legislation and constitutional amendments that his loyal parliament had passed, including the 17th Amendment that formalized the transfer of power to the presidency and immunized the regime's past actions from legal challenges, and the 'President to hold another office Act 2004,' which allowed Musharraf to hold both the offices of President and Chief of Army Staff.[171] The Court rejected all the petitions, upholding the constitutional amendments and Musharraf's authority to hold two offices. The Court accepted the government's word that the parliamentary elections had been democratic, and based on this, the judiciary determined that any constitutional amendments passed by a democratically elected parliament were procedurally valid and therefore could not be subject to judicial scrutiny. The Court stated "The 17th Amendment is not merely a *proforma* rubber-stamping by Parliament of the various constitutional amendments made by General Pervez Musharraf through the LFO. Instead, it can be seen…that Parliament has independently applied its mind…and has then reached an independent conclusion." On the question of whether the president's power to hold two offices violated the parliamentary system and balance of power between the president and the elected parliament, the Court stated that Pakistan was no more a purely parliamentary system, and therefore there was no reason to consider this concentration of power in the presidency a violation of the parliamentary system. Thus, this case highlighted the judiciary's restrained and deferential approach in cases pertaining to the regime's political authority and legislative actions.

However, with the growth of the military's landed and commercial interests and deeper penetration into the economy, the judiciary issued an increasing number of judgments pertaining to the military's economic prerogatives. As the table below shows, the proportion of judicial decisions contesting the military's economic prerogatives increased during this period, even when compared to

[171] *Pakistan Lawyers Forum v Federation of Pakistan*, 2005 PLD SC 719.

the previous democratic decade. Over the course of 10 years in the 1990s, the judiciary reported 127 judgments pertaining to the military's economic prerogatives, of which only 38% of decisions went against the military, while in only four years under military rule between 2002 and 2005, the judiciary reported 44 judgments pertaining to the military's economic prerogatives, of which 61% of decisions went against the military. The judiciary was now more willing to challenge the military's economic prerogatives, even when the military was directly in charge of the political system, making such contestation riskier.

Table 5.2: Comparison of Reported Judgments Pertaining to the Military's Economic Prerogatives – 1988- 1999, 2002-2005

	1990-1999	2002-2005
For the Military	79	17
Against the Military	48	27

Individual decisions further showcase the judiciary's more assertive approach towards the military's economic prerogatives. The expansion of the military-run cantonment housing schemes and Defence Housing Authority (DHA) generated petitions challenging the administration and procedures used by military authorities to run these vast housing schemes. In *Pakistan Defence Officers' Housing Authority Karachi v Shamim Khan* (2005), the Court determined that it had the jurisdiction to interfere in DHA's granting and rescinding of plot allotments, to determine if the authorities had followed procedures or acted discriminately.[172] Similarly, in *Shahid Aleem v Pakistan Defence Officers Housing Society* (2005), the Sindh High Court limited the authority of the governing body of DHA to prescribe criteria and qualifications for registering real estate agents in the territorial jurisdiction of the DHA, holding that only a legislative body could prescribe such criteria and the DHA authorities did not hold such powers.[173] In *Clifton and Defence Traders Welfare Association v President, Clifton Cantonment Board, Karachi* (2003), the Sindh High Court also held

[172] *Pakistan Defence Officers' Housing Authority* v Shamim Khan, 2005 PLD SC 792.
[173] *Shahid Aleem v Pakistan Defence Officers' Housing Authority*, 2005 CLC 1624.

that, before authorizing the construction of billboards, the military authorities had to gain the consent of people affected by the construction of these billboards. The court held that billboards were a public nuisance and authorizing their construction without consent was a violation of fundamental rights.[174] During this period, the courts increasingly exercised jurisdiction over the procedures used by the military authorities to manage their vast landed interests and housing schemes.[175]

The judiciary's increased scrutiny of the military's commercial interests was in line with an increased focus on socio-economic litigation and human rights issues, and an expansion of its jurisdiction to deal with such issues. As discussed in the previous chapter, as the judiciary moved further from the military and drew closer to the bar it shifted to articulating a broader socio-economic role for itself and asserting greater independence from executive institutions. Public interest litigation referred to the idea that if a matter of significant public importance arose and it related to the enforcement of fundamental rights, procedural restrictions should not impede the hearing of these cases, and therefore, under Article 184(3) of the Constitution, the Supreme Court could directly exercise jurisdiction to tackle such cases. The impetus behind public interest litigation was the notion that the most deprived, suppressed and economically vulnerable segments of society should be able to have their rights enforced, and the courts were willing to bypass procedural restrictions to directly intervene and ensure that their issues were heard and rights were enforced (Siddiqui 2015). Siddiqui (2015) writes that before 2002, the Court accepted very few constitutional petitions under article 184(3), but this number went up from 11 in 2001 to 42 in 2002, and then 58 in 2003. Ghias (2010) explains that there was a rapid pace of neo-liberal economic growth under Musharraf particularly after the surge in foreign direct investment since 2001, and the aggressive liberalization policies

[174] *Clifton and Defence Traders' Welfare Association v President, Clifton Cantonment Board, Karachi*, 2003 PLD Karachi 495.

[175] Other cases checking the prerogatives and autonomy of DHA authorities during this period included *Yasmeen v Beach Developers* 2003 YLR 1109, and *Rabia City, Residents Welfare Association v Cantonment Board, Faisal Cantt.,* 2003 MLD 627.

pursued by Musharraf's prime minister, Shaukat Aziz. In this period of rapid growth new governance challenges emerged, and the focus of public interest litigation was to protect the rights of populations negatively affected by the economic changes. The judiciary expanded its role by managing the socio-economic fall out of the liberalization process, which brought the military's economic interests and the rights of those affected by the military's economic operations and activities under increasing judicial scrutiny.

Thus, two trends were clearly apparent. On the one hand, the judiciary did not contest the military regime's political agenda, authority and governance structure, showing cautious deference and instead blaming the political class for the failures that brought about the need for the military regime and its legislative overhaul of the parliamentary system (Khan 2015). On the other hand, the judiciary emphatically protected its own jurisdiction and authority, and then asserted and expanded its role in intervening on questions of socio-economic justice, expanding its jurisdiction over the military's economic prerogatives. Even in the face of a powerful military regime, the courts continued to cautiously act upon the norms and preferences that had started to take root in the judiciary during the 1990s: protecting the independence and authority of court from military intervention, and expanding the judiciary's role in socio-economic issues, increasingly contesting the military's prerogatives on these questions.

2005-2008: The Military and the Judiciary Clash[176]

On June 29th, 2005, Chief Justice Siddiqui retired and the next senior-most judge, Justice Iftikhar Chaudhry was appointed Chief Justice. Justice Chaudhry was promoted to the Supreme Court

[176] Since the key political events during this period involve the judiciary I do not separate the discussion of the general political environment from the discussion of the role of the judiciary during this period.

when he took the oath in 2000 and he was a member of the bench for several important judgments that upheld the regime's authority and political agenda. Thus, the military did not anticipate any difficulties with a chief justice who was considered to be a Musharraf loyalist (Khan 2015). It was hard to imagine that within two years he would play a pivotal role in bringing about the downfall of the military regime.

Between 2005 and 2006, some ruptures started appearing in the steadiness of Musharraf's regime, with a rise in Islamist terrorism spreading from Pakistan's troubled tribal areas, a growing separatist insurgency in Balochistan, and increased political opposition from the religious right. However, there was no apparent threat to the political stability of the regime. Musharraf retained a comfortable majority in parliament, managed to keep the alliance of religious parties in control, maintained close relations with the United States, and his political opponents remained in exile. The regime did not foresee any real political threat (Jafferlot 2015).

Thus, there was no clear political opening or fragmenting of political authority that enabled the judiciary to assert itself and confront the military. Instead, during this period the institutional norms and preferences that developed over the previous two decades manifested themselves in a jurisprudential approach that strongly favoured independence from the military and an expanded, visible role for the judiciary, which claimed to represent the public interest against other power centers including the military. In the absence of interlinkages between the judiciary and the military, the judiciary was unlikely to accept a subordinate role to the military regime. Growing interlinkages between the judiciary and the activist bar associations, fostered the populism and activism that became most evident in these two years, and inevitably led to a clash between the judiciary and the military.

Under Chief Justice Chaudhry, the most significant change taking place was the explosive growth in public interest litigation. One of the first steps that the court took up was to reactivate the

Human Rights Cell of the Court to reduce the backlog of human rights cases and other public interest litigation cases (Khan 2015; Siddiqui 201.) The Human Rights Cell received numerous complaints about human rights violations and converted these into formal human rights petitions. The Court also took up an increasing number of cases *suo moto* (on its own motion, without a petitioner), if it determined that an issue was one of significant public importance and raised the question of the enforcement of fundamental rights. Between 2002 and 2004 the Court only took *suo moto* action in 14 cases, but this then went up to 15 *suo moto* cases within 2005 alone (Siddiqui 2015). Similarly, the number of human rights cases before the Court went up from 0 in 2004, to 12 in 2005, to 80 in 2006.

The initial focus of the public interest litigation under Chaudhry involved regulating the process of economic liberalization by intervening in issues such as unsafe high-rise construction, questionable land acquisitions and zoning of prime real estate, regulation of price controls that effected the prices of basic commodities, and transparency in the privatization of state enterprises (Ghias 2010). The literature on this period tends to focus exclusively on Chief Justice Chaudhry's public interest jurisprudence and describes this as his carefully crafted and path-breaking strategy to judicialize governance and build legitimacy for the Supreme Court (Ghias 2010; Khan 2015). Undoubtedly, Chaudhry was responsible for the rapid surge in public interest litigation and a new phase of judicial activism by the Supreme Court, but as the discussion of the period from 2002 to 2005 shows, the high courts were already engaging with the regulatory challenges posed by the new liberalizing economy. This expansive role for the judiciary was not pioneered by Justice Chaudhry but was percolating upwards from the High Courts before being adopted by the Chaudhry court.

However, under Chaudhry, what was unprecedented was his interference in the security prerogatives of the military regime. During the war on terror that the military and intelligence agencies had been fighting since 2001, a growing number of people had been reported missing who had allegedly been detained in undisclosed locations as a part of counter-terrorism activities. These

enforced disappearances were reported by newspapers and human rights groups. In December 2005, after noting a newspaper article about the enforced disappearances, the Court took *suo moto* action and directed the government to either produce the detainees or provide information about their whereabouts. The *suo moto* intervention invited a flood of petitions, and the Court was now intervening in the fall out from the security operations of the military. The Supreme Court was not the only court intervening in military court cases. The Sindh High Court followed the Court's lead, and in *Abdullah Baloch v Federation of Pakistan* and *Naz Bibi v SHO*, the court exercised jurisdiction over enforced disappearances, and asked for the production of disappeared detainees.[177]

The Missing Persons cases also highlighted a new aspect of jurisprudence under Chaudhry. The Court started taking *suo moto* notice of issues based on newspaper articles. If a news item struck a chord with an individual judge, the chief justice could directly convert it into a petition. Khan (2015) explains this created a feedback loop between the Supreme Court and the media, as the newspapers and electronic media reported on an important policy failure or human rights issue, the court took notice of it, and the media outlets publicized the court's actions. With the passage of time, as the number of *suo moto* cases increased rapidly, the courts became media favourites, as they picked up issues that had been the focus of media coverage. The Court developed an unprecedented level of visibility. The *suo moto* power was a potent tool in the hands of the Chief Justice, as there were no prescribed standards or criteria for determining if an issue was worthy of *suo moto* action, and it was entirely at the discretion of the Chief Justice if he wanted to intervene, making it easy for him to respond to popular sentiments and issues that would maximize the visibility, popularity and impact of the courts (News 2007c). Bar associations lauded and celebrated the judiciary's increased interventions in a wide range of governance issues, and scrutiny of policies and actions undertaken by the military.

[177] *Abdullah Baloch v Federation of Pakistan*, 2006 PLD Karachi 584; Naz Bibi v SHO, 2006 PCr LJ 1447.

While initially the judiciary's renewed activism was focused on low-level governance problems that did not directly challenge the military's core interests, this began to change as the judiciary grew more ambitious in challenging the military starting with the missing persons cases. The turning point came when the Court stalled the privatization of Pakistan's largest state-owned steel mill through its public interest litigation in *Watan Party v Federation of Pakistan* (2006).[178] While this case did not deal directly with the military's prerogatives, this privatization was a cornerstone of Musharraf's economic agenda. A nine-member bench of the Court held that the process of privatization was vitiated by "acts of omissions and commissions on the part of State functionaries reflecting violations of mandatory provisions of the law."[179] The proceedings of the case shed light on the concerns and priorities of the judges. Justice Chaudhry observed that though the court does not formulate policies, but it had a mandate to "adjudicate as to whether the privatization policies were in the national interest…or not (News 2006a)." As Justice Chaudhry articulated the court's policy-making priorities, Justice Buttar voiced the Court's policy preferences stating that "entities having strategic importance cannot be sold to foreign investors and privatization of state-owned strategic entities is against the universal law (News 2006a)." The remarks of the judges during the proceedings showed that the judges had little concern for legal requirements, procedure or precedent, and the restraints these placed upon the judiciary's ability to intervene in policy-making, as the Court articulated a broader mandate to determine if policies were being made in the national interest and referred to universal principles rather than statutory law. As one senior lawyer, who was highly critical of the judgement opined:

> "Pakistan Steel Mills judgement looked ridiculous. The judges did not know the ABC of economics. Any objectivity and established legal principles were sacrificed because of Chaudhry's sense of 'justice.'[180]

[178] *Watan Party v Federation of Pakistan*, 2006 PLD SC 697.
[179] Ibid
[180] Interview L-22, April 16th 2017.

The Steel Mills decision had significant repercussions on the relationship between the judiciary and the military. One lawyer explained that: "The first real opposition of the judiciary to the military came in 2006. They would not tolerate the Steel Mills privatization. This sent a signal that the court intended to be disruptive."[181] In 2007, the terms of both the president and the parliament were expected to expire, creating the possibility of legal challenges to i) Musharraf's re-election as President, ii) his possible postponement of the parliamentary elections, and iii) his authority to remain both President and Chief of Army Staff. The military regime was less willing to tolerate a potentially unreliable judiciary that could not be expected to guarantee the regime's political stability. (News 2007).

On March 8th 2007, a full bench of the Supreme Court issued notice to the government regarding the recovery of people who had been missing for many months after being detained by intelligence agencies (News 2007a). The following day Musharraf summoned Justice Chaudhry for a meeting in the military headquarters. Musharraf informed Chaudhry of a series of complaints against him including charges of corruption and nepotism and Musharraf asked him to resign from his position, but Justice Chaudhry refused to resign, even after being pressured by military intelligence (Khan 2016). Musharraf sent a presidential reference against Chaudhry to the Supreme Judicial Council, the superior judiciary's internal disciplinary body, levelling a series of allegations against him including nepotism, abuse of power and issuance of government resources. Video and images of Musharraf ordering a defiant Chaudhry to resign, and later of security officials forcing Chaudhry into a police car, spread across the media and became the catalyst for a backlash against Musharraf's regime (Ghias 2010).

The military regime's treatment of Chaudhry and his refusal to resign brought the entire lawyer's community of the country together in a movement that came to be known as the Lawyers'

[181] Interview L-62, May 26th, 2017.

Movement. The movement began with lawyers protesting in the high courts and boycotting court proceedings. The government responded to the lawyers' protests with heavy-handed tactics, attacking and injuring protesting lawyer in the court rooms. Images of the black-coated lawyers protesting and braving bleeding wounds captured the headlines week after week (Aziz 2012; Khan 2015). Business in courts around the country came to a standstill (News 2007e). Journalists swooned over the defiance of the lawyers, reporting on the unprecedented and "unshakeable solidary of the lawyers in raising the banner of the independence of the judiciary and the rule of law (Alam 2007)." Lawyers who aligned with the executive or did not throw their full weight behind the movement were thrown out of the bars and the bar councils cancelled their licenses (Alam 2007). Ahsan Bhoon, the President of the Lahore High Court Bar Association, and a known supporter of the regime "came under immense pressure to change his stance and support Iftikhar Chaudhry."[182] With regular rallies, protest events, and boycotts of the courts, the lawyers kept the momentum going for several months. The leaders of the Lawyers' Movement, Muneer Malik, Aitzaz Ahsan Ali Ahmed Kurd and Hamid Khan, turned Iftikhar Chaudhry into a political campaigner having him speak to large public rallies of lawyers and supporters around the country. When he arrived in major cities, such as Lahore, tens of thousands came to watch him and welcome him (Dawn 2007b; Malik 2008).

The Lawyers' Movement had turned the dismissal of the Chief Justice into a massive public controversy that dominated the headlines for months. In this environment, the Movement leaders were able to ensure that the reference before the Supreme Judicial Council which met and deliberated in private, was shifted to the Supreme Court, making it a public court hearing. In June 2007, the Court began its hearings on the presidential reference against Chaudhry. This was a high-stakes case in which the military took an active interest. The Court banned all unauthorized personnel including military intelligence from entering the court and ordered the removal of all bugging decides from the

[182] Interview L-90, January 25th, 2017.

courts and judges' homes (Khan 2016). The judges ruled in favour of reinstating Justice Chaudhry. Justice Ramday who presided over the bench, announced the decision to widespread celebration within the legal community (Dawn 2007c). In the detailed judgment he said that for the judiciary "The time has come to put the nation on a right path and this can be done by following the character of the Founder of Pakistan so as to strengthen the country and to remove all excessive and colourable exercise of power in each and every sphere of government."[183] In this landmark judgment the Court had directly and publicly overturned the actions of the military dictator, upheld its independence with the support of the agitation by the lawyers, and articulated a broad mission for the judiciary to save and transform the country.

Musharraf's actions against the Chief justice had backfired, triggering a mass movement led by the lawyers and greatly diminishing the regime's popularity and stability. Simultaneously the regime was also rocked by a surge in terrorist activity during the summer, including a bloody confrontation between the military and a militant mosque based in the capital city Islamabad, that left many dead and the regime facing the anger of the religious right. Amidst all these crises, the bar associations and the judiciary did not let up in challenging Musharraf. Backed by political parties and civil society, the bar associations now argued that the movement was moving beyond restoring the Chief Justice to a broader agenda of restoring constitutional democratic rule to Pakistan (Dawn 2007c; Malik 2008; Shafqat 2017). The exiled leaders of the leading political parties, former Prime Ministers Benazir Bhutto and Nawaz Sharif, were making arrangements to return back to Pakistan to prepare for the expected elections.

Amidst all this political turmoil, the judiciary grew even more activist, challenging the regime's core interests regularly. Between August and November 2007, the Supreme Court dominated the headlines daily, as the judges dealt with a range of petitions that struck at the core

[183] *Mr. Justice Iftikhar Muhsmmad Chaudhry v President of Pakistan*, 2007 PLD SC 578.

interests of the military regime. First, the Court overruled Musharraf's deal to keep Nawaz Sharif exiled abroad, allowing Sharif to return to the country (News 2007h; News 2007m). Second, the Court took up petitions challenging the National Reconciliation Ordinance, a US-brokered deal between Musharraf and Bhutto's PPP under which corruption charges against dozens of political leaders and bureaucrats would be lifted, allowing these leaders to return back to Pakistan and participate in elections on the condition that they accepted that Musharraf remained President (News 2007g). Third, the Court ordered the government to open the militant mosque that had been besieged by the government and pay compensation to all those who died during the military operation against the mosque (News 2007g). Fourth, the Court resumed proceedings of missing persons and declared that there was "irrefutable proof the missing persons are being detained by the military's secret agencies…" and ordered their release by November 13th, 2007 (News 2007l; News 2007p)." Most importantly, in October 2007, all eyes were set on the Court as it heard petitions challenging the candidacy of Musharraf in the presidential elections, particularly while he still remained Chief of Army Staff. The judiciary decided to allow Musharraf to run for President but barred the Election Commission from announcing official notification of the results until it had finally disposed the petitions challenging his candidacy (News 2007j). By October 20th 2007, the political system was at a standstill and parliament did not meet, as it awaited the Court's word (News 2007i; News 2007k; News 2007n; News 2007o). The offices of judges were bugged and members of military intelligence visited judges to offer them deals and pressure them to rule in Musharraf's favour (News 2007q).[184]

Anticipating that the Court would rule against Musharraf's candidacy, the regime decided to pre-empt this by taking drastic action. On November 3rd 2007, a state of emergency was declared and the constitution was suspended once more. Lawyers and activists around the country were arrested and detained, and curbs were placed on the media. A new Provisional Constitutional Order (PCO)

[184] Interview J-75, November 23rd, 2016.

was announced, and judges were once more asked to take a new oath under the new PCO. This time an overwhelming majority of judges in the high courts and Supreme Court refused to take the oath. In the Supreme Court, only 4 out of 17 judges agreed to take the oath. In the Sindh High Court, only four out of 28 judges took the oath. In the Lahore High Court, only 13 out of 31 judges took the oath. In the Peshawar High Court, 10 out of 16 judges took the oath. Only in the Baluchistan High Court did all 5 judges take the oath. The result was the largest purge of the judiciary in Pakistan's history as most judges were removed from the judiciary after refusing to take the oath. The regime scrambled to appoint and promote new judges who were willing to take the oath, and the judiciary under the new Chief Justice Abdul Hameed Dogar were known, derogatorily, as the PCO judges.

Musharraf was then re-elected president while still in uniform. The Court of the PCO judges upheld the new PCO and Musharraf's emergency declaration.[185] However, the regime did not last long. Agitation on the streets grew, as lawyers, civil society activists, and political parties resisted curfews and arrests and continued to pour out on the streets calling for a return to democratic rule. Lawyers refused to attend the courts of the PCO judges, and most legal activity remained at a standstill (Nation 2007; News 2007r; Dawn 2008d). Musharraf lifted the state of emergency after six weeks, after issuing a series of decrees to ensure the regime's actions in November would not be legally challenged (Gall 2007). In December 2007, Benazir Bhutto, the leader of the PPP and the country's most prominent political leader, who had returned to Pakistan in October, was assassinated. Her assassination proved to be the final blow to the regime. In February 2008, elections were held, and her party now led by her husband Asif Zardari swept to victory, and the former Prime Minister Nawaz Sharif's PML-N came in second, while Musharraf's own party, the PML-Q, was wiped out in the election. Musharraf remained president for a few months more, but as the new parliament prepared grounds to impeach him, he decided to avoid the ignominy of impeachment and resigned,

[185] *Tikka Iqbal Muhammad Khan v Federation of Pakistan*, 2008 PLD SC 178.

bringing an end to his regime. Thus, Musharraf, who's regime seemed so stable a year earlier, was forced out of power. His downfall was not triggered by his political rivals, but by his high-handedness with an activist judiciary that had established its independence and relevance, encouraged and supported by an organized and independent bar.

Even with the resumption of democracy however, the judicial crisis remained unresolved. The judiciary was now populated by Musharraf's PCO judges, and the judges who had not taken the oath, including the ousted Chief Justice Iftikhar Chaudhry, remained ousted from power (Pakistan Times 2008). The PPP's leadership had returned to Pakistan under the National Reconciliation Ordinance (NRO) that had removed corruption charges and convictions against much of its leadership.[186] Justice Chaudhry had already accepted petitions challenging the NRO while he was still Chief Justice, and if he was reinstated the government faced the possibility that the judiciary would be overruled. Further, the military had ostensibly returned to the barracks but still remained engaged in fighting the war on terror and would have preferred not having the activist judges of the Chaudhry court intervening in these security operations.

The PPP government allowed the PCO judges to remain, expanded the number of judges in the High Courts and Supreme Court and incrementally re-inducted the judges who did not take the oath back to the benches, but refused to reinstate Justice Chaudhry himself (Iqbal 2009). The bar associations continued their agitation demanding that Justice Chaudhry be reinstated, disrupting court proceedings, locking courts and protesting in the streets (Dawn 2008a; Dawn 2008b; Dawn 2008c; Nation 2008). By March 2009, the bar associations in an alliance with the leading opposition party, the PML-N, organized a Long March from Lahore to Islamabad to demand the reinstatement of Justice Chaudhry (Nation 2009). Under pressure, the PPP government conceded, and agreed to reinstate Chief Justice Chaudhry. By March 2009, nearly all the judges who had not taken

[186]This had included the late Benazir Bhutto, and her husband, Asif Zardari, who was now the President.

Musharraf's second oath, and who were still below retirement age, had returned to the courts, under Chief Justice Chaudhry.

In the short period between 2005 and 2009, the judiciary engaged in high-risk activism, challenging the military regime on its core interests and prerogatives. As the cases discussed here indicate, the judiciary was intervening in all matters of state and justifying this expansion on the grounds of representing the public interest, and this new role placed it at odds with the military. A majority of judges were willing to lose their jobs and their authority to promote this agenda, indicating how deeply the new activist norms had been entrenched in the judiciary. The mobilized support provided by the bar associations for the judiciary's activism highlighted the close synergy that had developed between the two institutions. Just as the bar associations had chided the judges when they collaborated with Musharraf's regime, the bar associations mobilized in support of judges when they challenged the regime.

2009-2015: The New Democracy and the Restored Judiciary

During the new democratic dispensation after 2009, the military carefully managed its withdrawal from power to ensure it could protect its core interests and continue to more covertly involve itself in the politics of the state. Shah (2014a) writes that the military maintained its internal and legal autonomy, control of military budgets, autonomy in relations with the executive and legislature, and control over foreign policy, defense policy and intelligence.

The country lurched from crisis to crises during this period, ensuring the military remained in a central policy-making role. The primary crisis was the threat of Islamist terrorism and the military-led war on terror. By 2008, large swathes of the country's north-west frontier province came under

de-facto control of the religious militants of the Taliban, and cities around the country faced a relentless stream of terrorist attacks (Abbas 2008). The army had been initially reluctant to launch a full-scale attack on these militants while they remained limited to Pakistan's border regions, but as they advanced into the Pakistani heartland, the military was forced to take action. Perhaps the most decisive event was the Taliban's brutal attack on an Army Public School in the city of Peshawar in 2014, in which over 100 children were killed (Dawn 2014). The military had already launched several operations against the militants before, but after the attack on the school, an operation of unprecedented scope and size was launched. The military demanded more powers and autonomy to carry out the operation, and the legislature readily granted it these powers. This included expanded discretion in detention powers and the use of force, military-run committees determining security policies in the different provinces, and the expansion of the jurisdiction of military courts to include those accused of religion-based terrorism (Dawn 2015). Thus, in the fight against terrorism the military was able to assume powers it had not even gotten during Musharraf's dictatorship, including the creation of a parallel judicial system unseen since Zia's era[187].

Beyond the war against the Taliban, the commercial capital of Karachi also witnessed a surge in violence. The war against the Taliban in the north sent a flood of refugees into Karachi, triggering ethnic tensions between the different ethnic groups in the city. The Taliban also increased their presence in the city adding to the mix of violence and insecurity in the city. The military was given powers to take the lead in bringing peace to the city. The military's paramilitary organization, the Rangers, took the lead in policing responsibilities in the city, sharing and often superseding the authority of the civilian police and provincial government (Dawn 2017). Thus, during this period of violence and insecurity, the military was deeply embedded in internal policing around the country.

In 2010 the country also faced the biggest natural disaster in its recent history with a flood

[187] This is discussed in more detail in Section 2 of the dissertation.

that spread across much of the provinces of Punjab and Sindh, leaving millions homeless. Once again, the military played a central role in carrying out disaster relief, assuming civilian roles that civilian institutions simply did not have the organizational and administrative capacity to undertake (Shah 2010). Thus, through a series of crises the military maintained a wide degree of autonomy and assumed a range of roles typically managed by civilian institutions.

The civilian political parties largely acquiesced to military autonomy and authority over defense and foreign policy, but there was still contestation between the two sides over the extent of the military's authority and autonomy. The PPP government tried to bring the military intelligence service, the ISI, under more civilian control in 2008 and create a parliamentary committee on national security to determine rules of engagement and agreements with foreign militaries in 2011. However, the military continued to apply pressure through its political allies and media connections to ensure that such efforts yielded few substantive results, and the military's prerogatives remained largely intact (Shah 2014a).

In 2009, the US government signed a new law that expanded civilian aid and redirected military aid to the Pakistani army through the civilian government, making it conditional on certification that the military was operating under civilian control and keeping out of political and judicial processes (Shah 2014a). This generated tension between the government and the military, as the military had previously benefitted from direct control over military ties with the US and the military believed that the civilian ambassador to the US, a close aid of the PPP government, had orchestrated this change. The military was not willing to lose this prerogative, and in 2011 a story emerged in the media about an alleged memorandum sent by the Pakistani ambassador to the US, asking for US help against a military coup in exchange for meeting American demands regarding Pakistan's national security policy. The Director-General of the ISI claimed he had verified the story, and soon the military leadership and the political opposition used the scandal that came to be known

as ‘memo gate’ to apply pressure on the government to fire the ambassador and permit the military to maintain its control over military assistance. The government fired the ambassador, and the military retained effective control over US military assistance. Thus, during this period, there was considerable contestation between the government and the military over military prerogatives, but the military adapted its methods for preserving prerogatives and largely succeeded.

At the same time, even as the military maintained its prerogatives, its ability to manipulate the political process has been more limited than in the past. The PPP government served its entire five-year term from 2008 to 2013, the first civilian government in Pakistani history to do so, and elections were held on schedule. This was in spite of the fact that the military did actively consider ousting the PPP president (Walsh 2010). And in 2013, Nawaz Sharif, the political leader who Musharraf ousted in the coup in 1999, returned to power in a landslide victory for his party, the PML-N. The parties learned some lessons from the 1990s and reduced the levers the military had to intervene in the political process. Under the 18th constitutional Amendment, parliamentary supremacy was restored, the president was turned into a figurehead, and his powers to dissolve the assemblies were removed. During this period, Pakistan’s political parties and military were locked in a tense and volatile relationship, as political parties sought to protect their electoral turf while the military adapted its methods and utilized opportunities to preserve and expand its prerogatives under civilian rule.

The Populist Judiciary and the Military

In the aftermath of the Lawyers’ movement and the restoration of Justice Chaudhry, the judiciary achieved a level of visibility, authority and popularity that was unprecedented in its history. The judiciary was rewriting its role in the political system, stepping into the domains of the executive and legislature. Petrol prices, sugar prices, private and public-sector corruption, the cutting down of trees, land allotments, bureaucratic appointments: all these issues invited *suo moto* interventions by the

Supreme Court. Judges summoned public office holders to the court rooms and then rebuked them for not carrying out the courts orders (Waseem 2012). Given that the PPP government under President Zardari had delayed the restoration of Justice Chaudhry, the restored judiciary had little support for the elected government. The president's power to dissolve elected assemblies had been removed by 2009, but the judiciary's power to oust parliamentarians for not fulfilling vague standards of morality and sagacity, under Articles 62 and 63, remained, and they became vehicles for the unelected judiciary to manipulate the arrangement of elected power. In 2010, the Court overturned the National Reconciliation Ordinance, described earlier in the chapter, reopening corruption cases against political leaders and bureaucrats, including then President Zardari. Justice Chaudhry ordered the PPP Prime Minister Gilani to write a letter to Swiss authorities to reopen corruption cases against his president. In 2012, the Supreme Court convicted Gilani for contempt of court for refusing to write a letter to Swiss authorities, and then, based on that conviction, ousted the Prime Minister for violating the morality standards under Article 62 and 63. The courts were willing to use all the tools at their disposal to assert their will over the government in all matters of politics and policy-making and even ousted an elected Prime Minister.

In comparison to the judiciary's relentless focus on the actions of the civilian governments, and routine contestation of executive and legislative authority, there were fewer confrontations between the military and judiciary during this period than between 2005 and 2007, leading to criticisms that the judiciary served the interests of the military in constraining the electoral branches and democratic consolidation (Shah 2014a). However, this does not accurately characterize the relationship between the two unelected institutions during this period. As shown below, when we compare the judiciary's reported judgments towards the military during the two democratic periods we see that while the judiciary was slightly more deferential on security prerogatives during this period, it was considerably more assertive in contesting the military's economic prerogatives and

political and policy-making prerogatives, indicating that the increased judicial assertiveness was a new durable feature of Pakistan's jurisprudence towards the military and was not a temporary fixture of the final years of Musharraf's rule or Chief Justice Chaudhry's leadership.

Table 5.3: Comparison of Reported Judgments Pertaining to Military Prerogatives – 1989-1999 and 2009-2015

	Security Prerogatives	Economic Prerogatives	Political and Policymaking Prerogatives
Proportion of Decisions Contesting the Military (1990-1999)	42.5%	37.8%	44.2%
Proportion of Decisions Contesting the Military (2009-2015)	35.9%	55.7%	76.5%

A closer reading of these decisions further highlights how the judiciary continued to challenge the military. During this period, the courts made salient judgements challenging the special prerogatives provided to the commercial enterprises run by the military's welfare foundations. I discuss two cases that highlight the judiciary's more assertive approach to the military's commercial interests during this period. In *Army Welfare Sugar Mills Workers Union v Army Welfare Sugar Mills*, the Court overturned a long-standing precedent upholding a ban on union activities in industrial units run by the Army Welfare Trust.[188] The Court ruled that under the Industrial Workers' Ordinance, industrial workers had a right to unionize. In the past, the judiciary had held that the Army Welfare Trust, being an army welfare foundation, had a direct connection to national defense, and therefore was exempt from upholding statutory rights granted under the Industrial Workers'

[188] *Army Welfare Sugar Mills Workers' Union v Army welfare Sugar Mills*, 2009 SCMR 202.

Ordinance. However, the Court now decided that the Army Welfare Trust Sugar Mills did not possess a direct connection to national defense work, and therefore, the Industrial Workers' Ordinance applied to the sugar mills, granting workers the right to unionize. The Court narrowed its interpretation of work related to national defense and reduced the scope of this exemption provided to military-affiliated companies.

Another similarly significant judgment was the *Suo Moto Case No. 10 of 2009*, also known as the *Makro-Habib* judgment.[189] In this decision the Court cancelled a lease of land to the Army Welfare Trust to build a shopping center. Under the agreement, the Army Welfare Trust 'purchased' a large segment of prime real estate from the government for a nominal fee, and then leased the land to a Belgian retail chain to establish a shopping center on the land.[190] In 2009, the Court received letters from a concerned civil society organization and turned the letters into a petition challenging the acquisition of the land and construction of the shopping center. One of the members of this civil society organization challenged the acquisition of the land asking "The property was given to the Army Welfare Trust for only Rs. 6000. Why is the Army Welfare Trust being favoured so much if it is just a regular NGO (non-governmental organization)?"[191] The Army Welfare Trust claimed that the organization possessed a special relationship with the military, which justified the favourable terms of its land acquisition, and opaque nature of the land transfer. But the Supreme Court ruled against the Army Welfare Trust, arguing that the lease of land was illegal, as the Army Welfare Trust was a private organization that did not possess a special relationship with the state, and therefore was not permitted any special privileges in the process of land acquisitions. One of the judges who decided this case explained "Big money was involved in the decision. But these institutions were expected to

[189] *Suo Moto Case No. 10 of 2009 in Re:,* 2010 SCMR 885.
[190] At the time General Musharraf was President, and, as Chief of Army Staff, he was also the President of the Army Welfare Trust. Petitioners challenged the lease of land and construction of the shopping center before the Sindh High Court, but in 2008, a bench of PCO judges ruled in favour of the Army Welfare Trust, allegedly without even providing notification about the hearing to the petitioners. Interview No. L-7, March 10th, 2017.
[191] Interview No. L-7.

act in the public interest. They just did not do it."[192] Thus, the Court, bolstered by its mission to act in the public interest overturned this land acquisition, and designated the Army Welfare Trust a private organization exempt form special privileges. The decision drew considerable military interest and concern. The Army Welfare Trust has repeatedly asked the Court to review its decision. And the Chief of Army Staff General Kayani issued a statement to the court that the "military is beholden to defend each and every square inch of its property."[193] The military was concerned about the domino effect on its other property acquisitions. Justice Khawaja who had authored the judgment and challenged military land acquisitions in other cases as well faced a backlash "including death threats and TV programs against him and his wife."[194] Thus these two cases show that judges were less willing to accept the argument that military-run commercial organizations possessed special privileges and were more willing to scrutinize their activities and exemptions than before, even in salient cases where the military was invested in the outcome and tried to influence the court's proceedings. Thus, the judiciary continued to increase its scrutiny of the military's economic interests, challenging and even overturning military land acquistions and other special privileges previously afford to the military.

If the judiciary was willing to challenge some of the military's economic prerogatives, they were even more assertive on the military's political and policy-making prerogatives. During this period, the judiciary heard a series of petitions against the former military regime, challenging the state of emergency and the issuance of the PCO in November 2007, charging Musharraf with treason for suspending the constitution, and overruling Musharraf's right to stand for subsequent elections.[195] In *Sindh High Court Bar Association v Federation of Pakistan* (2009), the Court ruled that the PCO

[192] Interview No. J-50.
[193] Interview No. L-7.
[194] Interview No. J-50.
[195] It is noteworthy here that the judiciary did not accept petitions challenging Musharraf's original assumption of power in 1999 or the PCO of 2000, since a majority of judges on the bench had taken oath under the 2000 PCO.

was illegal and unconstitutional. The judgment was a statement by the judiciary about its past history and its new role and legitimacy.[196] The Court went through a detailed history of the judgments upholding military usurpations of power on the grounds of the Doctrine of Necessity before rejecting the Doctrine of Necessity as a justification for extra-constitutional interventions. The Court stated:

> "It is held and declared that that the doctrine of necessity…were not applicable to all or any of the unconstitutional…actions taken by General Pervez Musharraf on and from 3rd November 2007 until 15th November 2007…because they were not taken…for the welfare of the people. It is further held and declared that the doctrine of necessity…absolutely has no application to an unconstitutional and illegal assumption of power…not provided for in the constitution."

The Court's statement revealed the judiciary's guiding priorities and self-conception. The Court wanted to divorce itself from a past of complicity with military rule, and also highlight that, in separating itself from military rule, it was looking out for the welfare of the people. Thus, in this statement both the pillars of the judiciary's new role conception were clearly articulated: an opposition to military rule, and a populist mission to uphold the welfare of the people. The Court congratulated itself for being the court that "for the first time in the history of Pakistan…instead of accepting or acquiescing in the situation…acted boldly and independently" and also discussed popular support from the bar associations and from local and global media for the actions of the judiciary, to demonstrate popular legitimacy for the judiciary. After this verdict, Musharraf became liable for treason charges, and his lawyers submitted multiple petitions contesting the maintainability of treason charges against him, but the courts repeatedly upheld the treason charges against him and allowed the treason case against him to proceed.[197][198]

In 2012, the Court reopened and finally issued a verdict on a petition challenging military interference in elections that had remained undecided since the 1990s. As discussed in the previous

[196] *Sindh High Court Bar Association v Federation of Pakistan*, 2009 PLD SC 879.
[197] *Pervez Musharraf v Nadeem Ahmed* 2013 SC 585; *Federal Republic of Islamic Republic of Pakistan v Pervez Musharaf*, 2014 PCr LJ 684.
[198] The courts also did not allow Musharraf to stand for subsequent elections. See *Pervez Musharraf v Election Commission of Pakistan* 2013 CLC 1461; *Pervez Musharraf v Appellate Tribunal for General Elections* 2013 PLD Peshawar 105

chapter, the Court had accepted a petition challenging alleged rigging of the 1990 election by the ISI in 1994.[199] The Court had conducted a series of hearings but ultimately did not pursue the case any further, until it was picked up again by the Court in 2007 before Musharraf dismissed Justice Chaudhry (Dawn 2007). Finally, in 2012, the Court reopened the case and in *Muhammad Asghar Khan v Mirza Aslam Baig (*2012*)*, the Court determined that the army and ISI had acted in an unlawful manner, holding that the functions of the military are only to "defend Pakistan against external aggression of threat of war" and "act in aid of civil power when called upon to do so."[200] The judgment that the former Chief of Army Staff was liable under the 1973 Constitution and was required to uphold the constitution not subvert it. The Court ordered an investigation into the rigging of the elections to charge and try both the conspirators and beneficiaries of the rigging plot. The verdict was a significant unambiguous statement about the limited constitutional role of the military and affirmed the judiciary's stance against political manipulations by the military. As one of the lawyers involved in the case explained:

> "From 1996 to 1998, the case was not really going anywhere. The courts were humming and hawing. (Chief Justice) Sajjad Ali Shah ran into his own problems. (Chief Justice) Saeeduzzaman Siddiqui was simply not going into it. The case just hung around. Then in 2012, the Court decided to take on the case…and now we have a judgment criticizing the role of the ISI. This was not just a private decision, but an institutional indictment."[201]

Thus, the judiciary has taken a clear and unambiguous stance outlawing the military's political interventions. The judiciary's own repeated interventions in the activities of the civilian and executive legislature, coupled with its stance against military interventions were part of the judiciary's jurisprudential strategy to carve out its own role as the legitimate intervening authority,

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[199]The ISI's political cell had allegedly supplied millions of rupees to an alliance of right-wing parties led by Nawaz Sharif to oppose Bhutto's PPP in the 1990 elections.

[200]*Muhammad Asghar Khan v Mirza Aslam Baig, Former Chief of Army Staff*, 2013 PLD SC 1.

[201] The lawyer also mentioned how the retired military officer who had to face the court was shocked that he was subject to these proceedings, stating "I can't believe I have to face this. Benazir Bhutto was a national security threat. The military intelligence had to act." See Interview No. L-62. This clearly indicated how unprecedented it was for the military's past political interventions to be subject to judicial scrutiny.

supplanting the military as the overseer of the political system, coopting the military's own self-serving anti-corruption rhetoric and using both constitutional and popular support to legitimize itself in this role. As one lawyer explained:

> "The judiciary sees itself as performing a function so that the army does not. What Iftikhar Chaudhry did was create an environment where the court acted as the political arbiter instead of the military. This was part of the judicialization of politics. The judiciary has grabbed a suprademocratic role from the army. The judiciary's role is not to hold the military accountable, but it is to take over some dominance or some space from the military, such as the macro-level anti-corruption agenda"[202]

On questions of the military's security prerogatives, the judiciary remained largely deferential to military's interests but the judiciary used these cases as opportunities to expand its own national security role. The Court intervened in the 'Memo gate' scandal discussed earlier and appointed its own commission of judges to inquire into the case and then began its own fact-finding proceedings against the former ambassador, summoning him for questioning before the Court.[203] The Court sided with the military in undermining the civilian government's foreign policy objectives and personnel, but in doing so it gave appellate courts the power to conduct investigations and gather evidence and establish its role in the preservation of national security (Naqvi and Zia 2012).

Similarly, in light of the growing violence in Karachi, the Supreme Court decided to begin *suo moto* proceedings to inquire what had needed to be done to improve law and order in the city. The Chief Justice began a series of broad hearings turning the court into an inquiry commission in which public officers and stakeholders from the commercial capital were brought before the court to face questions and criticism from the judges for their mismanagement of the city. There was little consideration for precedent and procedure during the proceedings as one lawyer familiar with the case explained: "Iftikhar Chaudhry was doing whatever he wanted. Whatever came to his mind, that

[202] Interview No. L-36, May 23rd, 2017.
[203] *Watan Party v Federation of Pakistan*, 2012 SCMR 584.

was popular with his following."[204] As a result of the hearings the Court ordered the paramilitary Rangers to take over some policing responsibilities in the city, granted the Rangers the authority and discretion it needed to secure parts of the city that had become violent 'no-go areas,' and ordered the Rangers to report to the Court about their progress. Thus, the Court empowered the military with internal policing powers, but in doing so, ordered the first ever judiciary-mandated national security operation, and gave itself an oversight role, thus extending its reach into the area of national security.[205] Throughout this period, the judiciary tried to expand its oversight role in the conduct of national security, establishing special benches to hear cases regarding detentions and enforced disappearances during security operations. Thus, even where the judiciary upheld the military's security prerogatives, it used these decisions as opportunities to begin to "play a national security role of its own."[206]

An important caveat here is that the judiciary has not pushed for the implementation of military-related judgments the way it has in cases pertaining to the civilian government. There has been little progress in the investigation ordered in Asghar Khan, or trials of military officials involved in enforce disappearances, and the courts even allowed Musharraf to leave the country while treason proceedings were ongoing effectively stalling the trial process. The lack of initiative in pursuing implementation indicates the judiciary's reluctance to push the military too far, particularly in security-related cases, which I discuss further in section 2, but this does not undermine the fact that the judiciary expanded its reach over military prerogatives, subjected its interests and assets to judicial scrutiny, and narrowed the military's permissible role in the political system. In doing so the judiciary actively pursued an agenda of judicial supremacy, taking on the role of the key arbiter and

[204] Interview No. L-60, April 13th, 2017.
[205] Even in the case detailed in the next section of the dissertation where the judiciary allowed the military to expand the jurisdiction of military courts to try terrorism suspects, a majority of judges on the bench strategically used that case as an opportunity to assert its own authority to challenge validly passed constitutional amendments that violated the 'basic structure' of the constitution.
[206] Interview No. L-36.

overseer of Pakistan's political order, challenging the excesses and corruption of Pakistan's other power centers including the military, with legitimacy bestowed by the constitution and its apparent interest in ensuring the welfare of the people.

1999-2015: Summary of Judicial Military-Relations

This section traced judicial-military relations from Musharraf's coup in 1999 through the first seven years of democratic rule from 2008 to 2015. In this period, the transition that had taken place in the judiciary over the previous thirty years manifested itself in the activist and assertive jurisprudence of the judiciary. As the key audience shaping the judiciary shifted from the bar to the bench, judges were no more loyal to or subordinate to the military. The judiciary emerged as a powerful stakeholder in the political system, pursuing an expanded independent role protecting middle-class socio-economic interests, blurring the boundaries between the executive, legislature and judiciary, and challenging the military's political interventions and economic excesses and impunity. Even in periods of relative deference to the military, the judiciary continued to preserve its independence and assert an expanded role in the system. The tables summarizing court judgments show how, over the course of this period, the judiciary increasingly challenges the military's economic and political prerogatives at a level unseen in previous periods. The judiciary pursued an independent agenda of judicial supremacy backed by a populist rationale. Where the institutional agendas of the military and judiciary aligned, such as the *Memogate* case or the *Karachi Law and Order* case, the two institutions supported each other, but where their interests did not align in 2007, the two institutions clashed, these clashes transformed Pakistan's political order. Thus, this was a court. In the next section I outline how the shift in judicial audiences over the previous thirty years shaped the judiciary's pursuit of judicial supremacy and the increasingly confrontational relationship between the two institutions.

SECTION II: The Transactional Court and Judicial Populism– Explaining Judicial Behaviour towards the Military from 1999 to 2015.

The previous section outlined how the judiciary pursued an agenda of judicial independence and supremacy, legitimized by a middle-class focused populist rationale, that frequently placed it at odds with the military. The judiciary remained largely deferent towards the military regime between 1999 and 2005, but even during this period the judiciary assertively protected its judicial power by resisting fragmentation and expanding its role in the socio-economic affairs of the state, including challenging the economic prerogatives of the military. After 2005, this expansion accelerated and soon the judiciary started challenging the core interests of the military regime including its security prerogatives and political agenda, articulating its role as the custodian of the public's interests, leading to a clash between the two institutions that ultimately brought about the downfall of the regime. Between 2009 and 2015, the judiciary continued to expand its jurisdiction, seeking to compete with the military as the interventionist guardian managing Pakistan's democratic system. How do we explain the judiciary's new role in the political system and approach to the military during this period?

Leadership-Related Explanations

There has been a growing literature explaining the confrontation between the judiciary and the military in 2007. The literature focusing solely on the judicial activity of that period, both inside and outside the courtroom, construct a narrative of a profound rupture from a past characterized by submission and stagnation, and seek explanations that are unique to this period. The most popular explanation has been the populism of Chief Justice Iftikhar Chaudhry (Ghias 2010; Siddique 2013;

Cheema and Gilani 2015). Scholars of judicial politics focus on the attitudes and preferences of individual well-placed judges within the judicial hierarchy to explain trends in judicial behavior across judicial institutions (Mate 2013; Hendrianto 2016) Chief Justices of courts especially tend to wield considerable power and discretion over fellow judges and thus can affect the decision-making of their courts, which is why their attitudes and preferences tend to merit especially close attention. In Pakistan, scholars point out that Justice Chaudhry carefully crafted a new and expansive rights-based jurisprudence through the use of public interest litigation, to win popularity and build a momentum for increased judicial activism, ultimately challenging both the military and civilian governments in a bid for judicial supremacy.

There is no doubt that Chaudhry's activism transformed the judiciary, but, as the previous section demonstrates, the high courts were already expanding the role of the judiciary and intervening in the socio-economic issues, including regulating the growing economic holdings and interests of the military before Chaudhry was appointed Chief Justice. Going back to 1988, with the *Benazir Bhutto* decision, we see the judiciary, with several interruptions, gradually expanding its jurisdiction, intervening in more governance issues and regulating the economy. In *Zafar Ali Shah* (2000), the Supreme Court emphasized the role of the judiciary in protecting socio-economic rights. Between 2002 and 2005, before Iftikhar Chaudhry became Chief Justice, the judiciary saw an unprecedented surge in decisions challenging the military's economic prerogatives. Thus, the judiciary certainly grew more assertive under Chaudhry's leadership, but the judiciary was already expanding its role, and challenging more military interests at the high court level before Chaudhry became Chief Justice, indicating his leadership alone could not explain the rise in judicial contestation.

Regime-Related Explanations

Changes in the political environment and the nature of the military regime also played a role

in shaping judicial assertiveness towards the military. Scholars suggest that courts are strategically deferential when confronted with a strong, stable unified government, and will be more assertive when the political system is more fragmented, particularly, when there is meaningful party competition (Chavez 2004), or when political institutions are not unified (Ferejohn et al.) Political and strategic considerations clearly played a role in explaining the path taken by the judiciary. The judiciary strategically acquiesced to the military to preserve itself in the early years of Musharraf rule. A Supreme Court judge who took the oath under the PCO and validated military seizure of power in the *Zafar Ali Shah* case defended his decision saying:

> "Some judges resigned, but others kept working in order to save the judicial system. Therefore, we decided to take the oath under the PCO. There were 3 main questions:
> 1. Whether the judges should resign en bloc? If this path had been adopted, it could have resulted in anarchy. And then there would have been military courts and no rule of law or dispensation of judges. So the court rejected that course. Therefore, we decided to take the oath under the PCO.
> 2. Should we have accepted the PCO? This meant we would be subordinate to the extra-constitutional order. We adopted a middle ground. We would take the oath but after taking the oath, courts will still have the power to make decisions according to the constitution. We upheld the power of the judiciary.
> 3. Should we have halted the takeover? We decided to give what we did, in order to save what we could."[207]

The judge's statement reveals how strategic concerns about preserving the authority of the judiciary in the face of a strong stable military regime with unfettered powers, governed the decisions of the courts in the early years of the regime.

Khan (2015) argues that, as the Musharraf regime and its political hold on the state grew weaker, the Supreme Court strategically seized the opportunity to rebuild its legitimacy after years of submission and deference to military rule that robbed the courts of credibility. She argues that the Court remained deferential as part of a strategy of self-preservation during the early period of Musharraf's rule when his authority was at its height, but then sought to rebuild its lost legitimacy by

[207] Interview No. J-16.

expanding its role and challenging the military as the regime's power waned.

The resumption of constitutional rule in 2002 certainly created some limits on the exercise of power by the military regime and opened up more opportunities for the judiciary to accept petitions challenging the military. However, as mentioned in the previous section, the amended constitution in 2002 was a vehicle for the military to establish a long-term political arrangement with the military at the helm, and thus did not significantly dilute Musharraf's authority.[208] Further, between 2002 and 2007, there was no significant reduction in the strength and stability of the regime, nor was there any new political competition for the regime (Jafferlot 2015). The political climate in 2005 still strongly favoured the regime and was not conducive to assertive challenges to the regime's authority. Therefore, the judiciary was not only responding to changes in the political environment and any weakening in the military's authority when it started asserting its authority against the military's core interests after 2005.

While the judiciary may certainly have sought to rebuild its legitimacy after 2005, as Khan (2015) mentions, the question remains: who was the judiciary seeking to gain legitimacy from? With whom did the judiciary lose its legitimacy by upholding the authority of Musharraf's military regime? Up till 2005, there was little evidence of mass popular opposition or resentment towards the regime, outside the peripheral regions of the state. As I will explain, the bar of lawyers remained steadfastly opposed to the military regime from the early days, and this was the audience with whom challenging the military regime would garner the judiciary legitimacy.

[208] The civilian constitutional arrangement was also influenced by Musharraf's interest in maintaining international legitimacy. However, in the era of the War on Terror, the government did not have to make significant concessions to democratic constitutional rule in order to maintain international legitimacy and ensure the continued provision of aid, and only had to demonstrate a façade of constitutional democracy, while continuing to preserve authority with the military leadership.

Media Support

The proliferation of private electronic media during Musharraf's rule also provided the Supreme Court with an opportunity to build public support and legitimacy for an activist judiciary (Ghias 2010; Cheema & Gilani, 2015). Judges picked up cases from newspaper articles and championed causes they believed would generate positive coverage and be well received, thus raising the costs of retaliation by the regime. Therefore, Ghias (2010) argues, that when the judiciary eventually challenged the regime, it benefited from a reservoir of public support that could arguably hold the military back from taking any action to undermine the judiciary's authority.

But positive media coverage clearly did not hold the military back from taking action against the judiciary. If anything, the positive media coverage of the judiciary led to both a judicial and media crackdown by the regime. In November 2007, when the military regime had decided the activist judiciary posed a threat to the regime's interests, and needed to be curtailed, the judiciary and media both paid the price. The regime declared a state of emergency, judges were ousted, their jurisdiction curtailed, and the media was subjected to a widespread crackdown to suppress any positive coverage for the judiciary. Therefore, favourable media coverage for the judiciary did not deter the military from undermining the judiciary.

Instead, I argue that the growth of private media had a more indirect role to play in increasing judicial willingness to contest the military regime, even in the absence of new political openings. The growth of private media closely connected the judiciary with audiences that judges cared about and gave these audiences a platform through which they could engage closely with and form and express opinions about judicial decisions. Judges coming from social networks were now especially concerned with how the media covered their decisions and shaped their reputation with their respective networks. Thus, I argue that the role of the media was to increase the importance of the

judicial motivation to build reputations with social networks with which these judges identified, and this impacted the judiciary's approach to other state institutions including the military. The effect of the proliferation of private media and increased media coverage of the judiciary was therefore to reduce the distance between the judiciary and the audiences that it cared about. Therefore, when discussing private media, what matters most is: what audience did judges care most about? The urban middle class was the primary consumer of new private media coverage, and I argue that these urban middle-class social networks that primarily populated the bar associations from which judges were recruited, were the audiences to which judges sought to project themselves. The growth of private media did not encourage judicial assertiveness by deterring military retaliation, but by connecting the judiciary more closely with urban middle-class social networks that favoured an assertive, populist judiciary.

Thus, regime-related factors, the proliferation of private electronic media, and the ascent of an activist Chief Justice, all played roles in explaining the emergence of an assertive judiciary contesting the military's supremacy in the political system during this period. But the process and timing of the surge in judicial assertiveness indicate that this surge was also guided by a change in judicial norms and preferences that preceded the change in judicial leadership and happened in the absence of any significant political opening. Therefore, in order to understand the actions of the judiciary during this period, it is necessary to examine the institutional and utilitarian interlinkages that shaped the norms and preferences of the judiciary during this period. In short, who were the judges' audiences?

The New Judicial Audiences

In the previous chapter, I outlined how the judiciary had evolved during this period, causing a shift in the audiences shaping judicial norms and preferences, away from the military and towards the politically mobilized bar associations. In this section, I demonstrate that the changing norms and

preferences generated by this shift in audiences best explains the emergence of a more independence and assertive judiciary. This judiciary was more independent, expanding its jurisdiction even under military rule, upholding its institutional interests and ambitions, and challenging the military when their institutional interests did not align. I first discuss the utilitarian interlinkages between the bar and the bench, then the normative interlinkages between the bar and the bench and the norms being transmitted from the bar to bench, and finally I demonstrate that these interlinkages shaped judicial behavior during this period.

Utilitarian Interlinkages: Judicial Careers

By 1999, the judiciary's institutional interlinkages with the military had been reduced, as the chief justices gained formal primacy in the judicial appointment process, and the majority of judges were recruited from the politically active bar, but there were still a number of high court and Supreme Court judges who had been appointed by the military during Zia's regime. The military could not assume that the judiciary would collaborate with or acquiesce to its political agenda as it did under Ayub and Zia. Musharraf's strategy with the judiciary therefore, was to first use the oath-taking to oust the most-independent-minded judges, place more pliable judges in positions of authority in the judicial hierarchy, and then bargain with these judges to incentivize them to support his political agenda.

A senior lawyer explained that before the *Zafar Ali Shah* decision validating Musharraf coup, "Judges were given a promise that their retirement age was being extended from 65 to 68."[209] This would mean that senior judges already in positions of authority would get to extend their tenures in exchange for upholding Musharraf's political agenda. In 2002, Chief Justice Irshad who had upheld

[209] Interview No. L-88, June 5th, 2017.

the coup was also appointed as Musharraf's Chief Election Commissioner after he retired as Chief Justice, and the next Chief Justice Sheikh Riaz Ahmed had a reputation for corruption, including accepting money from parties to decide cases (Khan 2016).[210] Justice Iftikhar Hussain, who became the Chief Justice of the Lahore High Court also had a reputation for corruption, and he remained Chief Justice of the court for five years, ensuring that the "court had no impact."[211] Justice Saiyed Ashad, the Chief Justice of the Sindh High Court, was also known to be "a pro-Musharraf judge."[212] Thus, through the PCO and subsequent bargains the regime ensured that the judiciary was led by "judges who had been corrupted, cooperating with the regime." In 2002, the government announced the constitutional package of the Legal Framework Order. Along with amending the constitution to shift powers from the parliament to the presidency, the LFO also extended the age of retirement of judges from 65 to 68.[213] When judges agreed to accept the age extension, they also had to accept and legitimize Musharraf's constitutional amendments. Thus, Musharraf used incentives to ensure these judges cooperated with the regime. Musharraf successfully bargained with senior judges to ensure they did not confront the regime, but he was not able to control the judiciary and fragment its authority the way Zia had, nor was he able to intervene as directly in the internal workings of the judiciary as previous dictators had, leaving many of the internal norms of the judiciary that had developed after the *Al-Jihad* case intact. Under Musharraf, barring the PCO and a few interventions, seniority was largely respected, particularly in the appointments of Chief Justices.[214]

During Musharraf's regime, the formal rules of appointment that were established after the *Al-Jihad* decision remained in place. I spoke to several important lawyers and judges about the process of judicial appointments during this period. After the *Al-Jihad* decision the Chief Justices of

[210] Interview No. L-15, May 20th, 2017.
[211] Interview No. L-62.
[212] Interview No. L-2, June 23rd, 2017.
[213] The extension in the age of retirement was meant to benefit the judges.
[214] One notable exception was Justice Najm-ul-Hasan Kazmi, who was known to challenge the regime, and who was forced out. Interview No. L-84.

the High Courts and Supreme Court had the primary say in the selection of judges. Typically, one-third of High Court judges were promoted from the judicial bureaucracy of the lower courts, and two-thirds of High Court judges were appointed laterally from the bar. Judges who were promoted from the judicial bureaucracy usually were a lot older by the time they moved through the entire bureaucracy and were promoted to the bench, and, barring a few notable exceptions, rarely spent more than a few years as High Court judges before they had to retire. The High Courts, and especially the Supreme Court, were largely populated by judges appointed from the bar. In appointing a judge from the bar, judges typically selected lawyers who had developed two types of reputation:

i) With the judges themselves. Justice Khawaja explained his selection as a judge of the Lahore High Court:

> "I had formed an impression with Chief Justice Justice Ajmal Mian, and with Justice Rashid Aziz Khan. How did Rashiz Aziz select my name? Rashid Aziz heard me a few times arguing the cases. What helped me was two key players had had exposure to me as a lawyer."[215]

ii) With senior and influential lawyers with which the judges had ties. Judges do not talk to the whole bar they just "talk to prominent lawyers, who will consider their number of reported cases, and if the lawyers have ever appeared against them or with them, as well as their level of professionalism, i.e. if they enjoyed a reputation of being a tout or not."[216] This allowed bar politics to influence the judicial appointment process.

> "Before becoming a judge, you belonged to or identified with a group or groups within the bar. After becoming a judge, you pick judges accordingly, from the group to which you belonged. Bar politics entered (the appointment process) that way."[217]

[215] Interview Justice Jawwad Khawaja
[216] Interview No. L-84. The number of reported cases means cases that had been reported by the courts, in which those lawyers had appeared as counsels.
[217] Interview No. L-27, May 28th, 2017.

Thus, ambitious lawyers seeking promotions, built relationships with political groups in the bar in order to move forward. As one lawyer explained:

> "What do you to become a judge in 10 years? Make friends with groups standing for the bar elections. Show up to the meetings and all. Participate in campaigns they are doing." [218]

Another lawyer explained to me how the appointment process played out in the Lahore High Court:

> "After the Judges' case, in terms of appointments things have gotten better because there is public pressure from the bar. The judges ask the bar groups: what are your objections to my nominees? People aligning themselves with groups enhance their chances of becoming judges. Hamid Khan had a monopoly over bar politics (in Lahore) for 17 years. He was the key stakeholder from the bar and could ensure members of his group were selected. He was always very harsh on the bench. But generally, he placed emphasis on good independent-minded judges."[219]

The military-run executive was not entirely removed from the appointment system. Musharraf's attorney-general did play an influential role in the appointment process, to ensure the judges appointed would "not be the type to upset the apple cart."[220] However, the Attorney-General sought to maintain good relations with judges and therefore also "would want the kind of people who the judges wanted as judges."[221]As one lawyer explained, under Musharraf "It was still the Chief justice who had the final say. Makhdoom Ali Khan (the Attorney General) is not a bully. Really, he also wanted to appoint judges who were competent."[222] Thus, during Musharraf's era, given that Musharraf avoided controlling and overpowering the judiciary, judicial appointments still remained primarily in the hands of the judiciary, and the Attorney-General and Advocate-Generals remained the government's only institutional interlinkages with the judiciary. They did not overturn the new norms of appointment in the judiciary, and only sought to ensure that more radical judges were not

[218] Interview No. L-60, March 27th, 2017.
[219] Interview No. L-36.
[220] Interview No. L-30, June 12th, 2017.
[221] Interview No. L-70, June 18th, 2017.
[222] Interview L-2, June 23rd, 2017.

appointed to the bench. Judges appointed during this period were mostly professional lawyers who developed reputations as lawyers and maintained close relationships with groups in the bar.

After the return to democracy in 2008, the new civilian government attempted to restructure the judicial appointment system to make it a collaborative process involving multiple political institutions. The 18th constitutional amendment, passed in 2010, established two new forums for judicial appointments: The Judicial Commission and the Parliamentary Committee. The Judicial Commission of Pakistan was headed by the Chief Justice of Pakistan and consisted of senior judges of the Supreme Court and High Courts, the Attorney General, Law Ministers, and a representative of the Bar Council. The Commission was to nominate judges for each vacancy in the High Courts, and the nominations were then sent to the Parliamentary Committee, composed of representatives from the two houses of the legislature, and including members from both the ruling party and the opposition, for confirmation. This new process was challenged before the Supreme Court for infringing upon the independence of the judiciary by including the parliament and elected executive in the process of judicial appointments. The Court admitted the petition challenging the constitutional amendment and suggested that the legislature alter the 18th Amendment to increase the number of judges on the Judicial Commission, ensuring that judges comprised a majority on the Judicial Commission, and to restrict the power of the Parliamentary Commission to reject a recommendation of the Judicial Commission. These alterations were made in the 19th Amendment. Then two separate Court decisions made the Parliamentary Committee almost redundant, and the Chief Justices maintained the steering role in appointments. Thus, the constitutional amendments made almost no significant change to the judicial appointment process, and only further entrenched the formal control that judges had in the process of judicial appointments, and the judicial appointments continued as before.

After the restoration of the judiciary in 2009, the military played almost no role in the judicial

appointment process. Justice Chaudhry and subsequent Chief Justices were the primary authorities in judicial appointments. In *Sindh High Court Bar Association* (2009), the Court ousted all judges who had signed onto Musharraf's 2007 PCO. With many new judges to appoint, Chaudhry's primary criteria was loyalty. As one senior lawyer explained: "after the PCO, loyalty to the Lawyers Movement was the sole criterion for appointment. Tehreeki (movement) lawyers as they were called were selected."[223] Thus, judges were appointed from the groups within the bar that had actively been engaged in the Lawyers' Movement. The result was the role of bar association leaders who had led the Lawyers' Movement became significant in the appointment process. As one lawyer from the Lahore High Court explained, "today the judiciary in Lahore is 60% under the control of the bar."[224]

Hence, the *Al-Jihad* decision had set the stage for an appointment system under which judges gained primacy in the judicial appointment process, the role of executive institutions including the military was reduced, and the bar developed an informal but significant role in the appointment process, cementing the utilitarian interlinkages between the bench and the bar.

Normative Interlinkages: Judicial Reputations

During and after the 1990s, and especially after 2007, the relationship between the bench and the bar grew a lot closer. As one former judge explained to me "Before the judiciary was held in awe. There was lots of distance between the bar and the bench. Now this distance has disappeared."[225]

Initially, when Musharraf ousted the Sharif government, a majority of the lawyers' community favoured Sharif's removal (Shah 1999). However, the expectation was this constitutional

[223] Interview No. L-88.
[224] Interview No. L-40, May 28th, 2017.
[225] Interview No. J-44, November, 28th, 2017.

deviation would be temporary and democracy and constitutional rule would be restored swiftly. Therefore, there was no support for sustained military rule. Khan (2000) wrote:

> "The military assumed that the action to oust Mr. Sharif symbolized their (lawyers') distaste for democracy itself. This was a wrong assumption." When the regime announced that all judges would have to take the oath to the PCO to remain judges, bar associations around the country responded with condemnation, describing the oath as "unfair and untimely (Dawn 2000)."

Over the next two years, bar associations mobilized in opposition to the actions of Musharraf's regime. During the 1990s, the newly established Supreme Court Bar Association (SCBA) had been established and became the leading forum within the national hierarchy of bar associations. The leadership, resolutions and decisions of the Supreme Court Bar Association came to de facto represent the views of the bar. Between 2001 and 2004, the SCBA challenged Musharraf's legislative and electoral actions in the courts, including his referendum, his assumption of the office of the presidency while remaining chief of army staff, and his amendments to the Constitution, and even appealed to the United Nations (Ali 2002; Dawn 2002e; Daily Times 2002; Zia 2002; Nation 2003). Other bar associations including the Lahore High Court Bar Association and Sindh High Court Bar Association held rallies from the High Courts to protest Musharraf's legislative actions, and ousted members who had joined the government's legal team (Zia 2002; Pakistan Times 2002; Pakistan Times 2004). Thus, from the early days of the Musharraf regime a norm of activism against the military regime was established in the bar associations.

In 2002, the bar activist Hamid Khan won the presidency of the SCBA, and he launched a concerted campaign to resist legislation empowering the military regime (Dawn 2002c). In subsequent SCBA elections, support or opposition for the actions of the regime typically dominated elections, and candidates who had established a reputation for opposing the regime were more successful. In the Lahore High Court Bar Association, the Professionals Group that had been formed by Hamid Khan, and which was largely led by lawyers opposed to the regime regularly won the Bar

elections (Dawn 2004; Dawn 2005b). Thus, across major bar associations, lawyers won elections campaigning on opposition to the regime and organized bar associations in opposition to the regime, and the lawyers' community continued to pursue oppositional politics challenging the military regime, just as it had against Zia.

However, there was an important difference between the bar's opposition to the Zia regime and the Musharraf regime, as now judges became the targets of the oppositional campaign as well. A veteran of the bar's movement against Zia explained "We never agitated against the judges. We never shut down the courts throughout our time…We were active but we never fought a fight against the judiciary."[226] However, this time judges who cooperated with the regime were not spared. After the *Al-Jihad* decision the bar had grown more vocal about judicial appointments and the conduct of judges. Bar associations condemned the judges who took oath under the PCO, and the Chief Justice for administering the oath of office of president to General Musharraf (Dawn 2000e; Dawn 2001). In 2002 the SCBA criticized Musharraf's Legal Framework Order, and especially the proposed extension of the retirement age of judges and advocated for the Supreme Court to strike down the Legal Framework Order (Dawn 200e). When the Court upheld Musharraf's referendum and LFO, including the extension in the retirement age, judges came under harsh criticism from the Bar. The extension in the retirement age divided the bar and the bench, because it benefited senior judges, but therefore delayed promotions of junior high court judges, and reduced the numbers of vacancies for lawyers to fill. An alliance formed between junior judges and the bar against the retirement extension. Hamid Khan as President of the SCBA accused the judges of the Supreme Court of sharing power with the military rulers for which it was being rewarded (Dawn 2002c). The SCBA announced that they would not argue any constitutional matters before the Supreme Court as it would be a futile exercise, and they could not expect justice from the compromised Court (Kamran 2002;

[226] Interview No. L-9

Dawn 2002c). The bar's campaign against the judges who were willing to cooperate with the regime and accept the age of extension intensified (Rana 2003). The Lahore High Court Bar Association refused to accept Chief Justice Riaz as Chief Justice of Pakistan once he passed the retirement age and accepted the extension and announced that it only accepted the next judge in line as Chief Justice. The Pakistan Bar Council then released a White Paper on the Judiciary which called out judges who had "bad reputations", discussed corruption among senior judges, shamed judges for upholding the powers of the regime, and criticized the state of the judiciary at the time (News 2003; Pakistan Bar Council 2003). Thus, bar associations exercised their power over the reputations of judges to pressure the judiciary into acting in line with the norms and preferences of the bar.

The judiciary's response demonstrated how sensitive judges were to the pressure campaign being waged against several senior judges by the bar. Chief Justice Riaz accused Hamid Khan of contempt of court for his statements against the judiciary. The Supreme Court also tried to defend its decisions upholding the regime's authority and actions, by trying to show that they had the support of senior lawyers. As the leading lawyer Farhatullah Babar (2002) wrote:

> "Never before has the Supreme Court sought to defend oath taking by judges of superior courts under the Provisional Constitutional Order (PCO) as it did last week. The Supreme Court said that senior lawyers like Khalid Anwar and SM Zafar welcomed the oath taking by the judges of the Supreme Court. One hopes that the honourable judges are guided solely by law and the Constitution and not by certification of some members of the bar. If such certification is accepted as a guiding principle it would be difficult to counter the statement of the bar which it is claimed represents the collective wisdom of the lawyers' community."

Clearly, the judges were acutely concerned about the viewpoint of the bar, and the ability of bar leaders to shape their reputations. A senior lawyer explained:

> "Once you become a judge, you ask who do I please? Start off as a judge, the judge cares about senior leaders of the bar. Then they care about how the Supreme Court views them and how other judges are viewing them. Once they go up to the Supreme Court they care about the bar leaders again because at that stage they will be viewed closely by the bar and the legal community."[227]

[227] Interview No. L-60.

One former judge explained his experience of building a reputation. He said:

> "When I became a judge, I did not know bail, criminal procedure or any other aspect of criminal law…I was only a very typical tax lawyer. But I always sat with an open mind towards any one appearing before me. I never talked down to any lawyer who was appearing before me. I always tried to give relief so I got a reputation as a relief giving judge among lawyers."[228]

Why is it that reputation with the bar had become so much more important? First, most judges now came from the bar, had developed relationships with particular groups within the bar, and thus were conscious about their reputations with these groups in the bar. Leaders of these bar groups, who had helped these judges get appointed now felt the judges were indebted to them and expected them to make decisions in line with their preferences.

Second, with the proliferation of private media, judges grew "a lot more concerned about self-aggrandisement and cared about how they were projected."[229] But their primary spokespeople were senior lawyers who came on television channels to discuss the decisions of the judges, elevating the importance of bar leaders in shaping the reputations of judges with their social networks.

Third, the bar leader had the capacity to mobilize the bar. As the bar associations grew exponentially, the sheer size of the bar associations added to the power and influence of the leaders of the bar. The bar was filling up with young lawyers with poor training, little money and few employment prospects. These idle lawyers spent their time in the barrooms with colleagues looking for work or other opportunities (Dawn 2010c). The unemployed and discontent lawyers populating the barrooms were an important resource for bar leaders, who brought these lawyers out to protest and rally and disrupt courts to support demands made by bar leaders. As Ijaz (2012) explained:

> "The primary edge that the lawyers possessed over other professional and civil society groups was they were already somewhat organized and politicized. The presence of district and even tehsil (local) Bar associations with elected office bearers meant that the minimum requisite infrastructure was already in place…Impoverishment, compounded with organization and independence made for a volatile combination"

[228] Interview No. J-65, March 14th, 2017.
[229] Interview No. L-22.

This mobilization potential was on display during the Lawyers' Movement. During the Movement, bar associations kept up a regular cycle of protests for over almost two years, and the lawyers developed a repertoire of contention that included rallies, boycotts, long marches, confrontations with police and sealing of courts. In interviews, bar leaders described the ranks of their bar associations as troops in battle and used the language of battle to describe the actions they took on the streets against the government.[230] As one former judge explained: "Iftkhar Chaudhry was revived because of the bar. And not because of the senior elements of the bar but because of the rougher elements of the bar."[231] The ambition of the bar reached the extent that they operated as an independent political movement, even selecting their own presidential candidate to challenge Musharraf in the presidential elections in 2007 (Zia 2007). After the Lawyer's Movement came to an end, the lawyers continued to rely on their mobilization potential to pressure and control judges, and frequently resorted to violent and aggressive tactics against judges and other rival groups of lawyers. Since 2007, there has been a growing number of incidents of lawyers breaking out into gunfights, manhandling journalists, beating up judges and locking up courts (Cowasjee 2010). Judges grew apprehensive of the consequences of upsetting sections of the bar. Even senior judges were not immune. The offices of Chief Justice Khawaja Sharif of the Lahore High Court were locked and stoned by lawyers. A senior lawyer explained that after the Lawyers Movement:

> "The Bar has been emboldened. It has gone way beyond its mandate. The bar has a very inflated view of its own importance. Now the Bar is perceived as much stronger. Judges have their primary audience as the bar. Judges have become more sensitive to the esteem with which the bar holds them. Bar has a lot of glamour."[232]

[230] Interview No. L-16, January 29th, 2017.
[231] Interview J-19, April 23rd, 2017.
[232] Interview No. L-50, May 18th, 2017.

Thus since 1999, the bar's willingness and ability to pressure judges and tarnish their reputations and standing has grown significantly. This meant, as one bar leader from the Lawyers' Movement put it "We were each other's biggest supporters and each other's' worst enemies."[233] Judges who pursued the agenda of the bar were actively supported by the bar, and judges who fell out of line with the norms and preferences of the bar became the targets of the bar. Another bar leader summarized the impact of the change in bar-bench relations:

> "Some disruption has been good. Judges get called out when they need to. Judges have historically been so removed from any critical quarter, so they think everything that comes out from them is gold. The disruption has had its extreme effects. We have seen judges play to the gallery."[234]

What norms and preferences did the Bar expect the bench to uphold? Firstly, as discussed in detail earlier, the bar was actively opposed to military rule. Bar associations denigrated judges who cooperated with Musharraf's regime, and lionized judges who refused to do so. Thus, the consensus in the bar supported civilian rule and constitutional democracy. However, this did not imply support for electoral supremacy. After the restoration of democracy, leading bar associations were just as critical of political parties and political leaders as they had been of the military regime. [235] When Justice Chaudhry overturned the National Reconciliation Ordinance (NRO) that provided the PPP leadership and its allies relief from charges of corruption and the Court reopened corruption cases

[233] Interview No. L-99, January 28th, 2017.
[234] Interview No. L-2.
[235]This did not mean that divisions did not develop in the bar, as political parties sought to win over factions of bar associations. However, just as it did in the 90s, the bar always maintained its autonomy from political parties, and bar leaders also advocated for the autonomy of the judiciary from political parties, rejecting the 18th Amendment for providing parliament more influence in the judicial appointment process. Even as political parties supported candidates in bar association elections, electoral candidates had to demonstrate their distance from political parties in order to be deemed credible by the voting lawyers. In 2016, for example, Farooq Naek, a former Law Minister of the PPP ran for the Supreme Court Bar Association elections, and he was widely seen as too close to the leadership of the PPP. Rasheed Rizvi, his rival during the elections attached the label of a party worker to him, and successfully used his political ties against him, and won the elections by demonstrating his independence from political parties.

against the PPP, bar leaders supported Chaudhry's decision. Bar associations rallied in support of Chaudhry's decisions against the PPP and pushed for implementation of the Court's decision. Qazi Anwar, the President of the SCBA described parliamentarians as "smugglers and cheaters (Business Recorder 2010)", and the SCBA called for a Long March to ensure the Court's NRO decision was implemented, and "the ruling clique" was exposed (Dilshad 2010). Thus, the consensus within the Lawyers' movement was that political parties were run by corrupt self-interested elites, and both the bar and judiciary had to be kept independent from the party leaders and given wide latitude to hold them accountable.

The bar from which judges were mostly recruited was largely composed of groups from across Pakistan's middle class, and therefore represented the ambitions and frustrations of this middle class, and this included frustration with entrenched political elites and their reputation for corruption. Aziz (2015) explains that there has been an ascendant aspiration in the middle class of South Asia that seeks to assert "its control over the political process through an anti-corruption movement" and "deliver clean politics." For the section of the middle class represented in the bar, the courts represented the vehicle for pursuing an anti-corruption agenda and therefore, the consensus within the bar supported an interventionist judiciary with expansive powers that both resisted unrepresentative military rule, and oversaw the democratic system to keep corrupt political parties accountable to the public interest.

Thus, in the 2000s the norms that developed within the bar during the 1980s and 1990s, had grown more entrenched, including opposition to military rule, distrust of political parties, and support for judicial supremacy subject to accountability by the bar. And judges seeking to build a reputation were expected to endorse and uphold these norms or face the ire of an emboldened bar that was willing to criticize and condemn judges who fell out of line.

The Bar as Key Audience: Enforcing Populist Judicial Supremacy

By the 2000s, the breaking of the utilitarian and normative interlinkages between the judiciary and the military had transformed the relationship between the two institutions. This was the era of the transactional court where the judiciary only supported the military when their interests aligned, and opposed the military when their interests clashed, and as the significance of the politicized bar grew as a key audience shaping a more activist and ambitious judiciary, these interests clashed more and more. The dynamics of this transactional relationship best explains the relationship between these two institutions during this period. In this section I show how the separation from the military and the growing influence of the active bar shaped the norms and preferences underlying judicial decision-making towards the military.

From the start Musharraf anticipated that the military could neither reliably expect judges to collaborate with their political agenda as in Ayub's time, nor expect judges to acquiesce to military control as in Zia's time. Instead, Musharraf sought to bargain with judges by providing the more pliable judges material incentives to cooperate with the regime. Over time the bar leveraged its growing interlinkages with the judiciary to both ensure that more independent-minded judges who had close ties with the bar were appointed and promoted, and judges who were willing to make deals with the military faced widespread condemnation and the ire of the legal community. By 2007, the interlinkages between the military and the judiciary had reached their lowest point, and the interlinkages between the bar and bench had reached their highest point. As of 2007, only one judge remained who had been appointed during Zia's regime, and the majority of high court judges had been appointed after the *Al-Jihad* decision, in which the role of executive institutions had been

removed from the process of judicial appointments, and the role of the bar in the appointment process had grown in significance. The close ties with the bar shaped the decision-making of the judges in two ways.

Firstly, the socialization of judges as lawyers shaped the norms and preferences of these judges. As one lawyer explained,

> "The relationship between lawyer and judges has become far too cozy. As judge you carry over your prejudices from the bar. Judges come to the bench as fully formed jurists. You become a judge after having fully formed ideological preferences developed in the bar."[236]

I spoke to two former Supreme Court judges, one recruited from the bar, and another promoted from the subordinate judiciary, and the two viewpoints reflect how their prior experiences shaped their understanding of the role of the judiciary. The judge recruited from the bar explained how important his time as a lawyer was in shaping his views as a judge:

> "As a lawyer, I always thought lawyers had a leadership role in society. The public is not vocal, lawyers need to be playing a role in shaping public opinion. As General Secretary of the Bar, I used to be very vocal about these issues. When I was Attorney general, I learned that the bench had a role to play to bring about social change. Law can be a catalyst for social change, and this informed my decision-making."[237]

In contrast, the Supreme Court judge promoted from the subordinate judiciary explained:

> "Judges have their own sphere of action. To overstep that sphere is unjust. Good fences make good neighbours. Judicial self-restraint is important."[238]

The emphasis of the judges from the bar on a broad socio-economic role for the judiciary juxtaposed against the emphasis of the judge from the lower courts on judicial restraints, highlights how much of a difference a background in the more activist bar made. Thus, jurisprudence was shaped by years spent as a lawyer in the bar, and in response to the preferences of the bar.

Secondly, the bar was also able to enforce its assertive norms in the judiciary, as judges

[236] Interview No. L-70.
[237] Interview No. J-2.
[238] Interview No. J-6, November 20th, 2016.

sought to please the bar through its decisions. As one former judge explained, while describing an incident he witnessed in court:

> "Today the maverick judge is favoured who does not consider himself bound by procedure and promises to do substantive justice…You put on a show, you have to be seen to be bold. In a case the judge said "Procedure and all is clear but tell me the issue and I will do substantive justice. I said to the judge "sir you cannot do that in this case you will be out of jurisdiction" He said "But I will do substantive justice" Why did the judge do this? He is creating an impression. There will be lawyers in attendance and this way a positive view is formed of the judge."[239]

The events of the Lawyers' Movement in 2007 highlight how the bar can use both its reputational interlinkages and utilitarian interlinkages to affect the actions of the bench, even among judges who were not necessarily predisposed to the preferences upheld by the bar. Initially in March 2007, when Justice Chaudhry was forced out by the regime, his case was referred to the Supreme Judicial Council (SJC) which carried out its proceedings in private. Chaudhry's junior, Justice Javed Iqbal, headed the SJC. He was known to be sympathetic to the military and was willing to take action through the SJC against Chaudhry.[240] However, after the lawyers unified behind Justice Chaudhry, and the Lawyers' Movement took off, the Court accepted the demand of the lawyers, and altered the proceedings against Chaudhry from a private disciplinary proceeding before the SJC to a public court proceeding hearing challenges to Chaudhry's dismissal. As one lawyer explained "In the first few days after Chaudhry was sacked, the bench (Chaudhry's fellow judges) was hostile towards Iftikhar Chaudhry. But then they saw lawyers started coming out on the streets and…the bench followed suit."[241] Further, in November 2007, when judges resigned en masse refusing to take Musharraf's new oath, not all judges preferred refusing the oath, and some were impatient to take the oath after initially refusing. However, senior bar lawyers kept up the pressure on these judges and maintained a boycott of the judges who did take the oath, in order to ensure that the consensus opposing Musharraf

[239] Interview No. J-33, March 21st, 2017.
[240] Interview No. L-94.
[241] Interview No. L-66, May 28th, 2017.

was not unraveled. A senior bar leader explained "There were still judges who wanted to take the oath. But because we made it clear, we will get you reinstated without you having to take the oath, they stayed loyal."[242]

Thus, the events of the Lawyers Movement show how the bar was not just important as a support structure for judicial assertiveness, but also as a venue where judicial norms were generated and as an audience using its linkages with the judiciary to enforce these norms in the judiciary. As a leading bar activist from the Lawyers' Movement explained:

> "In the Lawyers' Movement we gave two messages: To the government we said, you do not mess with the Supreme Court. And to the judiciary we said: Only if you stand for your independence will we support you."[243]

The career of Chief Justice Iftikhar Chaudhry exemplifies the close ties between judges and the bar during this period, and how the bar's linkages with the bench shaped the decision-making of the bench. Chaudhry did not come from a privileged background and he got his law degree from a less renowned law school in Sindh, before practicing law in Balochistan. He was elected President of the Balochistan Bar Association in 1986, where he gave several speeches opposing military rule, and he was also twice elected as a member of the Balochistan Bar Council (Qalb-i-Hassan. 2013). He was appointed as a High Court judge in 1993. To move forward in his judicial career, Chaudhry took the oath under the PCO in 2001 and was elevated to the Supreme Court, but once he became Chief Justice, he paid close attention to cultivating a relationship with the Bar. In 2006, a dispute grew in the SCBA over the election for its president, as the outgoing President of the Bar who had close ties with the regime (Dawn 2006), sought to ensure that Munir Malik, the activist presidential candidate who opposed military rule, could not win the election. As Chief Justice, Chaudhry intervened, and

[242] Interview No. L-1.
[243] Interview No. L-90.

upheld Munir's victory in the bar election (Adil 2006). In this way Chaudhry, unlike his three predecessors during Musharraf's rule, won the support of the bar. When Munir Malik won the elections he "assured unqualified support from the SCBA for Justice Chaudhry" and then said "we are fortunate to practice in the age of a visionary chief justice who is committed to rule of law and believes in the independence of the bar (Business Recorder 2007)." As one lawyer explained, "Iftikhar Chaudhry preferred to be under the glare, among the people. He gave much access to the bar, and judges were seen more clearly by lawyers."[244]Therefore, when Chaudhry was ousted by Musharraf, the bar with whom he had established a close relationship mobilized to resist the military and demand his reinstatement. Chaudhry's history as a bar leader and emphasis on strong ties with the bar were vital in building an assertive judicial campaign against the military regime.

Chaudhry's approach to jurisprudence also highlights the impact of his years as a lawyer and the importance he paid to gaining the support of the bar. As Supreme Court justice, Chaudhry used his *suo moto* powers to intervene in a range of issues that affected discounted sections of the middle-class. From dealing with questions of high commodity prices and petrol prices, an issue which hit the urban middle class the hardest, to pushing back against deregulation real estate scams, and pursuing cases of elite political and military corruption, Chaudhry's jurisprudential choices closely mirrored the middle-class anti-corruption agenda that had become the consensus in the bar (Waseem 2012). As one judge explained: "Chaudhry was one of the bar, and he always played to this gallery. Judges like him played to the bar, and projected populism with the bar."[245] As shown in cases discussed in the previous section, Chaudhry bypassed procedural norms to turn his courtroom into public spectacles where he intervened in issues generating widespread attention, guided by what the popular sentiment in the bar would support. A senior lawyer told me "Iftikhar Chaudhry fundamentally does not respect

[244] Interview No. L-80, July 22nd 2017.
[245] Interview No. J-19.

the law. He would do whatever he felt in the name of justice."[246] Thus, Chaudhry's jurisprudence was shaped by his interest in cultivating a reputation as an assertive populist with the bar.

However, just as reputations are built in the bar so are they brought down. After reinstatement, Chaudhry had the support of the bar as he championed a range of causes that were popular within the bar. But he also grew increasingly intrusive in the affairs of the bar and consolidated his control over judicial appointments. A close group of lawyers and judges tied to the Chaudhry and the Lawyers' Movement were strongly favoured in judicial appointments, and this alleged favouritism caused alienated sections of the bar to lash out. By 2010, a new grouping of lawyers formed within the Bar on a platform to reassert the Bar's separation from Chaudhry's Court and break the hold of this group of lawyers and judges over the bar after the Lawyers' Movement (Dawn 2010a; Dawn 2010b). Championed by the famous human rights lawyer, Asma Jahangir, the new group organized to win a series of bar association elections, and then used these platforms to criticize Chaudhry and his actions (Dawn 2011a; Khan 2011). Political parties who had been targeted and humiliated by Chaudhry in court, cooperated with this group, and levelled allegations of corruption against Chaudhry and his son, which further fueled the campaign of criticism against Chaudhry within the bar (Riaz 2010). By 2013, once Chaudhry retired, he had become a far more controversial and divisive figure than he had been in the aftermath of his reinstatement. Today, in most of my interviews, few lawyers and judges had positive words to say about him, and he has become a largely isolated figure within the legal community. Thus, Chaudhry's rise and fall exemplifies how vital the bar can be in making or breaking the reputations and fortunes of judges, and how time spent in the bar and relations with the bar shaped a judicial agenda of pursuing judicial supremacy legitimized by a middle-class populism that opposed and distrusted both military rule and political parties.

[246] Interview No. L-44.

Chaudhry was not the only influential judge expressing such preferences, and the bar-inspired agenda of judicial supremacy did not start or end with him. The current Chief Justice Saqib Nisar, a lawyer and bar leader during the 1990s, recently stated in a press conference that the doctrine of necessity justifying military interventions had been eternally buried (Express Tribune 2018). In another interview, when questioned about judicial interventions into the functions of executive institutions he expressed the same populist doctrine that had become entrenched in the superior courts stating

> "Only this way will the government officials have to improve the system. I will not back down, and these people will have to give ordinary people their rights…I will not sit quietly. If I have to stage a sit-in protest against the government I will but I will ensure that the bureaucracies and politicians get their jobs done. It cannot be that people keep dying and these people keep filling their pockets and stomachs (Chaudhry 2018)"

Justice Khosa, a future Supreme Court Chief Justice upheld Musharraf's treason trial in 2013, and in a recent Court decision said that the judiciary had the power to "cleanse the fountainhead of authority of the State so that the trickled down authority may also become unpolluted. If this is achieved then the legislative and executive limbs of the State are purified at the top."[247] Thus, these judges were upholding the norms and preferences that had developed in the bar, opposing military rule and distrusting political parties and pursuing an agenda of judicial supremacy under which the judiciary was granted wide powers to regulate the political system and ensure policy-making was carried out in the public interest, as understood by this middle-class bar and bench.

The diminishing role of the military and the increasing role of the politically active bar as audiences shaping the norms and preferences of the judiciary best explain judicial-military interactions during this period. As the utilitarian interlinkages between the judiciary and the military

[247]Justice Khosa was quoted in the previous chapter during his time as a lawyer in the 1990s advocating for the judiciary to assume wide powers to check the corruption of the legislature

weakened, judges did not need to support or acquiesce to the military's preferences in order to get appointed or promoted, and more independent-minded judges were appointed. As the normative interlinkages between the judiciary and the military weakened, judges were appointed from outside elite and bureaucratic networks closely tied to the military with a vested interest in military preeminence, and instead were appointed from networks more attuned to middle-class priorities and less wedded to military supremacy. Thus, the judiciary was neither loyal to the military nor under military control anymore, only supporting the military when the interests of the two institutions aligned and clashing with the military when these interests clashed. What were the judiciary's interests and ambitions now? These were determined by the close relationship between the judiciary and the politically active middle-class bar. With increasing utilitarian interlinkages between the judiciary and the bar, bar leaders expected judges who had been appointed or promoted with their support to uphold their preferences on the bench. And with increasing normative interlinkages between the judiciary and the bar, even when judges did not need support from the bar for appointments and promotions, judges recruited from the bar either shared the activist norms and preferences of the bar or upheld these norms and preferences in order to build a reputation with the bar. Hence the bar's preference for an activist judiciary, unrestrained by procedural limitations, regulating the political system to check both military rule and political corruption and pursue a middle-class populist agenda, was transmitted to the judiciary. As one lawyer explained,

> "The judges now see themselves as playing the same role that the military had attempted to play…an institution beyond corruption that can bring governance to the country." [248]

This inevitably led to clashes between the military and the judiciary.

[248] Interview No. L-36.

Conclusion:

Thus, through a discussion of judicial appointments and backgrounds, bar-bench relations and judicial rhetoric both on and off the bench, this section has shown that the judiciary's increased assertiveness, expanding role in the political system and clashes with the military in the 2000s can be best explained by the changing audiences shaping judicial norms and preferences. While strategic considerations regarding openings in the political environment, and support from private media and civil society certainly played important roles in shaping judicial behavior during this period, these factors alone are not enough to explain why the judiciary asserted itself even in the absence of significant political openings or who the judiciary sought to win legitimacy and support from when acting assertively. Instead, I argue, that with the growing distance between the judiciary and the military and the increasing role the bar played as an audience shaping judicial norms and preferences, the judiciary developed an increasingly transactional relationship with the military and pursued a more ambitious and expansive political and policy-making agenda, that inevitably placed it at odds with the military on several major issues. The events of 2007 that helped bring down the military regime, can best be understood as a climax in a history of changing institutional relationships that reshaped the judiciary into a more assertive and ambitious institution, no more loyal to or controlled by the military.

SECTION 2

JUDGING MILITARY PREROGATIVES

Chapter 6

EXPLAINING JUDICIAL ASSERTIVENESS ACROSS MILITARY PREROGATIVES

Introduction

This section of the study seeks to explain how judicial contestation of military prerogatives is affected by the nature of the prerogative being contested. Military prerogatives refer to the power the military has over its own participation in various state activities. It does not simply refer to military involvement in these activities, on the orders of the civilian government (such as national emergency relief), but to the military's prerogative to determine its own participation in state activities (Trinkunas 2001). In states where the military has ruled or continues to rule, courts deal with litigation challenging the military's prerogatives in a range of policy areas, and the courts' response to this litigation varies considerably.

In Pakistan, the judiciary in recent years has asserted itself against the military, challenging and overturning land acquisitions by the military, and initiating investigations against military officers accused of participating in electoral rigging, yet it has also ceded its own jurisdiction to the military on the question of trials of terrorist suspects. Similarly, in Egypt, during the authoritarian regime of Hosni Mubarak, civilian courts overturned convictions of opposition politicians, and overturned actions taken by the Egyptian military against civilian landowners but upheld the wide jurisdiction of military courts. How do we explain this variation in patterns of judicial assertiveness within each state?

Theories of democracy and democratization have come to a growing consensus around the value of the rule of law as integral to democracy (Held 1987; Shapiro 1996; Hilbink 2007). Essential to establishing the rule of law is the equality of all citizens and institutions under the law and predictability and consistency in the application of rules and regulations (Chavez 2008). Yet, if rules are not applied consistently across institutions, and certain institutions maintain special privileges and remain immune from judicial scrutiny and accountability, then the rule of law and consequently the legitimacy and functionality of democracy, is undermined. For this reason, when a coercive institution such as the military retains special prerogatives that render it unaccountable to civilian institutions, this undermines democracy (Fitch 2001).

Scholars of civil-military relations in the developing world have examined the rise and fall of military regimes (Nordlinger 1977), the policy consequences of military and civilian rule for the military (Pion-Berlin 2001), and the role of the military in the processes of democratization and democratic consolidation (O'Donnell et al., 1986; Geddes 1999). This literature distinguishes between different types of military prerogatives (Stepan 1988). Fitch (2001: 62) differentiates between prerogatives insulating the military from government control of its activities and prerogatives enabling the military to exert political influence or control over civilian leaders. The contest between military and civilian institutions over the extent of the military's prerogatives shapes the democratic trajectory of the state (Fitch 2001; Janskoski 2012; Eldem 2013). Pion-Berlin (1992) argues that militaries take two approaches in the contest with civilian institutions over military prerogatives. The defensive approach is where the military guards what it understands as its core functions against unwanted interference by civilian outsiders. The offensive approach is where the military tests and pushes the limits of its authority by challenging the government for influence or control over broader range of policy issues. The military's determination to take an offensive strategy

regarding its prerogatives leads to them expanding their sphere of influence, assuming and absorbing new roles, and, in the event of military coups, directly seizing state power. Therefore, the military protects and expands its prerogatives during both during and after military rule, and militaries are willing to use offensive and defensive tactics to protect and further their interests during both periods.

A military dictatorship will seek to ensure that its control over all the political affairs of the states is uncontested. Similarly, a military in a young democracy will seek to ensure that it retains considerable influence and autonomy after democratization. Hence, the literature on civil-military relations and comparative democratization highlights the military's interest in protecting and expanding prerogatives during both democratic and authoritarian rule, the differences in the types of military prerogatives, and the importance of successfully contesting these prerogatives in order to bring the military under civilian control. Thus, explaining how and why civil-military contestation varies across different types of military prerogative is necessary to understanding whether civilian institutions can successfully constrain politically powerful and autonomous militaries in both authoritarian and post-authoritarian states.

In this section I examine how contestation between the military and one specific civilian institution, the judiciary, varies across different types of military prerogatives. I argue that, whether the state is a military dictatorship or a democracy, the judiciary is more deferential to the military in cases where the prerogative being challenged is connected to the military's maintenance of its *institutional autonomy*. I argue this variation in contestation is strategically motivated, as judges anticipate that the military is likely to retaliate against any action undermining its institutional autonomy, even if that retaliation is costly for the military. In this chapter I first discuss how this study of judicial-military interactions builds on the literature on strategic judicial behavior, by highlighting how the fluid political environment of authoritarian and post-authoritarian states shapes judicial strategy. I then discuss how the military differentiates between prerogatives that are

connected to the military's institutional autonomy and those that are not and discuss how this shapes judicial strategy towards the military. Finally, I briefly probe the case of Pakistan, to discuss how this explains variation in judicial contestation across military prerogatives in Pakistan.

Judicial Strategy and the Military

The analysis in this chapter builds on the literature on rational choice institutionalism, which explains political action with reference to rational interest calculation (Shepsle 2006). Strategic interaction among individuals or institutions maximizing their self-interest is seen as the foundation of politics. The rational-choice institutionalist approach to understanding judicial behavior locates the judiciary within its institutional environment and seeks to understand how the configuration of this environment acts to constrain or shape judicial decision-making (Whittington 2000). Over the last two decades, scholars have provided compelling qualitative and quantitative evidence that judges are aware of the conditional nature of their influence and are protective of their policy-making authority, making them attuned to the interests of policy makers in the other branches of government (Epstein and Knight 1998; Maltzman et al. 2000; Helmke 2005; Vanberg 2005 ;Lax and Cameron 2007; Epstein and Jacobi 2010). They must anticipate that their choices will induce reactions by others and factor these reactions into their decisions. This is because respect for judicial authority by executive and legislative institutions is maintained only as long as "on balance, the presence of independent courts provides sufficient benefits or subverting them is too costly" (Vanberg 2015: 180) The distinct feature of rational-choice explanations is that judges, when deciding to act assertively, are anticipating whether the political actors subject to their decisions will comply or retaliate to their

decisions. Thus, this approach explains judicial behavior towards other institutions, by understanding what formal and informal political conditions constrain or enable judges to act assertively.

Under the rational-choice framework to explaining judicial decision-making, the primary motivation of the judiciary is the motivation to realize its policy preferences. Courts are understood to be goal-oriented entities with a distinct set of policy preferences and each court seeks to maximize its interests, reacting to the opportunities and constraints in the political environments. Therefore, judicial actors must make choices between when they can act sincerely in line with their policy preferences, and when they must act strategically to maintain or expand their institutional authority to realize policy preferences (Epstein and Knight 1998; Kapiszewski 2014). When a judge decides whether to challenge the government or government institutions, the judge has two concerns. First, the judge will consider what cost an institution subject to the judiciary's decision can impose on the judiciary if the judiciary decides against that institution. Second, the judge will consider whether the assertive decision will have the support of other political actors and institutions, such as opposition parties in the legislature (Clark 2010), important state or societal actors (Mate 2010), or the general public (Vanberg 2005), all of which can raise the costs of non-compliance, defiance or retaliation by the targeted government institutions (Vanberg 2015).

One set of studies within the strategic school focused on how judges pay attention to political institutions and the political context. Scholars suggest courts are able to be more assertive when the political system is more fragmented, raising the cost of repealing judicial decisions or reducing judicial authority for the other political actors (Ferejohn et al. 2007). There could be more political fragmentation when the party systems are more fragmented (Rios-Figueroa 2007), when parties alternate in power more often (Ramsmeyer 1994), when there is greater political competition (Chavez 2004), when the political institutions are not unified and, particularly in political systems with divided government, when institutions are run by different parties (Ferejohn et al. 2007). However,

this literature on political fragmentation does not adequately consider crucial features of the political environment that shape judicial decision-making in authoritarian and post-authoritarian states.

The rational-choice literature has largely focused on the interaction of the executive, the legislature and the judiciary, wedded as it is to the classic tripartite model for the separation of powers (Bowen 2013). It has largely ignored the impact of government bureaucracies (such as the military and the civil service) on judicial assertiveness because these branches are perceived as mere agents of the three political principals.[249]This model does not fit states where unelected government bureaucracies preceded elected branches developmentally and enjoy autonomy from these branches. Since these institutions are not merely agents of these political principals in many democratic and authoritarian states, this tripartite characterization of the strategic environment in which the judiciary operates is incomplete. The military in post-authoritarian states is a prime example, since the military wields considerable autonomous power, and establishes independent relationships with societal actors even after democratization (Shah 2014a). Therefore, I use a different framework to study these relations, which treats state civilian and military bureaucracies as political principals, and sheds light on the sources of authority and legitimacy on which these unelected actors rely and the distinct tactics they deploy in their interactions with the judiciary.

Accordingly, it is necessary to describe the motivations and actions of the military when it acts as political principal. As explained earlier, both during authoritarian and post-authoritarian periods, the military has a vested interest in maintaining and expanding its prerogatives (Stepan 1988; Hunter 1997).[250] The extent to which the military enjoys prerogatives varies considerably across different political systems. In dictatorships where the military as an institution runs the state, we

[249] Ginsburg (2009) explains how Asian judiciaries round the world have become increasingly involved in regulating the actions of administrative agencies on behalf of the political branches of government, which he calls the "judicialization of governance," yet this work also treats bureaucracies as mere agents of political principals.
[250] Stepan (1988) lists up to twelve types of military prerogatives that fall into four categories of state activity: recruitment of elites, public policy, internal operations of the armed forces, and national security.

expect the military institution to have maximum prerogatives, effectively having the prerogative to run most or all of the affairs of the state. In dictatorships where a military officer personally runs the state, often with a combination of civilian and military figures leading the regime, the military would enjoy a similarly high level of prerogatives. In civilian dictatorships, the military usually wields less considerable power and influence, but still maintains some prerogatives. In young democracies that follow military regimes, usually succeeding pacted transitions (Linz and Stepan 1996), the military often maintains certain political and policy-making prerogatives Therefore, the next question is: what tactics does a politically powerful, autonomous, military use to protect its prerogatives from judicial intervention, and how does this shape judicial behavior towards the military?

Selective Assertiveness and Strategic Deference

Whether it is a military dictatorship or an unconsolidated democracy where the military still maintains autonomy from civilian control, judges recognize that the military can credibly threaten significant repercussions to the authority of the court. Prior to democratization, the military is well-positioned to undermine the judicial institutions if courts assert themselves against the prerogatives of the military. The military regime would seek to create a weak judiciary unable to challenge the prerogatives of the ruling military. The regime can do this the following ways:

i) It can weaken the judiciary through fragmenting the judicial system (Ginsburg and Moustafa, 2008). In a fragmented judicial system, the executive regime creates one or more exceptional courts that run parallel to the regular judiciary and are not over seen by the regular courts. These courts operate under the tight control of the executive regime with limited due process rights. The regime then expands the jurisdiction of these exceptional courts to include critical and politically sensitive cases, limiting the ability of

the regular judiciary to take on such cases, and placing these cases in the hands of courts directly answerable and subordinate to the executive branch.

ii) It can also contain judicial activism by reconfiguring judicial authority to constrain the efforts of litigants and judges (Ginsburg and Moustafa, 2008). Regimes can engineer constraints on the institutional structure of judicial review, the type of judicial review permitted, and the legal standing requirements. The military regime can also limit the types of legal challenges that can be made against the state. These restrictions constrain the ability of the judiciary to act assertively against the military.

iii) It can also disable court activism by incapacitating judicial support networks. When a judiciary faces a powerful authoritarian executive, it often relies on support from civil society organizations, such as rights organizations. However, military regimes can create a bevy of regulations that allow them to intervene in and weaken these civil society support networks, leaving judges isolated.

iv) Beyond directly weakening formal judicial authority, the military regime can also undermine judicial authority, by threatening judges, delegitimizing the judiciary or simply not complying with judicial decisions.

Thus, judges recognize that the military is in a position to restrict their discretion and jurisdiction if a court attempts to act more assertively than the military will tolerate. And there are a host of ways in which military regimes are able to significantly weaken the authority of the judiciary.

After democratization, the military does not have the same powers to undermine the judiciary as it is formally subsumed under the civilian executive. However, it does typically have prerogatives it seeks to sustain. In Turkey, after the return of a civilian government in 1961, the military continued to hold several prerogatives, including: appointments as legislators for military officers, formation of a National Security Council to develop national security policy, enhanced jurisdiction of Military

Courts to try civilians, and the creation of the Army Mutual Assistance Association to give the military a stake in business and industry (Eldem 2013). Being a de facto independent political principal, the military can retaliate when the courts contest these prerogatives. The military's response to unfavourable judicial actions could take the following forms:

i) Threatening costly coercive actions such as coups and threats against judges (which have garnered the most scholarly attention (Croissant, et al., 2010))

ii) Attempting to undercut the powers of the judiciary, through allied political parties in Parliament.

iii) Delegitimizing the judiciary. The military could leverage its public credibility as a patriotic institution to delegitimize institutions challenging its authority. The military could also use its intelligence and surveillance apparatus to uncover potential scandals regarding judges or their family members, in order to publicly delegitimize judges contesting their prerogatives.

iv) Ignoring and not complying with the court's decision, thus also undermining judicial authority.

However, defying or undermining the judiciary can be costly for the military. Military regimes that undermine the judiciary may compromise their international and domestic legitimacy. In Egypt, for example, the military dictatorship of Anwar Sadat strengthened the independence of the judiciary to gain international legitimacy and attract foreign investment (Moustafa 2003). Similarly, in post-authoritarian regimes, undermining the judiciary may also prompt backlash from political or social allies of the judges against the military. In Pakistan after the resumption of democracy in 2008, when the Chief of Army Staff issued a statement criticizing the judiciary for 'not staying in its place,' the Chief Justice of the Supreme Court publicly chastised the army for undermining democracy and received widespread media coverage and support Thus, military retaliation against judicial decisions

is rarely cost-free, and a strategic military will retaliate when the cost of complying with the judicial decision outweighs the cost of retaliating.

However, I argue, there are certain prerogatives for which contestation by the judiciary is considered a redline. On these prerogatives, a military that seeks to remain a principal in the political system, will almost always retaliate against civilian intervention. These non-negotiable prerogatives pertain to the military's *institutional autonomy*. By *institutional autonomy* I mean the discretion the military requires to organize itself for the purpose of carrying out its core security mission with the resources it deems that it requires, without external interventions (in short, preventing civilian intervention into the military) (Pion-Berlin 1992). I argue that the military is likely to retaliate against civilian interventions into its institutional autonomy, *even* when such contestation might be costly for the military. On the other end of this spectrum of prerogatives are prerogatives pertaining to the military's political authority. By *political authority* I mean the military's discretion to influence the administration and regulation of the political, social and economic life of the state (in short, expanding military interventions into the civilian domain). The military will only act to protect these prerogatives against judicial contestation when the cost of such retaliation is not high. Thus, whether we are in a military-led or backed dictatorship, or a powerful military in a post-authoritarian regime, the military is likely to retaliate against judicial contestation of military prerogatives that are tied to its institutional autonomy, even when such retaliation could prove costly.

How does this effect judicial decision-making? Kapiszewski (2014) argues that judicial decision-making is characterized by tactical balancing. In each decision, judges must always choose between making decisions based on their own norms and preferences and making decisions based on concerns regarding the preferences of other political institutions. Accordingly, I argue that on questions where military retaliation is highly likely, judicial strategy *trumps* judicial norms and preferences. On these questions, the tactical balance will tip in favour of the military's preferences.

Therefore, even an otherwise assertive judiciary with norms and preferences that do not align with the military, will strategically defer to the military. However, as the prerogative's connection to military autonomy decreases, the tactical balance is less likely to tip in favour of deference to military preferences, thus raising the likelihood of judicial contestation. Hence, judicial contestation across military prerogatives is characterized by selective assertiveness, where the judiciary will strategically defer to the military on questions regarding the military's institutional autonomy, even as it acts more assertively on other military prerogatives.

It could be argued that this deference to military autonomy is not a product of judicial strategy but is built in to the state's constitutional framework. Given the high value placed on institutional autonomy by the military, it would be intuitive to expect that the legal and constitutional framework of the state accommodates the military's preservation of its professional autonomy and limits the military's assertion of its political authority. However, this does not mean that the judiciary's strategic deference on questions of institutional autonomy should therefore be inevitable or even expected.

When a case comes before the courts, there is clearly a conflict of interpretations over the scope of the military institutional autonomy. Deference in these case does not simply refer to deference to the military's institutional autonomy, but deference to the military's own *interpretation* of its institutional autonomy, which could be very expansive. For example, in Pakistan, the courts may have to decide: Is the military's contention that its welfare organization can unilaterally acquire lands for the welfare and benefit of the soldiers a reasonable reading of the scope of its institutional autonomy? Or: Is the military's contention that a military court martial decision cannot be appealed to civilian courts a reasonable reading of the scope of its institutional autonomy? These are questions of interpretation of the scope of the military's institutional autonomy, and I argue that the judiciary is more deferential to the military's interpretation of the nature and scope of its institutional autonomy,

than it is to the military's interpretation of the nature and scope of its political authority.

The Pakistani case of *Brig. (Ret). F.B. Ali and another v the State* (1975) is illustrative of this interpretational deference and is useful to discuss here. In this case the Supreme Court had to decide if the Pakistan Army Act could apply to civilians who had seduced soldiers into joining a plot to overthrow the civilian and military leadership of the state. Applying the Army Act would mean trying these civilians in military courts and limiting the jurisdiction of the civilian courts over these civilians. The appellants argued that placing one class of civilians under the Army Act and thus denying that class the same rights afforded to those who had access to the civilian courts, amounted to a violation of equal protection for that class of civilians. The Supreme Court dismissed this argument stating that in order to prove "validity of a classification," the army just had to show the classification is "based on a reasonable distinctions…and rests on a substantial difference or distinction."[251] This is a permissive standard that granted the military broad interpretive discretion to determine what class(es) do or do not fall under the Army Act. As long as the military can show that there is a *reasonable* distinction between that class of civilians and other classes of civilians, this would be enough to justify subjecting that class to a different set of rules and limiting access to civilian courts.[252] Further, once someone could be tried by the military court, it was the prerogative of the military to decide if they will be tried by military or civilian courts, and thus, whether the jurisdiction of civilian courts was ousted or not.[253]

This judgment illustrates how the question is not merely one of deference to the military's institutional autonomy, but about deference to the military's interpretation of the scope and nature of its institutional autonomy.

Thus, whether we are in a military dictatorship or a new democracy, and regardless of the

[251] Brig. (Retd.) F.B. Ali and another v the State, PLD 506 (SC 1975).
[252] By reasonable, this meant the distinction had to have some connection with the defense of Pakistan.
[253] Ibid.

judiciary's norms and preferences, the judiciary will show strategic deference to the military on questions of the military's institutional autonomy. Hence, I argue that:

The judiciary is less likely to contest military prerogatives pertaining to the military's institutional autonomy than prerogatives pertaining to the military's political authority.

Selective Assertiveness and Strategic Deference in Pakistan

There are broadly three types of military prerogative wielded by the Pakistan army:

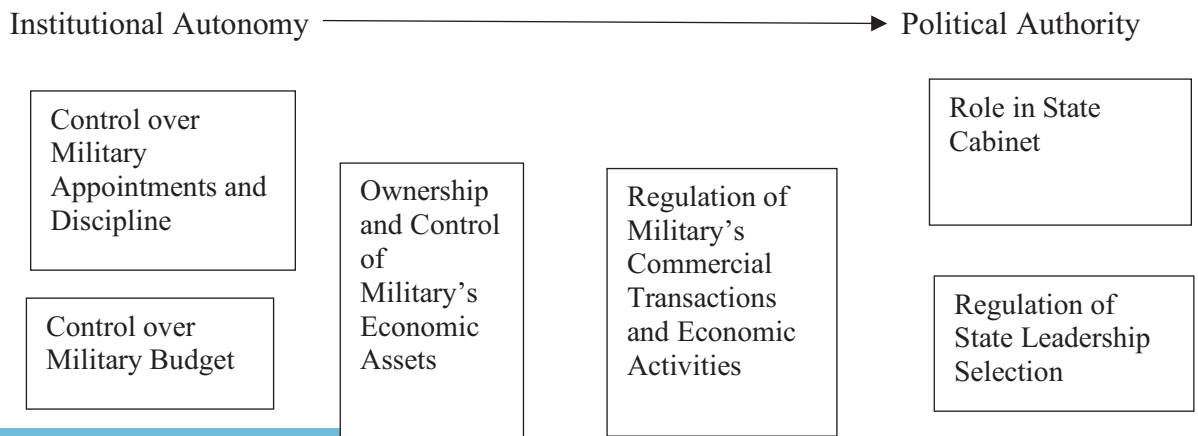
i) the military's political authority to intervene in and manage the political affairs and policy-making institutions of the state.

ii) The military's institutional autonomy to formulate national security policy and manage its internal discipline, appointment and promotion system, shielded from political interference.

iii) The military's control over its economic assets as the Pakistani military possesses a wide range of economic interests including military lands, housing societies, fertilizer factories, cement factories, a welfare trust for members of the military, to name a few (Mani 2010).

The figure below provides examples of the different types of military prerogatives in Pakistan and shows where they fall on the spectrum between institutional autonomy and political authority.

Figure 6.1: Types of Military Prerogatives in Pakistan



Jurisdiction over Civilian Crimes unrelated to National Security

Given this variation in types of military prerogatives, the empirical question is: *How does judicial contestation in Pakistan vary across different types of military prerogatives?* I consider several possible explanations for the judiciary's approach to dealing with different types of military prerogative. I argue that the most plausible explanation for variation in judicial assertiveness across military prerogatives, is that the judiciary is strategically deferential when dealing with prerogatives tied to the military's institutional autonomy, as compared to other military prerogatives.

Rules-Based Approach: According to this approach, the jurisprudence tackling different military prerogatives is guided by established judicial rules and legal precedents. Article 199 of the Constitution of Pakistan and the Pakistan Army Act do provide a strong bar against interference in the internal actions and security operations of the military, and judgments exhibiting deference to the military frequently cite these laws as the rationale for their judgments, as will be discussed in detail in subsequent chapters. However, a focus on the legal precedents of Article 199 does not adequately explain varied positions taken by the judiciary, as the judiciary has at times shown willingness to go beyond the requirements of Article 199 in order to uphold the autonomy of the military, and, at other times, has shown an interest in restricting the scope of Article 199 and curtailing military attempts to expand its jurisdiction. Therefore, a narrow focus on the language of Article 199 to explain judicial deference, does not provide an adequate explanation for how this norm of deference emerged and how its scope has varied across cases implicating the same constitutional articles and statutes.

Ideas-Based Approach: According to attitudinal scholars, the Pakistani judiciary's approach to the

military's prerogatives should be guided by the ideological position of judges on the different types of military prerogatives. My research revealed some judges were favourably inclined to protecting the military's institutional autonomy to manage national security and the internal affairs of the military. However, my research also showed that individual political attitudes of judges, while certainly part of the explanation, did not go far enough in explaining the judiciary's approach across military prerogatives. Even in recent years, as judicial assertiveness towards the military increased, and judges developed an increased interest in playing a role in managing national security interests, the judiciary continued to remain steadily deferential to the military on questions of the military's institutional autonomy, making the variation between contestation of institutional autonomy prerogatives and contestation of other prerogatives even more stark. Therefore, given that attitudes towards uncontested military autonomy have shifted, but the jurisprudence has followed similar patterns of selective assertiveness, this indicates that attitudes alone cannot explain variations.

Selective Assertiveness and Strategic Deference: I find that the judiciary's varied approach to dealing with the military's prerogatives can be best explained by a strategy of selective assertiveness and strategic deference. Judges recognize that the military values its prerogatives differently and will respond differently to adverse judgments, based on the prerogative at stake. My research has shown that the powerful Pakistani military exhibited willingness to retaliate strongly when its institutional autonomy was challenged by the courts, and judges incorporated this possibility of military retaliation into their decision-making. For example, when the Pakistani Supreme Court sought to hold the military accountable for enforced disappearance of people by military intelligence agencies, the military's response was to challenge the Courts jurisdiction, question the Court's patriotism, and overtly refuse to comply with the Court's orders. After facing considerable pushback from the military on these 'Missing Persons' cases, there has been limited progress in these cases, and no

penalties meted out to military officials, and the judiciary has stopped contesting the military on this issue.[254] Therefore, based on this strategic approach, I pose two case-specific hypotheses. *The Pakistani judiciary, is:*

i) more willing to contest military prerogatives pertaining to the military's political authority and public policy-making role than prerogatives pertaining to maintaining its institutional autonomy to devise national security and manage its internal affairs; and

ii) less willing to contest the military's prerogatives pertaining to control over its economic assets and activities if those prerogatives are tied to maintaining the military's institutional autonomy.

Method of Analysis

In the following chapter, these hypotheses are developed and tested using a mixed-method analysis. First, I analyze the coded dataset of 723 court decisions pertaining to military prerogatives between 1973 and 2015, using a logistical regression, to determine how variation in the type of military prerogative being challenged will affect judicial contestation of the military. After completing this analysis, I closely study a selected sample of 8 relevant cases from the period 2008 to 2014 that allow me to examine how the judiciary deals with questions regarding the military's institutional autonomy. The combination of both quantitative and qualitative methods of analysis allows me to consider and eliminate alternative explanations for variations in judicial contestation across cases and show both how the thesis of selective assertiveness best explains this variation, and how strategic concerns regarding likely military retaliation motivated strategic deference on questions of the military's institutional autonomy.

[254] This series of 'missing persons' cases will be discussed in more detail in the next chapter.

Conclusion

Thus, in this chapter, I argued that in authoritarian and post-authoritarian states around the world, militaries possess a range of prerogatives to determine and manage their own domain of interests without civilian intervention, and intervene in the interests of other civilian institutions. Any discussion of how militaries can be brought under civilian control must take into account how these prerogatives vary, in terms of the willingness of the military to protect these prerogatives and the willingness of civilian institutions to contest these prerogatives. I argue that in the case of the judiciary, the judiciary is more willing to contest military prerogatives when they are not tied to the military's institutional autonomy. Since the military is always likely to retaliate against any attempt to reduce its institutional autonomy, even when such retaliation is costly, the judiciary will be more strategically deferential to the military's institutional autonomy, regardless of the norms and preferences of the judges. Therefore, I argue that even in states where the judiciary is acting assertively towards the military, this assertiveness will be trumped by strategic concerns when the judiciary confronts the military's institutional autonomy. In these cases, the judiciary defers to the military's discretion to determine the nature and scope of its prerogatives, uncontested.

Chapter 7

SELECTIVE ASSERTIVENESS AND JUDICIAL STRATEGY IN PAKISTAN

Introduction

In 2003, Jamshed Raza was charged in an assassination attempt on Pakistan's former military leader, General Musharraf. Raza remained in the hands of intelligence agencies from 2003 till 2009, when he was transferred to the police in 2009 and formally arrested for the attempt on Musharraf's life but no evidence was produced against him (Dawn 2016). In 2011, an Anti-Terrorism Court granted him bail citing the lack of evidence (Dawn 2011b). But authorities kept him in detention until his brother petitioned the Islamabad High Court for his release (News 2011a). The Islamabad High Court upheld the order of the Anti-Terrorism Court, setting aside the detention order (*Dawn* 2011b). In spite of the orders of the High Court however, a new detention order was issued and he remained in detention, on the grounds that he might indulge in terrorist activities (News 2011a). Raza was then taken to a prison in Bahawalpur on the allegation that he had committed a robbery but was acquitted of these charges as well (Dawn 2016). From the jail, Raza was "disappeared." Military Intelligence picked him up and allegedly detained him in a military-run internment center in the remote town of Lakki Marwat (Asad 2013). His family and lawyer demanded more information on his whereabouts and repeatedly issued *habeas corpus* petitions for his recovery before the High Court, but the court repeatedly delayed hearing the petitions (Dawn 2016). Then in 2015, the news came that he had been tried and convicted in a military court and he had been sentenced to life imprisonment (Dawn 2015).

A lawyer familiar with the case explained his confusion to me. "First you said he has disappeared. Then he is back. Then he is convicted. But we don't get any trial proceedings. We don't have any offence. At least show the charge."[255] However there are no records of trials conducted before military courts. It was then announced through a military press release to the media that he had been involved in killing two soldiers, a dubious claim given that he had never been charged for such an action during his previous trials and detentions (Dawn 2015b). Finally, in September 2016, the Lahore High Court gave Raza's lawyer a hearing but quickly disposed of the petition, ordering the military authorities to provide the lawyer and the family a copy of the orders of the military court (Dawn 2016). In spite of the obvious violations of rights and due process perpetrated against Raza, the courts showed no interest in engaging further with the case or interfering in the actions of the military courts. The lawyer I spoke to said:

> "I filed a petition regarding the functioning of military courts. But the Supreme Court rejected it. I said we need to give those tried before military courts a separate right of appeal. But we can't get any attention over this issue. When I took the case to a High Court judge, in his chambers he said you cannot bring this case because you are not an effected party. I said the problem is an effected party cannot bring this case to you. The Courts kept blocking my petitions and appeals demanding more transparency and scrutiny of military courts. The cause dies when you give up the effort."[256]

The tragic saga of Jamshed Raza and his lawyers' hapless struggle for more justice and transparency, blocked repeatedly by a reluctant judiciary averse to challenging the military, provides a lens through which we can view the limits on judicial assertiveness in Pakistan. The armed forces have been afforded freedom to conduct security operations with unrestricted discretion and minimal judicial

[255] Interview No. L-17, December 7th 2016.
[256] Interview No. L-17.

scrutiny.[257] If recent years have seen the emergence of an assertive judiciary, ready to contest the military's political grip on the state, and hold generals accountable for their actions, this momentum stalls when the judiciary enters the domain of the military's security prerogatives. The question is why?

As outlined in the previous chapter I argue that the judiciary's willingness to assert itself is contingent upon the type of military prerogative being challenged. Whether we are in a military dictatorship or a democracy, the judiciary is deferential to the military in cases where the prerogative being challenged is connected to the military's maintenance of its institutional autonomy. I argue this is an outcome of judicial strategy. Judges recognize that the military can credibly threaten significant repercussions to the authority of the court. If the military determines that its institutional autonomy is being undermined it is much more likely to retaliate against the judiciary. Accordingly, the strategic judiciary would seek to avoid provoking military retaliation if it wishes to maintain its authority to realize policy preferences. Therefore, in each case judges must ask: Is the prerogative under question connected to the military's conception of its institutional autonomy? In the first section of this chapter, I test my hypothesis of selective assertiveness, using a dataset of Pakistani high court decisions pertaining to military prerogatives from 1973 to 2015, and I discuss the analysis and implications of my findings. In the second section of this chapter, I select and discuss a series of salient judgments that deal with questions of military prerogatives connected to its institutional autonomy, to better understand the sources of judicial deference in these cases and shed light on how strategic concerns about preservation of authority guide this deference to the military's interpretation of its institutional autonomy.

[257] Some of the most notorious incidents in the military's history, including atrocities committed during the 1971 War in East Pakistan (Now Bangladesh), the murder of the journalist Faisal Shehzad in 2012, and the apprehension of Osama bin Laden in a military compound by US Forces in 2011, were dealt with through judicial commissions which did not publish any reports, and did not take any punitive action against those involved.

SECTION I: Testing Hypotheses on Selective Assertiveness

High Court Decision Data

I collected and coded an original data set of high court decisions reviewing laws pertaining to the military or actions taken by the military between August 1973 and August 2015.[258] Pakistan's superior judiciary is composed of the Supreme Court, five High Courts (four until 2010) and the Federal Shariat Court.

Under Article 199(1) of the Constitution of 1973, the High Court accepts five types of writ: the writ of *habeas corpus*, the writ of *mandamus*, the writ of *certiorari*, the writ of *quo warranto*, and the writ of *prohibition*. The writ of *habeas corpus* is issued to executive authorities compelling them to release someone from detention and bring them before the courts. The writ of *mandamus* is issued to lower courts or government officials when judicial or executive officers are not following the laws, to ensure that they do. The writ of *certiorari* is issued when a decision made by a lower court is accepted for appeal.[259] The writ of *quo warranto* is issued when the person claims any power without legal authority or when an official does any act without the backing of law. When the lower courts accept a case outside their jurisdiction the higher courts can issue a writ of *prohibition* to stop the lower court's proceedings. Beyond its writ jurisdiction the High Courts also has a Rights jurisdiction. Under article 199(2) of the Constitution, High Courts can be moved for the enforcement of any

[258] The full set of cases is available as a dataset upon request.
[259] There is a range of lower courts from which appeals can be made to the High Courts including sessions courts, anti-terrorism courts, labour tribunals, service tribunals, to name a few. I provide an organogram of the structure of the Pakistani judiciary in a separate appendix to this project.

fundamental Rights that have been abridged.

The Supreme Court has three types of jurisdiction: original jurisdiction, appellate jurisdiction, and advisory jurisdiction. Under the original jurisdiction the Court can directly hear cases pertaining to disputes between two or more governments, i.e. the federal and/or provincial governments, and it also can issue orders on questions that it decides are question of public importance involving the enforcement of fundamental rights. Under its appellate jurisdiction, the Court can hear and determine appeals from judgments, decrees, final orders or sentences by the High Courts. Finally, the President can gain an opinion from the Supreme Court on any question on which he considers of public importance, although this advisory jurisdiction is rarely invoked.

In selecting decisions for this dataset, I include judgments based on three criteria. First, I only consider *reported* judgments by the superior judiciary. A large number of high court decisions go unreported and are therefore simply unavailable for consideration in this study. Thus, this is not an exhaustive study of all high court judgments pertaining to the military during this period. Restricting the dataset to reported judgments does not create a selection bias because the choice to report a judgment is not made based on the outcome of the decision, nor on the salience of the issues being considered, but on an assessment that the decision will have an impact on the jurisprudence on that particular question, i.e. that the judgment will have value as a legal precedent for subsequent decisions.[260] Second, I only select judgments during the period from 1973 to 2015 because Pakistan has been under the same constitutional framework, the Constitution of 1973, since then. While this Constitution has undergone several amendments, and suspensions during initial periods of martial

[260] The reporters are the Pakistan Law Decisions (PLD), Pakistan Law Journal (PLJ), Supreme Court Monthly Report (SCMR), Monthly Law Digest (MLD), Yearly Law Review (YLR), Pakistan Criminal Law Journal (PCrLJ), Civil Law Cases (CLC), PLC (Pakistan Law Commission), Sindh and Balochistan Law Review (SBLR) and Key Law Reports (KLR).The citations for the relevant judgments from each of these reporters are compiled in the Annual Law Digest (ALD).

law, the courts have still operated under its framework throughout this period.[261] Third, all the decisions must challenge the interests or actions of the military and its subsidiary institutions. This criteria excludes judgments that may be based on military law, but in no way challenge the interests or actions of the military or its affiliated institutions.[262] Therefore, accordingly, I collect all analytically distinct reported judgments decided between 1973 and 2015 that pertain to the authority and actions of the military and the institutions and organizations attached to it or that fall under its control, which fall within the writ and rights jurisdiction of the High Courts and original and appellate jurisdiction of the Supreme Court.[263] Based on these criteria, I include 723 High Court and Supreme Court decisions in this dataset.

Dependent Variable: Judicial Contestation

For the purposes of this analysis, I follow Kapiszewski's (2007) suggestion that we think not just in terms of whether the high court rules for or against the military but examine the intensity with which the court "endorses or challenges" the exercise of military powers. Accordingly, there are three possible outcomes in each judicial decision. The first outcome is that the court rules in favour of the military, not contesting the authority or actions of the military at all. The second outcome is that the court rules against that particular exercise of military power but does not challenge the military's power to carry out such actions. The third outcome is that the court rules against the military's action *and* shifts the authority of the military to carry out such actions either partially or completely to

[261] During periods when military dictators suspended the Constitution, the courts were still expected to operate and decide cases as nearly as possible in accordance with the constitution.
[262] For example, judgments pertaining to rent disputes between residents living within residential schemes owned and run by the military are decisions based on military law, but do not challenge actions taken by the cantonment authorities and are thus excluded.
[263] By analytically distinct, I mean that I do not consider judgments pertaining to the same petition at different stages of the appeals process, as these decisions all pertain to the identical question and fact pattern. Thus, if both the High Court judgment and the Supreme Court judgment on a particular petition are reported, I only consider the final Supreme Court judgment on that petition.

another civilian institution. A hypothetical example is useful to clarify the distinction between the three possible outcomes. The court has to rule on an appeal challenging a decision by the military's own court martial proceedings. The court has three options in the final judgment. 1) The court can dismiss the appeal, not challenging the actions or the authority of the military courts to make that decision. 2) The court can grant the appeal, ruling against the particular action taken by the military courts on procedural grounds (eg. the court did not carry out any evidentiary hearings during the proceedings), but not contesting the military court's authority to make such a decision. 3) The court can grant the appeal, ruling against the action taken by the military courts, on the determination that the appellant does not fall under the jurisdiction of the military courts, thus contesting the military court's authority to hear cases pertaining to this class of accused.

Given the three possible outcomes, I accordingly use an ordinal variable. The first outcome is that the court rules in favour of the military not contesting the military at all, which is coded as 0. The second outcome is that the court rules against the military's actions but does not rule on the military's authority to carry out such actions which is coded as 1. The third outcome is that the court rules against the military's actions *and* rules against the military's authority to carry out such actions, either by shifting that authority partially or completely to another civilian institution, which is coded as 2. I use this ordinal variable instead of a simple dichotomous variable because a simple dichotomous variable does not adequately capture the way the content of the judiciary's decision responds to military power or redistributes that power.[264]The ordinal variable, *Contestation*, by distinguishing between decisions that contest the military's actions, and decisions that contest the military's actions *and* authority, captures this consequential distinction using a simple objective

[264] Lax (2011) advocates for a model of analyzing judicial opinions that goes beyond the ruling itself to the content of the decision, and the rules being made or altered by the judges in their opinions.

criterion. In the dataset, as indicated in Table 1, we see there is also a considerable spread across these three possible outcomes.

Table 7.1: Summary of High Court Decisions from 1973 to 2015

Type of Judicial Contestation	Frequency
Does not Challenge Military Action/Authority (0)	373
Challenges Military Action but not Authority (1)	165
Challenges Military Action and Authority (2)	185
Total	723

Hypothesis Review

The theoretical framework discussed in the previous chapter suggests a number of testable hypotheses concerning the likelihood that the judiciary will contest the actions and authority of the military. The first priority is distinguishing judgments based on the type of prerogative under consideration, in order to determine the effect of the type of prerogative on the judiciary's assertiveness. There are three types of prerogative that Pakistan's military holds.

I) *The Military's Control over its Security Structure and Mission*: The first set of prerogatives deals with the military's control over its core structure and national security mission. This includes judgments dealing with the military's control over formulating national security policy and carrying out security operations, and oversight of the forces involved in carrying out this security mission. These forces include the military, military intelligence and several associated paramilitary outfits that fall under the military's control, including the Frontier Corps, the Pakistan Rangers, the National Guard and the Airport Security Force. Under Article 199(3) of the Constitution, the courts are barred from making orders on applications pertaining to members of the Armed Forces, in respect to any action that relates to his or service in the forces. Instead members of the military are subject to the

jurisdiction of the military courts, i.e. the Court Martial and Field General Court Martial. The civilian courts typically have to deal with the following questions:

i) what classes of personnel fall within this category of armed forces in service?

ii) what actions taken by personnel are considered to be related to service in the forces (questions frequently arise regarding actions taken by soldiers in their personal capacity)?

iii) what actions taken by civilians directed towards the military can fall under the sweep of military court jurisdiction?

iv) when can military court decisions be appealed to the civilian courts?

v) what is the scope of security operations?

vi) what rights can be violated during security operations without judicial oversight or intervention?

II) The Military's Control over its Economic Assets and Activities: The second set of prerogatives deals with the military's economic assets and economic activities. Pakistan's military economy comprises three distinct segments: major public-sector organizations controlled by the army, the commercial subsidiaries that provide for the welfare of the army, and the vast real estate empire owned and administered by the army and a subordinate civilian bureaucracy.

The three major public-sector organizations are the National Logistics Cell (NLC), the Frontier Works Organizations (FWO) and the Special Communications Organization (SCO). The NLC is the largest goods transportation company in the country, and officially falls under the Ministry of Planning and Development, but its operations are managed by the military, being staffed and supervised by army officers, with the Quartermaster General of the military in control (Siddiqa 2007). The FWO remains the largest contractor in the country for constructing roads and collecting tolls, and is staffed by the army's corps of engineers, and falls under the administrative control of the Ministry of Defense (Siddiqa 2007). The SCO runs the telecommunication networks in the areas adjoining the disputed border with India in Kashmir and is controlled by the signals directorate of the

military (Siddiqa 2007).

Beyond this the military has two commercial subsidies: The Fauji Foundation and the Army Welfare Trust. All these subsidiaries are controlled at the top by senior generals or members of the Ministry of Defence. The Fauji Foundation was established to cater for the welfare of military personnel and is one of the largest business conglomerates in the country, with vast industrial operations including sugar mills, corn complexes, fertilizer companies, and oil companies to name a few. The Foundation also controls vast swathes of land as part of its industrial empire, and the governing board is controlled by the army, with 80-90% of jobs taken by the army. The Army Welfare Trust was established to create greater employment and profit-making opportunities for the military. For this purpose, the Army Welfare Trust has constructed and acquired farms, sugar and rice mills, and cement manufacturing, among other industries.

Third the military owns more land than any other institution or group in the country. As of 2007, the military controls about 11.58 million acres, which is approximately 12 percent of the total state land in the country (Siddiqa 2007). The military has the capacity to convert this land from official state purposes to private commercial purposes and also distribute it among army officers for personal use. The Department of Military Land and Cantonment (DML & C) manages military land in rural and urban areas. There are vast areas designated as cantonment land around the country, some within major cities, and run by the DML& C which comprises both civilian and military bureaucrats. These cantonment areas operate under special statutes independent from the regulatory framework of the provinces within which they fall. The Defense Housing Authority (DHA) is officially a private project of urban housing schemes in major cities around Pakistan, but the controlling interest belongs to the military, and the Corps Commander for each city serves as the chairman of the DHA housing scheme in that city. The expansion and regulation of the military's lands generates a large share of the jurisprudence in this dataset.

The primary questions that come up for litigation regarding economic assets include:

i) What special exemptions are military run or owned organizations entitled to?

ii) What is the scope of the authority of these organizations to acquire and repurpose lands?

iii) What procedures and rules must be followed in the promotions and dismissal of employees?

iv) What authority do military administrative authorities have over residents and landowners living on military owned lands?

v) Do federal and provincial property laws and taxes apply to military owned lands?

vi) What administrative decisions can be appealed to civilian courts?

III) Military's Control over Politics and non-Security Policy-Making Activity: These are cases where the military played a role in or took over the policy-making and political branches of government, unrelated to security. Thus, it covers the granting of non-security executive, legislative and judicial functions to the military. The jurisprudence pertaining to these functions typically increases during periods of military rule, as the military intervenes in all institutions of governance. At the apex of the executive structure this includes formal seizures of executive power through military coups, and informal interventions in the political process to favour allied political parties. Below high-level political interventions, military officers are also recruited laterally into civilian bureaucracies. As of 2011, out of roughly 650 DMG officers, the District Management Group that forms the key administrative cadre of the civil service, around 100 officers are from the armed forces (Chaudhry 2011). During periods of military rule, the induction of military officers into the administrative bureaucracies increase. Legislatively, military regimes seek to create news laws and amend the constitution. And judicially, summary military courts have also been established to deal with criminal cases.

The primary questions that comes up for litigation regarding the military's political and policy-making authority include:

i) What conditions permit the military to assume political power?

ii) What legislation can the military pass once it assumes political power?

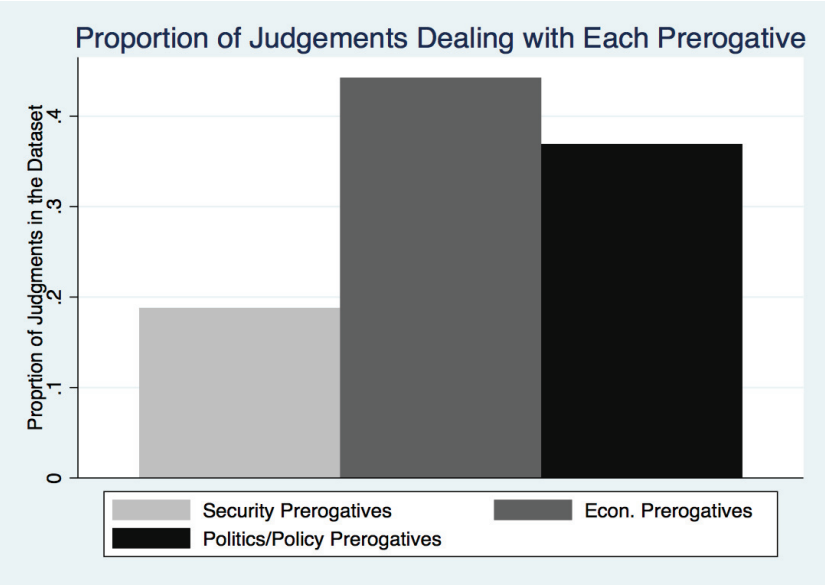
iii) When can military officials stand for or intervene in elections?

iv) What is the jurisdiction of summary military courts?

v) What is the jurisdiction of civilian oversight institutions over military bureaucrats?

There is a considerable spread of high court judgments across the three types of prerogative as shown in Figure 7.1 below.

Figure 7.1: Breakdown of Judgments by Prerogative Type (1973-2015)



The empirical implication of this argument is that in cases pertaining to the military's control over its security structure and mission, we should see the greatest deference to the military's interpretation of its discretion, as these are most closely tied to the military's institutional autonomy. Similarly, in cases pertaining to the military's involvement in political and policy-making activity unrelated to security, we should see the least deference to the military's interpretation of its discretion and authority, as these are more related to the military's political authority than its institutional autonomy. Finally, in cases pertaining to the military's economic resources and activity, some cases deal with the military's prerogative to acquire resources and revenue for the purposes of the military,

while others deal with the military's prerogative in the administration of civilian employees and residents within the structure of these military-run organizations. Therefore, we should find that the courts are less deferential in cases pertaining to the military's economic assets and activity, than in cases pertaining to the military's control over its structure and security mission, but more deferential than in cases pertaining to the military's political and policy-making activity, and within this subset of economic prerogative decisions, the court should be more deferential when deciding cases pertaining to the military acquisition of resources and revenue. Accordingly I argue that:

The Pakistani judiciary, is:

i) more willing to contest military prerogatives pertaining to the military's political authority and public policy-making role than prerogatives pertaining to maintaining its autonomy to devise national security and manage its internal affairs; and

ii) less willing to contest the military's prerogatives pertaining to control over its economic assets and activities if those prerogatives are tied to the military's acquisition of revenue and resources than if those cases are tied to the military's regulation of its economic assets and activities.

Measurement and Estimation

For my dependent variable, I use the ordinal variable, *Contestation,* discussed earlier. It is coded 0, if the judiciary does not contest the military, 1 if the judiciary contests the military's actions but not its authority, and 2, if the judiciary contests the military's actions and authority. To test my hypotheses I use the categorical variable, *Prerogative,* which indicates whether a judicial decision pertains to the military's control over its security structure and mission (1), or to its control over its economic assets and activity (2), or to its interventions in political and policy-making activity

unrelated to security (3).[265]

I also control for four potential influences on the judiciary's decision-making. Following the basic insight of the strategic approach, the courts should be more deferent to the military during periods of military rule, when the military's power is not fragmented or diluted, than during periods of democratic rule (Tsebelis 2002; Rios-Figueroa 2007). Accordingly, I use a dummy variable, *Democracy*, which is coded 1, during periods of democratic rule and 0 during periods of authoritarian rule.

The judiciary should be even more deferential to the military when military regimes suspended the constitution restricting the jurisdiction of the judiciary and removed the constitutional safeguards protecting its independence (Schedler, et al. 1999; Widner 2001; Randazzo et al. 2016). Accordingly, I use a dummy variable, *Constitution,* that is coded 1, during periods when the constitution was fully in place, and 0 during periods when the constitution had been, at least partially suspended

I also control for the identity of the petitioner moving the action against the military or respondent against whom the military moves the action, capturing the notion that the quality of legal representation should vary according to the plaintiff or respondent type, and using the assumption that political status is a reasonable proxy for litigant resources (McGuire 1995; Sheehan, et al. 1992; Staton 2010). Controlling for the identity of the challenger involves estimating a seven-category variable, *Challenger,* which accounts for a large number of categories of petitioner. The base category of the variable is the modal challenger, a private individual.[266][267]

Fourth, I add the dummy variable *Salience* as another control. I define salient judgments as

[265] The replication dataset is available upon request.
[266] These categories include civil society organizations, private corporations, major political leaders (i.e. heads of major political parties), local government institutions, provincial government institutions and federal government institutions.
[267] Where the Supreme Court itself moves the petition (*suo motu*), I code that as a federal government institution, since, technically the Supreme Court is a federal government institution.

judgments that the judiciary perceives as significant because of the issues and actors involved and the political circumstances in which the judgment is being made. Based on studies of the Indian judiciary, which is structured similarly to the Pakistani judiciary, I measure salience by the number of judges appointed to decide a case, since the Chief Justice typically assigns three judges or more to a case that raises significant questions and concerns (Chandrachud 2014). I expect that, if judges are acting strategically, in a salient decision the judiciary is less likely to assert itself, anticipating that the military is more likely to retaliate to contestation. Therefore, deference in salient judgments should provide further evidence of the court acting strategically.

I also control for cases decided during the tenure of Chief Justice Iftikhar Chaudhry. Justice Iftikhar Chaudhry, as discussed in earlier chapters, was renowned for his assertive decisions, and scholars explain some of the Pakistani judiciary's most assertive moments as a product of his activist populism (Ghias 2011; Siddique 2015). Therefore, I use a dummy variable *Chaudhry,* coding cases deciding during his tenure as Chief Justice as 1, and cases not decided during his tenure as 0.

Finally, I expect the judiciary to be more deferential to the military during periods of military conflict, given that the judiciary would be willing to extend more discretion to the military during times of conflict. Between 1973 and 2015, the state was not engaged in any external military conflicts, but there were significant internal military conflicts. Accordingly, I use the UCDP/PRIO Armed Conflict dataset (Themner and Wallensteen 2013) to code for whether Pakistan was involved in an intrastate conflict. I use a categorical variable, *Conflict,* and code the absence of any conflict as 0, the presence of conflict leading to at least 25 battle deaths in a year as 1, and the presence of conflict leading to over a 1000 battle deaths in a year as 2.

Three possible questions and concerns can arise regarding this research design, and how it tests the hypotheses presented in the previous chapter. The first concern would be whether the distinction between contestation of military action and contestation of military action and authority is

sufficiently objective and apparent in each judgment. To address this concern, alongside the ordinal regression, I also run a logistical regression to test my hypotheses, in which I use the dichotomous dependent variable *Outcome,* which simply indicates whether the court ruled for or against the military. If my results hold in both the ordinal and logistical regressions this would provide greater robustness to my findings.

The second concern pertains to the distinction between institutional autonomy and political authority, and whether the division into three types of prerogatives adequately captures that distinction, especially given that the category of decisions pertaining to the military's economic prerogatives brackets both questions of institutional autonomy and political authority. My second hypothesis addresses this concern as it explains how the court would distinguish between economic prerogatives that relate to the military's institutional autonomy and economic prerogatives that are not. To test the second hypothesis, I also run a logistical regression of just decisions pertaining to the military's economic interests. I use a dummy variable, *Institutional Autonomy*, to indicate if the case deals with a prerogative related to the military's institution autonomy. Within the economic decisions, judgments pertaining to the military's acquisition and repurposing of land, powers of revenue generation and taxation, and special exemptions for military commercial activity, would all be considered tied to the military's generation of revenue and resources for its institutional purposes. These judgments would be coded as 1 for Institutional Autonomy. On the other hand, judgments pertaining to the military's administration of housing societies, cantonments and commercial organizations, including its authority over employees, and over residents and landholders would not be considered tied to the military's institutional autonomy, and therefore would be coded as 0. I use a logistical regression with the dependent variable *Outcome* here, since upon removing the other categories of decisions, the number of decisions is too small for reliable ordinal regression results. If the judiciary is more deferential in cases pertaining to the military's institutional autonomy than those

that are not, within the subset of economic decisions, this would add robustness to my findings.

Finally, a third concern is that the difference between the three categories of *contestation* is not strictly ordered, i.e. moving from upholding the military action/authority to contesting the military action is not the same as moving from contesting a military action to contesting military action and authority. Therefore, I also carry out a multinomial logistical regression, where this assumption of order between the levels of contestation is relaxed, to ensure my results are valid.

Analysis

Table 7.2, below, presents the logistic regressions for the likelihood of the judiciary contesting the military's prerogatives in Pakistan. All statistically significant results are provided in bold. Model 1 is the ordinal logistical regression, representing my hypothesis with all 5 control variables that may affect whether the judiciary decides against the military. The subsequent models all address the potential shortcomings of the research design as outlined in the section above. Model 2 is a logistical regression that presents the likelihood of the judiciary simply deciding against the military and addresses concerns about classifying judgments across an ordinal spectrum of contestation. Model 3 is a logistical regression that presents the likelihood of the judiciary deciding against the military in cases pertaining to the military's economic prerogatives. It tests the second hypothesis and addresses concerns that the division into three categories of cases may not capture the distinction between institutional autonomy and political authority. Model 4 is a multinomial regression that addresses the concern that the different levels of contestation are not evenly spaced on the ordinal scale.

Table 7.2 shows strong evidence for our hypothesis. In all models the sign on political and policy making prerogatives is positive and significant at the 0.05 level or lower. This means that

when the type of prerogative shifts from other types of prerogatives to the political and policy making prerogative, the probability of judicial contestation is increased. Therefore, the courts are more likely to contest the military's prerogatives when the prerogative is a political and policy-making prerogative than when the prerogative pertains to the security structure or mission. Similarly, in all models the sign on economic prerogatives is positive and significant at the 0.05 level or lower, which means that when the prerogative shifts from a security prerogative to the economic prerogative, the probability of judicial contestation is increased. This suggests that the courts are more likely to contest the military's prerogatives when the prerogative is an economic prerogative than when the prerogative pertains to the military's internal structure and security mission. Table 7.2 presents the results of the regression models on the following page.

Table 7.2: Judicial Contestation of Military Prerogatives (w/ Robust Standard Errors)

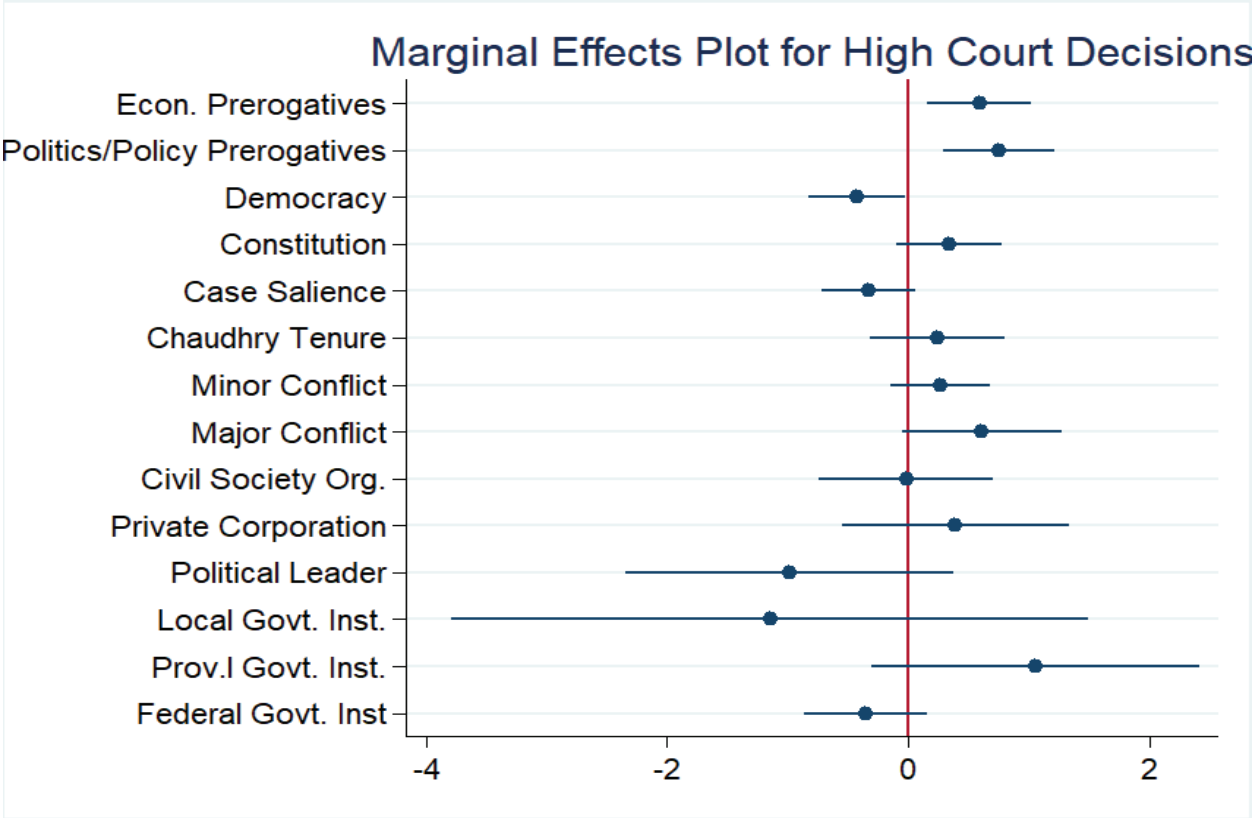
	DV: Contestation of Military Prerogative (Ordinal)	DV: Decisions Against Military (Logistical)		DV: Contestation of Military Prerogatives (Multinomial)	
	(1)	(2)	(3)	(4)	
				Contest =1	Contest =2
Prerogative Political and Policy-Making	**0.756***(0.236)**	**0.755***(0.250)**	**-**	**0.621**(0.302)**	**0.926***(0.287)**
Prerogative Economic	**0.590***(0.222)**	**0.419**(0.229)**	-	0.065 (0.290)	**0.804***(0.327)**
Prerogative Security	(reference category)				
Prerogative					
Democracy	**-0.426** (0.21)**	**-0.444**(0.223)**	**-0.598**(0.303)**	-0.232 (0.277)	**-0.583**(0.21)**
Constitution	0.342 (0.225)	**0.431*(0.245)**	0.353 (0.370)	0.504 (0.315)	0.352 (0.294)
Salience	**-0.328*(0.199)**	**-0.525**(0.209)**	-0.287 (0.312)	**-0.459*(0.270)**	-0.322 (0.251)
Chaudhry Tenure	0.243 (0.283)	0.317 (0.284)	0.227 (0.409)	0.359 (0.354)	0.241 (0.328)
Conflict					
Minor Conflict (< 25 deaths)	0.178 (0.227)	0.178 (0.227)	0.437 (0.317)	0.041 (0.291)	0.412 (0.280)
Major Conflict (< 1000 deaths)	**0.315*(0.332)**	0.315 (0.332)	**0.785*(0.467)**	0.237 (0.417)	**0.925**(0.399)**
No Conflict	(reference category)				
Challenger					
Civil Society Org.	-0.016 (0.369)	0.112(0.418)	1.573**(0.617)	0.223 (0.515)	-0.101 (0.472)
PrivateCorp.	0.393 (0.370)	0.112 (0.438)	0.230 (0.488)	-0.235 (0.692)	0.413 (0.486)
Political Leader	-0.981(0.696)	-6.03 (0.631)	(0 cases)	-1.363 (1.083)	-0.915 (0.748)
Local Govt. Inst.	-1.144 (1.349)	-1.301 (1.143)	-0.755 (1.249)	**-14.3***(0.56)**	-0.703 (1.186)
Prov. Govt. Inst.	1.055 (0.693)	0.715 (0.624)	**1.548*(0.815)**	-0.441 (1.125)	**1.156*(0.672)**
Federal Govt. Ins.	-0.351 (0.259)	-0.003 (0.337)	0.108 (0.395)	**0.694*(0.368)**	**-1.000*(0.521)**
Private Individual	(reference category)				
Inst. Autonomy	-	-	**0.690**(0.278)**	-	-
Constant		**0.669***(0.256)**	**0.862**(0.362)**	**-1.279*** (-0.315)**	**-1.567*** (0.338)**
Observations	723	723	320	723	
Log Likelihood	-725.377	-486.227	-209.056	-713.721	
AIC	1482.754	1002.453	444.113	1487.442	

Note: *p<0.1; **p<0.05; ***p<0.01

The substantive effects of each of these relationships is also quite large. Figure 7.2 presents

the marginal effects from model 1. The first two coefficients suggest that the likelihood of the judiciary deciding against the military varies considerably across the three different types of prerogative. This indicates that the type of prerogative being challenged substantively alters the probability of judicial contestation in a particular case.

Figure 7.2: Marginal Effects Plot for Judicial Contestation of Military Prerogatives



We thus find strong evidence for both of our hypotheses. The judiciary is more likely to contest the military's political and policy-making prerogatives than contest the military's security structure and mission prerogatives. The judiciary is also more likely to contest the military's economic prerogatives than contest the military's internal structure and security mission but the increase in likelihood is less pronounced. The multinomial regression and logistical regression both show that the results are robust. The logistical regression of cases pertaining only to the military's economic prerogatives also shows that the courts are significantly less likely to challenge military prerogatives tied to the military's institutional autonomy. Thus, this provides evidence for the second

hypothesis and shows that the distinction between prerogatives tied to the military's institutional autonomy and prerogatives that are not, does guide the courts' decision-making.

The control variables provide some insightful and some surprising results. The most unexpected result we find is that the judiciary is less likely to assert itself against the military during periods of democratic rule than periods of authoritarian rule. This result is certainly surprising but not altogether unexpected, and lends some support to the primary argument in this project: that the judiciary's increasing assertiveness against the military over time was not linked to political openings, but to the entrenchment of a more assertive set of norms and values over time that manifested in increased judicial assertiveness during General Musharraf's military regime. We do, however, see that during periods where the constitution was absent the judiciary was less likely to make decisions against the military, indicating that the lack of judicial independence during these periods did deter the judiciary, although the relationship is weak. There seems be no clear relationship between the identity of the challenger and the likelihood of judicial assertiveness against the military, possibly because in a majority of cases the challenger was an individual. The results for military conflict are unexpected since they show an increased likelihood of judicial contestation during periods of major intrastate conflict. However, this can perhaps be explained by the fact that the years with major intrastate military conflict have mostly fallen after 2007, which coincides with the rise in the judiciary's overall assertiveness, thus making it difficult to discern the actual impact of the conflict on decision-making. Iftikhar Chaudhry's tenure as Chief Justice also does not have a significant impact on judicial assertiveness, indicating that simply focusing on his leadership as an explanation for judicial assertiveness would not be adequate.

The findings from the control variables indirectly support the other empirical argument in this project: that both political openings and individual judicial leadership are inadequate to explaining judicial assertiveness, pointing to the need to find an alternative explanation for the increasing

judicial assertiveness in recent years in Pakistan.

Finally, this chapter argues that the judiciary deferred to the judiciary on some types of prerogatives more than others for strategic reasons, out of fear of retaliation. The results for the *salience* variable provide some supportive evidence for this, since we also find that across the models the judiciary was less likely to challenge the military in salient cases than in non-salient cases. This suggests strategic calculations on the part of the judges since the military would probably be more opposed to adverse judgments in these cases than in less salient cases. Thus, all together, the control variables provide some preliminary but limited evidence for judges acting strategically to avoid military retaliation where possible, and evidence for the judiciary acting more assertively over time for reasons that cannot be explained by democratic openings in the political system or the leadership of an activist Chief Justice.

The findings of this regression analysis strongly suggest that the likelihood of judicial contestation of military prerogatives varies depending on the type of prerogative under consideration in the case. The subsequent section delves deeper into several judicial decisions, both to further confirm this connection and unravel the strategic motivations for selective assertiveness.

SECTION II: The Judicial Strategy of Selective Assertiveness

In this section I examine a series of judicial decisions dealing with the military's institutional autonomy, which could reveal the important role of judicial strategy in explaining judicial deference in these cases and compare them to judicial decisions unrelated to the military's institutional autonomy. To select these cases I used a replicable case selection technique. I chose three questions that broadly represented the types of challenges to the military's institutional autonomy litigated before the courts: i) checks on the military's organizational structure, ii) checks on the military's security mission, iii) checks on the military's acquisition of resources and revenue. Then I selected a

fourth question that exemplified challenges unrelated to the military's institutional autonomy: iv) checks on the administrative procedures and rules of the military's economic interests.

For the first type of challenge, I examine judgments dealing with the scope and civilian oversight of the jurisdiction of military courts, the key disciplining institution within the military's structure. For the second type of challenge, I examine judgments dealing with the scope of judicial oversight of rights violations during military operations, specifically the practice of enforced disappearances. For the third type of challenge, I deal with the scope of judicial oversight of land acquisitions by the military's economic subsidiaries. For the fourth type of challenge, I chose a question that dealt with a subject that was not tied to the military's institutional autonomy: checks on the military's regulation of its subsidiary landed interests, the cantonments.

I chose at least one decision addressing these four questions, using two more criteria. The first is that the decision/s should be salient, i.e. it was decided by three or more judges. By choosing only salient cases, I can control for the possibility that any variation in the assertiveness can be explained by how salient these decisions were, and I am also more likely to find newspaper reports discussing the proceedings and implications of this case, enriching my analysis of these decisions. Finally, I only choose cases from the same time period between 2008 and 2015. By choosing cases from this period, I can control for the possibility that the variation in judicial approach can be explained by time, especially given the development of norms favouring judicial activism in recent years. This makes the selected cases especially interesting, given the judiciary's otherwise increasing assertiveness towards the military during these years.

I carefully analyze the texts of these judgments to discern the reasoning behind the choices judges made in these decisions. I use a combination of newspaper articles and interviews to situate these decisions in their proper political and legal context and better understanding the motivations driving the decisions made by these judges. I also use newspaper and interview data to add more

general detail about the stakes for the judges in these three areas of jurisprudence. In doing so I hope to provide a complete picture of the dynamics shaping the judiciary's selective assertiveness across military prerogatives.

Jurisdiction and Civilian Oversight of Military Courts

In *Muhammad Naveed v Federation of Pakistan* (2013), seven civilians and two soldiers were tried and found guilty by a field general court martial for an assassination attempt on General Pervez Musharraf in 2003.[268] The convicted assailants attempted to appeal the decision to the appellate tribunal within the hierarchy of the military courts but their appeals were time-barred and should have been dismissed.[269] Nevertheless, the military appellate tribunal still considered the appeal and, without giving the accused notification or a hearing, enhanced the sentence from life imprisonment to death.[270] Thus, the military appellate court had accepted an appeal that was legally time-barred, and, without providing notice to the appellants, enhanced the sentences, all in violation of judicial procedure. This was a straightforward case of military judges acting outside their jurisdiction. The convicted civilians appealed this sentence enhancement to the High Courts. Based on past precedent, civilian courts could intervene in military court decisions when the military courts had acted without jurisdiction or with malice intent.[271] But the High Court dismissed the appeal claiming that the civilian courts did not have jurisdiction to intervene in military court decisions.[272]

The convicted civilians then appealed this decision to the Supreme Court. The case stayed with the Supreme Court for several years, while the convicts remained imprisoned, and the Court did

[268] See *Muhammad Naveed v Federation of Pakistan*, SCMR 596 (2013).
[269] Article 33-B of the Army Act gives the defendants forty days to appeal the military court decision which they exceeded. See "Pakistan Army Act, 1952," Pub. L. No. Act XXXIX of 1952, § 33-B.
[270] Ibid.
[271] See *Ghulam Mustafa Khar v Federation of Pakistan*, PLD 26 SC 1989.
[272] Ibid.

not hear the case or make a ruling until 2013, by which time General Musharraf had been long removed from power. A three-member bench of the Court ruled that the decision to enhance the sentence in an appeal that was time-barred and conducted without notice or any hearings, interfered with "principles of natural justice" and the military appellate tribunal acted "without jurisdiction."[273]

Inamul Raheem, a former JAG lawyer of the military explained that the verdict highlighted the futility of appealing a decision within the military hierarchy (Iqbal 2014). A lawyer I spoke to explained, that if the Chief of Army Staff (at the time, General Musharraf) wanted those who had made an attempt on his life to get the maximum punishment, his juniors were certainly going to oblige.[274] Tariq Asad, another lawyer who had represented prisoners in military court trials said the Court was only willing to intervene and overturn the judgment because Musharraf, who was personally invested in the outcome of the case, was no more in office. "The ruling" he said "once again proved that the judiciary always goes in accordance with the circumstances and situation of the day" (Iqbal 2014). Confronted with a clear violation of judicial procedure by the military courts, the civilian courts were still reluctant to disturb the military courts' decision and interpretation of its jurisdiction until the Chief of Army Staff, who had a personal interest in the case, had completed his tenure. The path of this case and the timing of its final outcome demonstrate the cautious deference practiced by the judiciary in appeals of military court cases.

In January 2015, the Pakistani parliament amended the Constitution to establish military

[273] Ibid.

[274] He said "When someone is apprehended by the military unit, the head of the unit makes a charge. The charge then goes to the general running the Field General Court Martial. He then countersigns it. Now the same general who has signed the charge also constitutes the court. The sentence given is also confirmed by the same general. Thus, if a general who favors the charges also chooses junior officers to staff the bench of the military court, the court is very unlikely to make findings running counter to the superior officer." Further on the issue of death sentences, he said "if there is a death sentence, the death sentence has to be confirmed by the Chief or Army Staff. After this confirmation, the right of appeal is given before the military hierarchy. Now, if the sentence has been confirmed by the Chief of Army Staff, will a mere major then revoke it?" As he put it, "it's an appeal against Caesar before Caesar's wife." Thus, the hierarchy of the military ensures that procedure plays limited role in determining the outcomes of cases and especially of appeals. See Interview No. L-17.

courts for terrorist offences. The decision to amend the Constitution came after one of the worst terrorist attacks in Pakistan's history when six gunmen entered the Army Public School in the city of Peshawar, killing 141 people including 131 schoolchildren ranging between 8 and 18 years of age (Khan 2014a). The attack led to popular outcry for decisive action to be taken against terrorists. In response, the civilian and military leadership of the country announced a twenty-point National Action Plan to deal with terrorism, and the highlight of this was the proposal to establish Special Courts headed by military officers to try terrorists. The 21st Amendment to the Constitution expanded the applicability of the Pakistan Army Act beyond soldiers to individuals belonging to "any terrorist groups or organization using the name of religion or a sect" who are accused of:

i) Attacking military officers or installations;

ii) Kidnapping for ransom;

iii) Possessing, storing or transporting explosives, firearms, suicide jackets or other articles;

iv) Using or designing vehicles for terrorist attacks;

v) Causing death or injury;

vi) Possessing firearms designed for terrorist acts;

vii) Acting in any way to "over-awe the state" or the general public;

viii) Creating terror or insecurity in Pakistan.[275]

This legislation expanded the Army Act to a broad class of accused including not just those who had committed terrorist attacks, but also those involved in associated activities. Expanding the Army Act meant those accused of these acts were now subject to the same legal procedures as military personnel, and the civilian courts jurisdiction over this class of accused was limited to appeals based on violation of jurisdiction or demonstrably malicious intent by military court

[275] See "Pakistan Army Act, 1952," Pub. L. No. Act XXXIX of 1952, § 2(iii), amended as of January 6th, 2015.

judges.[276]

The procedure used in military courts demonstrates only limited adherence to the principle of due process that is enshrined in the Constitution.[277] The military court is composed of three to five serving officers of the armed forces, and there is no requirement that these officers be lawyers or have legal training. Therefore, whereas military courts are expected to follow the same rules of evidence as civilian courts, in practice these courts were lax on questions of the admission and verification of evidence. In particular, civilian courts typically did not admit prior confessions as evidence given that they could easily be extracted or coerced by security officers behind closed doors. Yet, confessions were frequently admitted by military courts and were often used as dispositive evidence.[278] Further, while defendants were granted access to legal counsel, they were given little choice in the legal counsel they were granted. Thus, military courts were staffed with officers from the military hierarchy with no legal training or regard for rules of evidence, in opaque procedures behind closed doors.

Given these urgent concerns about the practices and conduct of military courts, the blurring of the line between civil and military powers, and the ousting of the jurisdiction of the civilian courts, several leading bar associations challenged the establishment of military courts in the Supreme Court (Khan 2015; Tanveer 2015). This was not the first time that military courts had been proposed or established during democratic periods to try terrorists, but this was the first time the Supreme Court upheld such legislation.[279]

A key distinction between these cases and previous attempts to establish military courts, was

[276] See "PILDAT Policy Brief: Revival of Military Courts in Pakistan" (Pakistan Institute of Legislative Development and Transparency, 2017), http://www.pildat.org/Publications/publication/CMR/PILDATPolicyBrief_RevivalofMilitaryCourtsinPakistan.pdf.
[277] Ibid.
[278] Interview No. L-19, December 11th 2016.
[279] See *Darvesh Arbey v Federation of Pakistan*, PLD 846 (Lahore 1977); Liaquat Hussain v Federation of Pakistan, PLD 504 SC 1999.

that the parliamentary act establishing military courts was not a statute but a constitutional amendment. This placed the judiciary in a more precarious position as the petitions before the Court were asking the judges to strike down a constitutional amendment, which would be an unprecedented assertion of judicial power. The petitioners argued that this amendment could be struck down because it violated the *basic features* of the Constitution pertaining to fundamental rights and the independence of the judiciary.[280]With respect to the military courts, the petitioner Hamid Khan argued the extension of the powers of the military courts "abridged the fundamental right of access to justice; that independent court, independent procedure and right to engage counsel of choice are the essential elements of a fair judicial system, which are denied to those to be tried by the military courts."[281] The Court therefore could choose between upholding the establishment of special military courts on the grounds that the judiciary could only interpret and uphold the constitution but not challenge it, or overturn or return the constitutional amendment on the grounds that the military courts violated the most salient features of the constitution by denying fundamental rights and granting judicial powers to the executive branch.

The Court's plurality opinion, instead chose a third option: it held that the 21st amendment did not violate the most salient features of the constitution, and therefore could be upheld.[282] The Court argued that expanding the jurisdiction of military courts was just "a temporary measure (2 years only) targeting a very small specified clearly ascertainable class of accused has been brought into the net to be tried under the Pakistan Army Act."[283] Further, since the judiciary still maintained limited powers of judicial review over the transfer of cases to military courts and the decisions of

[280] The doctrine of basic structures is a judge-made Indian principle stating that a country's constitution has certain features that cannot be amended by its legislative body. Hence amendments to a constitution must not be in conflict with the basic structure of the constitution. The Pakistani judiciary has extensively debated this doctrine and had,until 2015, only partially borrowed it for the Pakistani context. See Saad Rasool, "Basic Structure Doctrine in Pakistan: Fidelity to Constitutionalism or Judicial Expediency" (Harvard University, 2013).
[281] See *District Bar Association, Rawalpindi v Federation of Pakistan*, PLD 401 SC 2015.
[282] Thus, a majority of the Court decided that the Court did have the power to overturn constitutional amendments passed by the legislature if they violated the *basic structure* of the constitution.
[283]*District Bar Association, Rawalpindi v Federation of Pakistan*, PLD.

military courts, the judiciary held that "it is difficult to hold that the essential nature of the Salient Features of Fundamental Rights as applicable in the Country has been repealed, abrogated or substantively altered." This stood in stark contrast to the "stinging, rights-based critiques of the lack of transparency in military courts", offered by several of the same Supreme Court justices during the hearings of the case in June 2015 (News 2015; Newberg 2016). The justification given by the Court was ultimately grounded in pragmatic rather than legal reasoning, as they argued the present "war-like situation necessitate[d]" this exceptional and temporary arrangement, given the inability of the overburdened and procedurally constrained civilian courts to act swiftly and decisively against terrorists.[284] This undeclared war distinguished this case from previous judicial rulings striking down military courts.

So, why were these judges willing to endorse the militarization of the judiciary, and the fragmentation of their own authority? I spoke to one of the judges who upheld the constitutional amendment and he gave me three justifications for the decision. First, he said "Military courts had the same proceedings as other courts. And there is just hullabaloo over the fact that petitioners have no access to counsel of choice."[285] Second, there would be "no delays and expeditious trials were the key concern."[286] Third, he said "people were supportive of it."[287] The logic he presented discounted the procedural shortcomings of the military courts, as he seemed more concerned about the speed of trials then the delivery of just outcomes, and he emphasized public support for military courts as a reason for deciding in favor of the military courts.

Another former judge further explained why the courts were willing to tolerate procedural leniency in these cases. He said, "Procedure has a significant place but the endeavor is to save somebody," and this class of accused "deny nothing, glorify what they have done" and will return to

[284] Ibid
[285] Interview No. J-20, November 2nd 2016.
[286] Ibid.
[287] Ibid.

their practices if released, and endanger people once again.[288] Therefore, from the perspective of the judge, "there may be twenty things wrong with the judgment (of the military courts), but ultimately this convict cannot go free."[289] For the Court it boiled down to the status of these accused, as a special class that the military wanted to see convicted, and that did not deserve to be afforded the same liberties as other accused civilians. There was a presumption of guilt shared by both the military and the judiciary that underlay the exceptional status judges were willing to grant those accused of terrorism. Even the bar associations were divided, as several major leaders of the bar challenged the establishment of military courts both inside the court room, but a bar association leader who brought one of the petitions told me "we challenged the military courts, but in reality we were for it."[290] Therefore, some judges were guided by their opinion of the accused, and public support for military courts.

However, what also was apparent was that even judges who were concerned about the imminent rights violations were unlikely to resist the expansion of military courts when the military had publicly advocated for the courts and had both public and parliamentary support. The military benefited from having developed a formidable intelligence collecting apparatus in the state which extended beyond the surveillance of security threats to include politicians, judges, and activists among others. This ensured the military had a monopoly over intelligence in the state, which it used in two ways to get its way in cases in which it took an active interest. First, military intelligence officers would provide confidential intelligence to judges privately to prove the guilt of those that needed to be transferred to military courts. During the proceedings of the case on the 21st Amendment, for example, judges were given private access to military intelligence about the terrorist networks the military was fighting, and the perpetrators of the attack on the Army Public School.[291]

[288] Interview No. J-33, March 21st, 2017.
[289] Ibid.
[290] Interview No. L-14, November 5th 2016.
[291] *District Bar Association, Rawalpindi v Federation of Pakistan*, PLD.

The judges receive this information but have no way to verify it. But this shared information can prejudice the judges against this class of accused, emphasize the unpopular consequences of limiting the military's discretion to deal with these accused, and remind the judges of the military's strong interest in the outcome of the case. Second, if this does not work, military intelligence reminds judges of the private information they have collected on judges. As one former judge told me, "Judges have skeletons in their closets. Military intelligence looks into them and keeps their tabs. And judges know this."[292][293]

Thus, in *District Bar Association, Rawalpindi v Federation of Pakistan* (2015) an otherwise assertive judiciary which was protective of its powers and jurisdiction and had opposed the establishment of military courts and the fragmentation of its authority in the past, was willing to acquiesce to a military takeover of its authority. Conversations with both judges and lawyers showed that judges were willing to consider exceptional solutions to confront the menace of terrorism, and they shared the military's contempt for this special class of accused. At the same time, judges were also aware of the military's strong interest in the outcome, and the public and political support the establishment of military courts enjoyed. Thus, for both sincere and strategic reasons, the Supreme Court accepted the government's description of terrorism and its consequences and used this to endorse the necessity of expanding the military court jurisdiction. It has been over three years since special military courts came into operation, yet they continue to operate, buttressed by a narrative of decisive success and continued necessity in the open-ended war on terror, and the Supreme Court shows no inclination to revisit the issue, undermining the time-bound rationale upon which they were endorsed in the first place.

[292] At least one retired judge and one former Supreme Court clerk told me that up till a few days before the decision, one of the judges who voted 'yes' was planning to vote "No" on the establishment of military courts, and his change of heart became a question of some debate and interest within the legal fraternity (Interview No. J-50, November 16h 2016; Interview No. L-72, December 5th 2016).

[293] Interview No. J-33.

Thus, the two judgments discussed here show how, in terms of the scope and jurisdiction of military courts, the civilian judiciary is reluctant to assert itself and will defer to the military's interpretation of the scope of its prerogatives, especially when they recognize the importance of the autonomy of these courts to the military leadership.

Scope of Judicial Oversight of Security Operations.

Enforced disappearances refer to the "arrest, detention, abduction…by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty, or concealment of the… whereabouts of the disappeared person, which place such a person outside the protection of the law" (Omer 2017). The practice of enforced disappearances has existed in Pakistan since at least the 1970s, but since Pakistan's involvement in the US-led War on Terror since 2001, it has increased. Since then, hundreds of people accused of terrorism-related offenses have reportedly 'disappeared' after being abducted by security agencies and detained in secret facilities. This practice spikes in numbers each time the military launches a counter-terrorism offensive across the country (Omer 2013).

The Supreme Court first took up the issue of the widespread practice of enforced disappearances in Pakistan in December 2005, when it took *suo motu* notice of a news report citing the growing number of enforced disappearances in the country.[294] Over the next two years, the Supreme Court and High Courts issued several orders registering their concern about the growing practice of enforced disappearances. The civilian courts asserted jurisdiction in these "Missing Persons" cases, as they came to be known, and this intervention of the judiciary was deemed intolerable by the military regime at the time. Chief Justice Iftikhar Chaudhry's continued interest in

[294] *Suo Motu* refers to take the Supreme Court taking up a case on its own initiative, in the absence of a petitioner.

Missing Persons cases even after objections were raised by the military regime became one of the key points of contention between the regime and the judiciary, and ultimately contributed to Musharraf's dismissal of Iftikhar Chaudhry.[295] After Musharraf's regime fell, the practice of enforced disappearances persisted, as did the judiciary's interest in placing limits on this practice. As of 2013, seven years had passed and the Supreme Court had routinely remarked on the culpability of security agencies, but there were still no judgments, prosecutions, or convictions related to the multiple 'missing persons' petitions pending in the Supreme Court (Omer 2013). In an interview, a lawyer who had represented families of people who had gone "missing" narrated one incident. He said,

> "In F-10 (Islamabad), they came wearing police uniforms, but they had Vigos (an expensive car indicating they probably were not from the police). A 40-year-old man was picked up, and his computer and laptops, and folders with documents were all taken. Next day, the people of the neighborhood were scared. Journalists, policemen, everyone was scared the moment they knew it's the (military intelligence) agencies (that took him). Police put these cases in the smaller offences bracket, because if it was classified as a bigger offence police would have to act quickly on these cases. The family was fearful because the only lawyer they knew at the time said nothing can happen, and there was no point going to the courts. There was a feeling of complete despair."[296]

This disturbing story raises the question: why were lawyers, judges and police all unwilling to take action in these cases?

I discuss three landmark judgments on the practice of enforced disappearances that highlight both what the judiciary was willing to do to deal with the problem of enforced disappearances and what the judiciary was unwilling to do. In the case of *President Balochistan High Court Bar Association v Federation of Pakistan* (2012), the Balochistan High Court Bar Association petitioned the Supreme Court, after several lawyers in the province of Balochistan had been forcibly disappeared, and some of their bodies were found soon after.[297] The petitioners in the case had directly approached the federal government regarding the situation in Balochistan and the problem of

[295] This is discussed in more detail in subsequent chapters.
[296] Interview No. L-53, Decemer 8th, 2016.
[297] See *President Balochistan High Court Bar Association v Federation of Pakistan*, 1958 SCMR 2012.

enforced disappearances.[298] However, the government, in its response insisted that there had been no enforced disappearances. The Court, in its decision, sided with the petitioners, holding that it was difficult to overlook the multiple accounts of 'missing persons' across Balochistan.[299] The Court went on to say that it was not "satisfied with the level of investigation" being carried out by the Frontier Corps (a paramilitary force that operated in Pakistan's western border provinces), of the missing persons cases and ordered the provincial government to locate the missing persons.[300]

Following this decision, however, achieving compliance from the Frontier Corps proved particularly difficult. During 2013, the Court repeatedly conducted hearings attempting to monitor the compliance of the security agencies in Balochistan. In July 2013, the Court issued a supplemental order, registering its concerns regarding the lack of activity by the provincial government, bureaucracies and Frontier Corps to comply with the decision.[301] The Court complained that security agencies had made no effort to locate some of the missing persons, or arrest those responsible for enforced disappearances. After the Court's reminder to security agencies to comply, the Court conducted further hearings and released another order a month later, stating that there was "sufficient material available" to show that the missing persons had been picked up by the FC.[302] The Court even issued a Contempt of Court notice to the head of the Frontier Corps, but beyond successfully tracing some of these Missing Persons, the Court was unable to get the FC to comply with its orders.

In May 2010, an anti-terrorism court acquitted 11 men on terrorism charges and ordered their release from prison. Instead of being released, however, they were allegedly subjected to enforced disappearances by members of the Armed Forces.[303] In 2012, the Court took up a petition by the families of the detainees and ordered the intelligence forces and military to locate the missing men.

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[298] Balochistan has been the site of a long-running insurgency by Baloch nationalists.
[299] *President Balochistan High Court Bar Association v Federation of Pakistan*, SCMR.
[300] Ibid.
[301] Constitution Petition No.77 of 2010: July 2013
[302] Constitution Petition No.77 of 2010: August 2013
[303] *Rohaifa through her sons and others v Federation of Pakistan*, PLD 174 SC 2014.

After repeated denial of their detention, the Attorney General finally informed the Court that they had been detained by military intelligence in connection with their terrorist activities. Between August 2011 and January 2012, four of the eleven men died in custody under suspicious circumstance and their lawyers said they had died after being subjected to torture (Omer 2013). Once their detention was acknowledged, the Court instructed the security authorities to allow the detainees' families to meet them.[304]

The Court first tried to hold the military accountable for the actions that had been taken and issued notices to the heads of the military intelligence agencies to provide answers on the disappearance and detention of the detainees in May 2013 (Dawn 2013a). The military's lawyer argued that the judiciary had no jurisdiction over the military intelligence agencies. The judiciary disagreed, and threatened to hold the lawyer of the military in contempt.[305] The lawyer then withdrew this argument and said "actions of the ISI and Army are subject to the law and the constitution."[306] The military maintained custody over these detainees by having them tried and found guilty through a special procedure conducted in Pakistan's tribal belt which was subject to a distinct set of laws, the Frontier Crimes Regulations, and fell outside the jurisdiction of the regular judiciary.[307] Thus, the judiciary was able to symbolically affirm that the military was subject to the law and the constitution but the military was able to keep the detenus under custody as long as it chose. The Court was able to use its authority to trace seven of the Missing Persons but beyond this, it did not push further to end their detention, nor did it hold the armed forces accountable for their actions.

In the third and final case from 2013, the Court made its strongest judgment on enforced disappearances (Khan 2013). In this case Yaseen Shah, the brother of the petitioner, Mohabbat Shah,

[304] When the lead petitioner in the case, Rohaifa, met her sons the condition they were in after extensive torture and abuse so effected her that she died the next day (Nangiana and Khan 2012).
[305] *Rohaifa through her sons and others v Federation of Pakistan*, PLD.
[306] Ibid.
[307] Ibid.

had gone missing in 2010 after a joint operation by the Police and the Army. The family was not allowed to meet him or informed of his whereabouts. The family petitioned the Supreme Court for his release from this illegal confinement.[308] The government first denied Yaseen Shah's detention, then a month later in November 2013, they said he was detained in an undisclosed location.[309] When the Court asked for him to be produced, the security authorities refused to comply, but it was then admitted by a police official that he was one of 35 interns who had been detained at an internment center. Finally on 7th December 2013, after repeated delays, 7 of the 35 missing persons were produced before one of the judges, not including Yaseen Shah.[310] The case revealed how the military authorities would defy and delay and misdirect the courts to maintain its secret detention of suspects.

In a strongly worded verdict, citing both the Constitution and international law, the Court held that that "enforced disappearances were violative of the Constitution of Pakistan" and these 35 were being "detained illegally."[311] The Court expressed concern at the "kafkaesque workings" of the security forces and held that "no law enforcing agency can forcibly detain a person without showing his whereabouts to his relatives for a long period"[312] Finally, the Court held that armed forces personnel responsible for the enforced disappearances should be dealt with "strictly in accordance with law."[313] The civilian government was asked to produce all the remaining missing persons, and take action against those civil and military officers who were involved in these enforced disappearances.[314]

In subsequent implementation hearings, Justice Khawaja threatened to hold high-ranking functionaries of the government in contempt of court if they did not take action against those

[308] *Human Rights Case No. 29388 -K of 2013: in the Matter of*, PLD 505 SC 2014.
[309] Ibid
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Ibid.

responsible (Pakistan Today 2014). However, little progress was made. Finally, in March 2014, Justice Khawaja gave the government 24 hours to take action against those involved in the detention, and in response, the government lodged an FIR (first investigation report) against a civilian administrator who had been involved in the enforced disappearances (Imaduddin 2014). No military officers were booked. Soon after, the Court stopped pushing for more accountability, and Yaseen Shah remained detained. This case was the most assertive attempt by the Supreme Court to hold the civilian and military security officials accountable for enforced disappearances. Yet, even here the implementation of the decisions was limited, and the judiciary stopped pursuing the case beyond the accountability of civilian officers.

The Missing persons cases highlight the challenges the judiciary faced in holding the military accountable for its conduct in security operations. In each case, we see that the judiciary pushed hard for the production and tracing of those who had gone missing and was able to get military officers to appear before the Courts and answer questions about the enforced disappearances. But beyond this, they were unable and unwilling to push forcefully for the implementation of their decisions and for military accountability. The outcome in the case of Missing Persons in Balochistan is illustrative. Once the names of two military intelligence officers involved in the enforced disappearances were revealed, the Court sought jurisdiction to have them presented before the civilian court to answer questions. However, the military declared that these officers would be tried in private military court proceeding, ousting the jurisdiction of the civilian courts (Iqbal 2014). The Court acquiesced claiming that the judgment of the military courts could be appealed to the civilian courts and thus their jurisdiction was not ousted (Iqbal 2014). Nevertheless, their jurisdiction over military courts was limited, and the accountability of the military for its actions remained insulated within the military. The military showed little interest in complying with judicial oversight of their security operations, and or implementing these decisions, and judges could only go so far to push the military

to act.

The judges understood that the military was willing to take drastic action to protect its security prerogatives. Justice Khawaja had been one of the most forceful advocates for accountability in Missing Persons cases on the bench. He soon became the subject of a malicious campaign questioning his integrity and patriotism. Mysterious banners appeared all along Constitution Avenue, the most securitized road in the capital city Islamabad upon which all the major government buildings were constructed. These banners questioned the patriotism and reputation of Justice Khawaja (Khan 2016). His wife's reputation and financial integrity were also brought under scrutiny with the discussion of alleged financial wrongdoings on TV talk shows hosted by media figures known for the pro-military slant of their shows.[315] After his retirement the interest of the Supreme Court in Missing Persons cases has waned.

Similarly, in the Sindh High Court, Justice Sajjad Ali Shah was one of the few judges who had developed a reputation for pursuing the cases of Missing Persons in security operations in Karachi. Justice Shah asserted that the Court had jurisdiction to inquire into the disappearances of missing persons during security operations in Karachi, and repeatedly asked for progress in the recovery of these missing persons (Masood 2014). He even ordered the cancellation of the salary of the Defence Secretary until certain missing persons were recovered (ARY 2014). Justice Shah was not considered "pliable" by the military, and in June 2016, his son went suspiciously missing after being picked up by unknown assailants (*Express Tribune* 2014).[316] He was released some days later, allegedly having been picked up by the Taliban militia and rescued by the military. However, the lawyers I spoke to indicated that he had been picked up by the military, possibly as a warning to his father and to the Sindh High Court to stop meddling in the affairs of the military.[317] One lawyer

[315] Interview No. J-50, November 16th 2016.
[316] Interview No. L-5, May 15th, 2017.
[317] Interview No. L-5

explained to me that this incident changed the approach of the Sindh High Court to cases pertaining to the military, both among judges and lawyers.[318] After the incident, he explained, lawyers in Karachi were reluctant to take on cases challenging the military's economic organizations let alone its security operations, and the Missing Persons bench of the Sindh High Court was placed under the supervision of a judge reputed for his deference to the security authorities.[319]

These accounts demonstrate that the military was not willing to broker any challenges to the conduct of its security operations, and judges were expected to be deferent to the military's interpretation of its autonomy in carrying out security operations. Those judges who chose to push for more oversight and accountability suffered personal and professional consequences. Therefore, the courts stayed strategically cautious, persisting in tracing Missing Persons, but not on holding the military accountable, and focusing their authority on the civilian government to take more action, aware that the civilian government was not really in control of these operations and thus was largely helpless. Amina Janjua, the chair of a rights group working for the recovery of Missing Persons said the Supreme Court remains the last hope of families of disappeared persons, as "only the apex court has the power to summon any intelligence agency officer or the government functionary" (Nation 2010). But ultimately, the judiciary has been unwilling to change the military's practices or hold the military accountable.

Scope of Judicial Oversight over Land acquisitions by the Military's Subsidiaries

Beyond cases pertaining to the military's internal structure and security operations, the courts

[318] Interview No. L-5
[319] Interview No. L-5.

can also be similarly deferent in cases pertaining to the military's acquisition of economic revenue resources. The Pakistani military is the biggest landowner in the country, and in multiple cases the acquisitions of the military's subsidiary organizations have been contested but the judiciary has been reluctant to hold them up to scrutiny.

An illustrative case is the case of *Muhammad Bux v Army Welfare Trust* (2011). In this case, the petitioners were a group of farmers who claimed that they possessed a piece of forest land which they required for cultivation purposes, and which they inherited from their father.[320] However, the land was instead handed over to the Defence Forces Scheme run by the Army Welfare Trust. The challengers argued that the disputed land, being forest land, could not have been allotted to the Army Welfare Trust, given that the farmers had a claim to the land and that the Welfare Trust could not acquire forest land.[321] The Court had to answer two questions: first, did the farmers had a claim on the land? And second, was the allotment of the land to the Army Welfare Trust was lawful? A three member bench of the Court swiftly decided in favor of the Army Welfare Trust, dismissing the claim of the farmers.[322] The Court ruled against the claim of the farmers on the grounds that they did not have documentary evidence for their claim. The Court refused to delve into the question of whether the Army Welfare Trust *could* actually acquire forested land, stating that since the farmers' claim was revoked there was no reason to consider the second question.[323]

The case was typical of the judiciary's largely deferential approach to land acquisitions by military subsidiaries. One former judge explained to me that in the case of disputed land claims, the military leadership has been willing to interfere when it is a question of "land ownership with a strong connection to the Armed Forces."[324] In cases where the ownership claim was made by an

[320] Muhammad Bux v Army Welfare Trust, SCMR 284 (2011).
[321] Ibid
[322] Ibid.
[323] Ibid.
[324] Interview No. J-19, April 23rd, 2017

organization with connections to the military leadership, the military would use the resources at its disposal to ensure a favorable result.[325] Two judges told me that in such cases the military used to send members of the ISI (Inter-Services Intelligence) to the proceedings of these cases.[326] The presence of these intelligence officers was intended to convey a message to the judges of the interest of the military leadership.[327]Thus, when the military was keen to prevent challenges to ownership of land, the military was willing to use whatever pressure tactics it could to ensure the courts did not intervene.[328]

One lawyer narrated a particularly bizarre case before the Lahore High Court regarding the expansion of the residence of the Corps Commander for Lahore[329]:

> "There is a very old tree which was Jinnah's (Pakistan's founder) favorite tree and which he used to frequent when he came to Lahore. The Expanding Corps Commanders House would mean the removal of Jinnah's tree. A public interest petition was placed before the courts to protect the tree from removal. The judge refused to entertain the petition of preserving the tree saying in court to the lawyer who brought the case that he "was too keen to save the tree. Trees you know are very dangerous. They fall on people and kill people. You have to remove such threats. Removing trees is a public service.""[330]

This account demonstrates the extent to which judges were willing to show deference when the land under consideration was closely tied to the military, in this case the residence of a powerful military officer, the Corps Commander. This was not because judges sincerely held that the military's land acquisitions should not be scrutinized. As one lawyer explained to me "I was a lawyer for DHA

[325] Ibid
[326] Interview No. J-19, Interview No. J-4, June 18th, 2017.
[327] Ibid.
[328] In a particularly alarming account, one lawyer told me about a case dealing with the acquisition of land for a housing scheme for military officers. The land had already been built upon, and the people living on this land appealed their case to the Courts. They hired a renowned lawyer, who made a strong case to the High Court to issue an injunction against the military's acquisition of land. However, on the day when a favorable verdict was expected another lawyer replaced the lawyer who had fought the case and the lawyer dropped the claim against the military acquisition. "When I asked the petitioner why he had dropped the charges: he told me that me and my sons were picked up by (presumably) men belonging to the military…After that I could not continue with this case, it just was not worth it." Interview No. L-48, April 25th 2017.
[329] The Corps Commander for the city is the general in charge of the garrison quartered in that city.
[330] Interview No. L-38, May 12th 2017.

(Defence Housing Authority). DHA does not have a favorable reputation with the judiciary…judges assumed that when it comes to plots (land)...these people are crooked."[331] Therefore, the deference in these cases was best explained by strategic deference when the military leadership took an active interest in the case, to avoid military retaliation.

Thus, these three sets of cases reveal the reasons behind the judiciary's selective assertiveness when dealing with the military's institutional autonomy. Given the military's interest and the resources at its disposal to weaken the authority of judges, judges strategically defer to the military's interpretation of its prerogatives to avoid the repercussions of assertiveness. As we saw in the cases of enforced disappearances, when judges contested the military's insituttional autonomy, they risked incurring both personal and professional costs. This is not to discount attitudinal reasons for deference as indicated in the case of the expansion of the jurisdiction of military courts to deal with the terrorists, but clearly it was not just an ideational alignment that led to deference in these cases, it was the apprehension of military retaliation.

Scope of Civilian Participation in Administration of Cantonments

When the courts dealt with prerogatives that fell outside the military's institutional autonomy, we see the courts acting more assertively, contesting the prerogatives of the military. As mentioned earlier, the Pakistani military owned and ran cantonments across the country. The cantonments began as garrison stations during British rule, but since then they have grown exponentially, and include significant civilian populations as well as both residential and commercial areas. These military cantonments had their own set of laws and were often exempted from the rules and regulations that

[331] Interview No. L-72, December 5th 2017.

applied to jurisdictions across the rest of the country. Yet, the judiciary has frequently held the regulatory exemptions provided to military cantonments up to scrutiny and challenged their constitutionality.

Under the Cantonment Act of 1924, a local government system was introduced for cantonments. Each cantonment is run by a cantonment board which typically comprises 25 members, of whom 12 are elected civilians, and 12 are selected civilian and military officers, with the military Station Commander acting as the President of the Cantonment Board. Unlike other local body elections, however, the military authorities sought to limit the entrance of political parties into the administration of cantonments, by only permitting elections on a non-party basis to cantonment boards (Dawn 2013b). In 2001, under Musharraf, the military further reduced civilian involvement in the administration of cantonments (Yasin 2015). Local government elections were held around the country but not in cantonment areas, and cantonment boards were then exclusively run by unelected officials, with the military officers at the helm.

In 2015, after 13 years without local government elections, Pakistan finally organized local government elections, at the insistence of the Supreme Court, and the cantonments were going to elect civilian officials for the first time since 1998. Initially the cantonment boards sought to resist complying with the Supreme Court order to carry out elections. However, in *Raja Rab Nawaz v Federation of Pakistan*, the Supreme Court did not accept any delay, and threatened to hold the Secretary of Defence in contempt of court for non-compliance if elections were not held in the cantonments.[332] The court held that elections were to be held because "local citizens must have the opportunity to exert direct influence on policy-makers and thus participate in the decision-making process" and local cantonment boards were not exception

While jurisdictions across the rest of the country were holding party-based elections, the

[332] See Rab Nawaz v Federation of Pakistan, 2014 SCMR 101

cantonments maintained their special exemption from holding non-party based elections. Then a petition was placed before the Lahore High Court, challenging this exemption provided to military cantonments. The Lahore High Court, upheld the petition, contesting the prerogative of military cantonments to keep political parties out of the cantonment administration boards. Justice Mansoor Ali Shah opined that the "existence of political parties is integral to a representative democracy" and that they are "a mechanism by which people of any background can be actively involved in the task of shaping policy and deciding how society should be governed."[333] He held that "political parties in order to be effective, require to engage in local political activity" and ruled that not allowing people to form and operate political parties in local elections, violated "inalienable rights guaranteed by the Constitution." Thus, on the question of the administration of military cantonments, the courts contested the prerogatives to maintain unelected military-dominated cantonment boards, opening up these boards to participation by elected political parties.

Therefore, we see that when dealing with prerogatives that were not tied to the institutional autonomy of the military, such as on questions regarding the administration of its landed and commercial subsidiary organizations, the courts were more willing to act assertively.[334] We see the same judges that acted deferentially to the military on questions regarding military security operations, actively contesting these prerogatives. When judges did not anticipate likely military retaliation, they were more likely to challenge the military.

[333] *Awais Younas v Federation of Pakistan*, Case no. W.P. 8222/2015

[334] In subsequent chapters, I show similar patterns of increased assertiveness on questions regarding the military's political and policy-making prerogatives, that contrast with the deferential jurisprudence of the military on questions of the military's institutional autonomy.

Conclusion

This chapter provides quantitative and qualitative evidence explaining patterns of selective assertiveness by the Pakistani judiciary. If one part of the story of judicial-military interactions has been an increasing assertiveness towards military prerogatives over time, another part of the story has been caution and deference when dealing with the military's interpretation of its institutional autonomy, even today. The empirical results in this chapter are highly consistent with the constrained role of the judiciary when it comes to dealing with the military's security structure and mission, as well as well as its sources of revenue and resources. The evidence suggests that the Pakistani judiciary is sensitive to distinctions the military makes between prerogatives that are tied to the military's maintenance of its institutional autonomy, and those that are not, and defers to the military's interpretation of the nature and scope of its institutional autonomy.

The discussion of a selected sample of cases spanning the types of military prerogatives that sustain the military's institutional autonomy in comparison to cases that do not deal with the military's institutional autonomy, confirm the empirical findings of the quantitative analysis of the first section. It also suggests evidence of the judges' motivations for deference in these cases. The military has a host of resources at its disposal, including intelligence, allies and coercive force, all of which it is more willing to deploy when it determines that its institutional autonomy is being challenged. Judges, apprehensive of the actions the military seems likely to take to protect this set of prerogatives, practice a studied strategic deference that persists both during periods of democracy and dictatorship, and through periods of judicial activism and restraint.

The consequences of this deference are unfortunate. Even as democratic rule entrenches itself, the national security state overseen by the military continues to expand unchecked. The War on Terror is fought, without any clear objectives, or transparency, and few can ask any questions about the

conduct of the war. Meanwhile the military continues to expand its commercial holdings. Judges, politicians, and civil society all know their place, and while judges have successfully expanded the questions they are willing to ask of military authority, there are a few questions they are simply not willing to ask. The judiciary's strategic deference on these questions has contributed to the sustenance of the military's exceptional status within Pakistan, undermining the establishment of rule of law within the state.

Chapter 8

CONCLUSION

A shared characteristic of most post-colonial states in the developing world is the developmental disparity between the unelected and elected sections of government. Colonial powers developed the administrative, adjudicative and coercive institutions of government before the representative and legislative institutions, and this disparity was inherited by most post-colonial states. There is an extensive literature on the relationships between the elected and unelected branches and their impact on the democratic and developmental prospects of these states (Finer 1965; Stepan 1988; Linz and Stepan 1996; Feaver 1999; Przeworski 2000). Given the decisive role that unelected institutions play in these states it is imperative that the scholarship on comparative political institutions move beyond exclusively focusing on the balance of power between the unelected and elected branches, and also study the relationships *between* unelected institutions to better understand the political trajectories and prospects for the establishment of democracy and the rule of law in most of the developing world.

Scholars and policymakers around the world agree on the necessity of bringing unelected militaries under civilian control (Hunter 1997; Fitch 2001; Croissant et al. 2010). And since the third wave of democracy there is a growing recognition of the critical role the judiciary plays in the establishment and consolidation of democracy (Huntington 1991; Schepelle 2003; Gloppen 2004; Hirschl 2008). But we have yet to understand when judiciaries will or will not stand up to powerful militaries. Through an analysis of judicial assertiveness towards the military in Pakistan, this

dissertation has addressed this glaring gap in the study of comparative political institutions. The dissertation also contributes to a better understanding of judicial behavior, integrating insights from both the rational-choice and historical institutional literatures on judicial politics to develop a more comprehensive model for explaining how both sincere and strategic judicial motivations shape the norms and preferences underlying judicial behavior. The dissertation has brought to bear evidence that, in the Pakistani case, a change in judicial audiences explains the judiciary's shift towards greater contestation of military prerogatives. It has also shown that this contestation is selective, contingent on the type of military prerogative being challenged. This final chapter will summarize the dissertation's conclusions, explore the generalizability of the audience-based explanation to other country cases, and explore this study's implications for debates in comparative politics and public law.

Dissertation Overview

Audience-Generated Judicial Assertiveness

The central empirical question of section 1 of this dissertation was: *Why did the Pakistani judiciary shift from collaborating with the powerful Pakistani military to contesting its core prerogatives?* Pakistan's judiciary had been widely disparaged by democratic activists for acting as the "B-team" of the Pakistan military. The judiciary had validated each of Pakistan's military coups and provided legal cover to military dictators to enact their political agendas through executive, legislative and judicial actions. Yet in 2007, when Pakistan's last military leader seemed secure at the helm of Pakistan's political system, the judiciary asserted itself, posing a direct and potent challenge to the military. In the dramatic confrontation between these two institutions, the military regime

ultimately faltered, and a broad democratic movement galvanized behind Pakistan's judges ushering in democracy after 8 years of military rule. The confrontation between the judiciary and the military and the outcome highlight the impact the interactions between these two institutions can have on the emergence and consolidation of democracy.

The explanation I have offered for the judiciary's shift from collaboration to confrontation is that, as the military's role as a critical *audience* shaping the norms and preferences of the judiciary decreased, so did the judicial norms of loyalty and deference to the military decrease. I argue that the judiciary converges on a set of institutional norms and preferences in response to the preferences of the institutions and networks, or "*audiences,*" with which judges interact, both individually and institutionally, and these norms and preferences shape the judiciary's behavior towards the military.

This audience-based approach helps conceptualize how different institutional norms and preferences form and change in the judiciary. I argue that judges are motivated by three goals: realizing their policy preferences, advancing their careers and building a reputation as judges. They are therefore attentive to the preferences of the authorities and organizations who can advance their careers, and the social and professional networks with whom they seek to craft reputations. Authorities, organizations and networks that can affect career advancement and reputation building within the judiciary have institutional interlinkages with the judiciary. By institutional interlinkages I mean links to the rules and processes of the judiciary that allow it to shape and affect the internal dynamics of the judiciary. Utilitarian interlinkages refer to the ability to impose costs and benefits on the careers of judges, and normative interlinkages refer to the ability to impose costs and benefits on the reputations of judges. Together, through these utilitarian and normative interlinkages to the inner workings of the judiciary, other institutions and networks become critical audiences affecting the internal structure and culture of the judiciary. Judges who express the preferences of these institutions and networks move upward in the judicial hierarchy and build reputations as judges, and through this

process, over time, the preferences of these audiences become normalized within the judicial system, thus entrenching new institutional norms and preferences. Simply put, judicial norms and preferences form in response to the preferences of the institutions and networks, or audiences, that determine the career trajectories and judicial reputations of judges.

Applied to the context of judicial-military interactions I argue that the judiciary's affinity to the military diminishes as authorities and networks from which judges seek approval, to advance careers and build reputations, grow independent from the military. I devise a typology of judiciaries based on institutional interlinkages with the military in countries located across the authoritarian and post-authoritarian spectrum. This typology connects the judiciary's norms and preferences with the military's linkage to the promotion/selection process (under military control or not?) and its linkage to the pool from which judges are drawn (part of the military's "distributional coalition" or not?). Therefore, where we see variation in these institutional interlinkages we should expect to see variation in the extent to which the judiciary is loyal and deferential to the military.

In chapters 3, 4 and 5, I discuss how this audience-based explanation explains the Pakistani judiciary's shift from deference to the military to confrontation with the military. Chapter 3 explains how, early in Pakistan's post-colonial history, the military-led executive was the most crucial audience for both career advancement and reputation building in the military. The military played a primary role in the selection of high court judges, and these judges came from the same network of British-trained elite military officers, bureaucrats and barristers. Thus, both career advancement and reputation enhancement were sought from elites closely tied to the military and vested in the success of the military regime. These audiences shaping the judiciary's values and preferences favoured a strong executive equipped with wide discretionary powers, and strong enough to hold back the tide of mass politics. The result was that this *loyal* court was willing to limit its own powers of judicial

review and suspend fundamental rights in order to give the military-led executive the widest possible discretion.

The details of the judiciary's transition from loyalty and deference to contestation are captured in chapter 4, which examines the period of judicial-military interactions from 1977 to 1999. The chapter documented three separate processes that together disrupted the institutional interlinkages between the military and the judiciary and thus, altered the audiences shaping the norms and preferences underlying judicial behavior towards the military.

Institutionally, a separation of the judiciary from executive control through a series of constitutional reforms and judicial decisions endowed the judiciary with significantly more autonomy and reduced the military's influence in judicial careers. During Pakistan's brief periods of constitutional democratic rule, the judiciary freed itself from executive control over pivotal institutional processes, such as judicial promotion and the professional pipeline to judicial careers.

Demographically, this period saw the increasing indigenization of the judiciary, leading to a commensurate shift in the judiciary's priorities and preferences. As the private sector in Pakistan grew and lucrative opportunities multiplied, the rewards for work in the commercial sector increasingly outweighed the rewards for joining the judiciary. Thus, a growing portion of elite, foreign-educated lawyers gravitated towards private commercial law. By contrast, the judiciary became a more appealing career path for locally-educated middle class lawyers who sought the upward mobility and respect promised by being members of the judicial elite. The result was a shift in the composition of networks from which judges were primarily recruited, changing from a foreign-educated elite closely aligned with the military elite to a locally-educated middle class network of lawyers, more distant from the military, less wedded to legal procedure and more attentive to mass politics and preferences.

Politically, at the same time that the private legal sector became a primary pipeline for judicial appointments, Pakistan's bar associations of private lawyers became increasingly politicized entities that embraced activism as a norm. The bar also became a site of oppositional politics that challenged the military regime. Lawyers eager to maintain their professional reputation within the Bar increasingly had to present themselves as independent from the military and pay at least lip service to the growing norm of activism. And since the bar had also been institutionally designated as the major recruiting site for Pakistan's judiciary, this meant that from this period onward, judge-hopefuls increasingly had to fall in line with these norms and to some degree embrace the more activist stance prevalent in the bar.

Thus, as a result of these three processes the military's institutional interlinkages with the judiciary were diminished, and the bar of activist lawyers became an increasingly critical audience shaping the norms and preferences of the judiciary. Consequently, the judiciary grew more independent from the military and sought to carve out a new more expansive and activist role in the political system.

Chapter 5 shows how the transition outlined between 1977 and 1999, best explains the confrontation between the judiciary and military in the 2000s. The chapter contended that, although regime-related factors and political strategy shaped the increase in judicial contestation of military prerogatives, the judiciary's confrontation with the military was, above all, facilitated by the change in the audiences that shaped the norms and preferences of the judiciary. The activist bar had developed close utilitarian and normative interlinkages with the judiciary, and, through these interlinkages, had transmitted a norm of populist activism that increasingly pitted the judiciary against the military as the judiciary sought to establish its place as the guardian of the public interest. Challenging the actions of the military regime helped judges gain legitimacy and support with the bar that increasingly influenced judicial careers and reputations. Thus, judges had both sincere and

strategic reasons to embrace a norm of populist activism that led to growing confrontations with the military.

In sum, without dismissing the relevance of other factors that contributed to varying judicial assertiveness towards the military this analysis has shown that changes in the institutional relationships between the judiciary, military and bar associations go furthest in explaining the variation in judicial assertiveness towards the military in Pakistan.

Selective Assertiveness Across Military Prerogatives

The central question of Section 2 of this dissertation was: *Does judicial assertiveness vis-à-vis the military vary depending on the type of military prerogative being challenged?* This section argues that, regardless of the time period, the Pakistani judiciary's willingness to assert itself is still contingent upon the type of military prerogative being challenged. Whether the state is a military dictatorship or a democracy, the judiciary is deferential to the military in cases where the prerogative being challenged is connected to the military's maintenance of its *institutional autonomy*. If the military determines that its institutional autonomy is being undermined it is much more likely to retaliate against the judiciary. Accordingly, the strategic judiciary would seek to avoid provoking military retaliation by deferring to the military on such questions.

Applying the Audience-Based Approach Beyond Pakistan

The audience-based explanation for variation in judicial contestation of military prerogatives can be applied to judicial-military interactions beyond Pakistan as well. Although the process of reshaping judicial norms and preferences towards the military in Pakistan through a change in judicial

audiences, was based on institutional processes unique to Pakistan, the impact of audiences on judicial norms and preferences underlying judicial behavior towards the military is not.

To demonstrate the generalizability of the audience-based approach I briefly outline the significance of audiences in shaping the judiciary's approach to the military in Egypt under the regime of General Mubarak, and in Indonesia under the regime of General Suharto. I select these cases because in both cases, similar to Pakistan, the military was the preeminent state institution dominating the political order of the state, with deep penetration into the state's economy as well. The two cases are both located at different points across the typology of judicial-military relationships outlined in this dissertation, and thus help show how variation across this typology can explain variation in judicial assertiveness towards the military in authoritarian and post-authoritarian states. If Pakistan is a case of a judiciary that shifted from a loyal to a transactional relationship with the military, the Egyptian case provides a contrast as the judiciary shifted from a transactional to a controlled and increasingly loyal relationship with the military. Finally, Indonesia is a case of a judiciary that lacked any meaningful contestation of the military, as a loyal relationship with the military was so deeply entrenched, that, even with the arrival of democracy, the judiciary remained loyal and subservient to the military.

Egypt:

Egypt under General (later President) Hosni Mubarak provides an ideal setting for extending this audience-based approach. In 1952, a group of military officers led by Colonel Nasser overthrew the Egyptian monarch and established a socialist republic. The state was ruled by Nasser's official party, the Arab Socialist Union, but all Egypt's rulers came from the Egyptian military, and the military remained the most powerful institution of the state. The difference between Egypt and

Pakistan was that in Pakistan the state was ruled by the military as an institution, whereas in Egypt the state was ruled by members of the military who formed a political party that was backed by the military. Mubarak, Egypt's third leader since the 1952 Revolution was also from the military and under him, the military's penetration of both Egyptian state and society grew, as the economic, institutional and judicial autonomy of the military increased. Military officers benefited from considerable patronage from the regime, and also developed a parallel military economy of manufacturing and commercial services, similar to Pakistan (Arafat 2017). Mubarak also came to rely on autonomous military courts that circumvented the ordinary civilian courts, to deal with the growing Islamist insurgency during his rule.

Egypt's judiciary, unlike most judiciaries in the Middle East, had a history of comparative independence.[335] Egypt's modern legal system was shaped in the first half of the 20th century and reached its utmost degree of independence in the 1940s, with the codification of the Law of the Independence of the Judiciary (Rutherford 2008). Lawyers and judges had been at the forefront of the anti-British nationalist movement in the 1930s and 1940s and were heavily influenced by ideals of classical liberalism (Rutherford). This included an emphasis on the separation of powers and judicial independence, and the judiciary sought to protect and promote some level of autonomy since then, limiting the interlinkages with Egypt's executive institutions, including the military. In this section I show how these limited interlinkages manifested themselves in limited but consequential confrontations between the judiciary and military under Mubarak's regime and then describe the process through which the military regime sought to alter the judiciary's behavior by deepening the interlinkages between the regime and the judiciary.

[335] The Egyptian judiciary is divided into hierarchical structures with differing jurisdictions. The National Courts are a hierarchical arrangement with courts of appeal and the Court of Cassation at the apex, and these courts primarily deal with civil and criminal matters. The administrative courts primarily deal with administrative matters, and the State Council is the court at the apex of this judicial structure. The Supreme Constitutional Court, which was established by Nasser's successor, Anwar Sadat under the 1971 Constitution, primarily deals with constitutional matters.

Utilitarian Interlinkages:

At the highest levels of Egypt's judicial structure, the executive branch exerts some influence over judicial appointments, but does not dominate them. Egypt's Supreme Judicial Council has been the governing body responsible for the administrative affairs of the ordinary judiciary. It has seven members, who are primarily the presidents and vice-presidents of the leading courts of appeal at the apex of the judiciary, namely the Court of Cassation, the Supreme Constitutional Court and the State Council. When a vacancy occurs for the presidency of a court, the senior members of the court involved develop a list of candidates (IBAHRI 2011). The president of the republic then chooses a judge from this list. The only judge the president gets to choose unilaterally is the president of the Supreme Constitutional Court. For all other positions the president is expected to choose a candidate from the ones selected by the judges (Rutherford 2008). Other than the presidents of the courts, most other judicial appointments remain in the hands of the judges. Thus, judicial appointments and promotions are largely controlled by the judiciary.

However, the executive institutions do maintain some links to the judicial system. Egypt's Supreme Judicial Council primarily comprises the presidents of the leading courts, and, as mentioned earlier these presidents are selected by the country's President, ensuring that the judges of the Supreme Judicial Council are the ones who are not expected to challenge the regime (Bernard-Maugiron 2016). Also, the Minister of Justice plays an important role in determining the geographical assignment and discipline of judges. Further, judicial candidates, particularly for the superior courts are vetted by the Ministry of Justice in conjunction with the intelligence services (typically run by members of the military) to ensure that judges with ties to opposition parties or societal groups do not populate the judiciary (Bernard-Maugiron). Thus, between a president from

the military and intelligences services tied to the military, the military maintained limited but significant utilitarian interlinkages with the judiciary (Brown 1997), but the primary audience for judicial careers remained the judges of Egypt's hierarchical judicial system. Judges who wished to be appointed and promoted would have to uphold the norms and preferences of the senior judges in Egypt's judicial hierarchy.

Normative Interlinkages

In Egypt, the vast judicial bureaucracy also formed a distinct community. The minimum requirements to be a judge are to be 30 years of age and have a degree in law. Nearly all Egyptian judges in the ordinary court system begin their profession in the General Prosecution Office, and after spending a few years in the Office are given the option to pursue a career as a judge. Roughly 3000 law school graduates apply to join the judiciary each year, and only 150-250 are selected after going through an evaluation process that examines their academic record, moral character and family background (Rutherford 2008). Historically, those appointed as judges were typically trained in the same law schools, socialized in the same circles, and often married within the same families (Rutherford). Social standing has always been a main criterion for appointment, which meant that most judges came from upper middle class and elite classes of society who sought to defend their social privilege and opposed radical change in the political system (El-Ghobashy 2016).[336] Thus, judges are typically deeply embedded in the social and professional network of judges, and this community of judges is a key audience for judicial decision-making.

[336] One leading Egyptian judge famously said that children of garbage collectors do not come from a respectable milieul and thus are unqualified to serve as judges (El-Ghobashy 2016).

The distinct identity and the associated norms and preferences of the judicial community are reinforced through the institution of the Judges' Club. The Judges' Club was established in 1939 in Cairo to enhance solidarity among members of the judiciary, look after their interests, and establish a cooperative. It is run by an administrative board whose members are elected by the general assembly of the club, and all judges from the ordinary courts and the public prosecution are represented on the board (Said 2008). The Judges' Club comprises almost 90% of all judiciary personnel in Egypt. Although the Supreme Judicial Council is the primary administrative entity of the judiciary, the Judges' Club claims to be the true representative of the judicial community (Said). The Judges' Club delivers official statements that publicize its opinions on political and legal affairs in the state, holds seminars to produce legal proposals, and organizes Conferences of Justice to debate and build consensus within the judicial community (Said). In this way, the Judges' Club represents and articulates the consensus norms and preferences of the judicial community.

Thus this community of judges, self-selected from the same socio-economic strata of society and socialized within the Judges' Club, preserved and reinforced the historic norms and preferences and the judicial community as it became a bastion for the values and norms of the Egyptian political elite that predated the military-led Revolution of 1952. Judges, seeking to craft reputations, would make rulings in line with the defined values of the judicial community. The professional socialization of judges produced and reinforced a corporatist identity associated with independence and liberal values in favor of civil liberties. This identity and associated norms remained in place making the judiciary a venue for an ideological framework that competed with the state-driven socialism of the military-led regime, leading to friction between the regime and the judiciary, and efforts by the regime to bring the judiciary under control.

Relationship Between the Military Regime and the Judiciary

Nasser sought to turn the judiciary into a loyal court, controlled by the regime and collaborating in pursuing the same political goals as the regime. The Judges' Club resisted Nasser's attempt to have all judges join the Arab Socialist Union, and then vocally criticized the regime's authoritarianism in 1969, including the use of exceptional courts (Aziz 2016). Nasser responded with a series of measures known as the "massacre of the judiciary" which included the dismissal of over a hundred sitting judges and the abolition of the Supreme Council of Judges. In place of the purged judges, Nasser appointed regime loyalists, ending the process of elections to the Judges' Club, and created a new oversight body for the judiciary, the Supreme Council of Judicial Organizations that was controlled directly by the executive branch.

Nasser's successor Sadat, in a bid to build his own legitimacy by coopting the judiciary, reinstated many of the judges dismissed by Sadat, and also created the new Supreme Constitutional Court at the helm of the judiciary (Moustafa 2007). Mubarak took power in 1981, and he went further in restoring the judiciary's autonomous status, reversing the actions taken by Nasser. Elections resumed in the Judges' Club, and the Supreme Judicial Council was restored.

Mubarak ruled from 1981 till 2011, and during the first two decades, Mubarak used two tactics to limit judicial challenges to the regime's interests. Firstly, Mubarak coopted the judiciary, primarily through the use of material incentives, similar to Musharraf in Pakistan. Senior judges who towed the regime's agenda were given special patronage, including official cars, government residents, subsidized land and housing (Aziz 2016). On the other hand, those who were perceived as independent could be transferred to less prestigious or lucrative courts by the Ministry of Justice (Bernard-Maugiron 2016). Thus, Mubarak unlike Nasser, did not seek to secure favourable rulings by directly reshaping or abolishing the existing judicial system, but focused on bargaining with

individual judges using the leverage provided by the limited interlinkages between the judiciary and the executive. Secondly, where Mubarak could not risk interference by the judiciary, he circumvented the ordinary judiciary through increased reliance on special courts including the State Security courts and, especially the military courts. These courts fell outside the regular judicial hierarchy as State Security Courts were staffed by judges who were tied to the executive, and the military courts were staffed by military officials. During the 1990s and the growing Islamist insurgency, Mubarak came to increasingly rely on the military courts to deal with the Islamist opposition. Thus, during the early years of Mubarak's regime, with limited interlinkages with the regime, the ordinary judiciary retained its largely independent identity with its associated liberal norms and preferences.

Growing Judicial Activism:

During Mubarak's regime the Supreme Constitutional Court and the administrative courts accumulated a large body of rulings seeking to limit the power of the regime. Just as in Pakistan, the judiciary pursued an agenda of judicializing politics and leaving its own imprint on the political landscape and trajectory of Egypt. In the economic sphere, the Supreme Constitutional Court played a leading role in overturning Nasser-era nationalization laws and pursuing economic liberalization (Moustafa 2007). In the political sphere, the Supreme Constitutional Court also issued strong rulings in favour of the political oppositions' rights and pushed for a restructuring of the electoral system for local and national elections. Moustafa (2007: 1) writes that by the turn of the century, the Supreme Constitutional Court had become the "most important venue for political activists to challenge the regime" and expose its repressive nature.

The Supreme Constitutional Court was not alone in this increased activism, as the other courts

increasingly challenged some of the regime's security interests and prerogatives of the military. In 1978, the High Administrative Court significantly limited the application of the emergency law by narrowing the legal definitions of "suspicion" and "sedition" (Rutherford 2008). In 1993, courts acquitted all defendants in the assassination of the speaker of parliament, rejecting confessions obtained through torture (El-Ghobashy 2016). In 1992, the Council of State struck down Mubarak's referral of civilians to military tribunals on grounds that this violated the constitution's guarantee of a fair trial. In the mid-2000s, the administrative courts overruled the military's expulsion of the residents of a mid-Nile island. Thus, administrative courts became an important venue for challenging the regime and the prerogatives of the military, and between 1995 and 2008, the caseload of the administrative courts increased. El-Ghobashy (2016) writes that as the regime produced ever more intrusive statutes in the 1990s to empower state authorities to take more repressive and coercive actions, more Egyptians turned to the courts to contest arbitrary and unfair decrees. The number of petitions increased sixfold from 10,709 to 65, 546, and this included important impact litigation meant to hold the government publically accountable for its' actions (El-Ghobashy).

By the early 2000s, the clash between executive institutions and the increasingly assertive judiciary reached its height. In 2000, the Supreme Constitutional Court passed a landmark transformative judgment holding that the judiciary should monitor all national elections. Shortly after the ruling, Justice Hussam Al-Ghiryani issued a ruling invalidating the 2000 parliamentary election results in East Cairo (Aziz 2016). This decision went too far for Mubarak, who then sought to reshape the judiciary by inserting regime loyalists into authoritative positions within the Supreme Constitutional Court. Previously the President of the Supreme Constitutional Court had always been selected from among the judges already on the Court, but in 2002 Mubarak broke with this convention, and instead placed the second in command at the Ministry of Justice, Fathi Naguib, as President. Naguib then increased the number of justices from 9 to 15, and handpicked judges who

were deferential to executive power, ending the liberal majority on the Court. Thus, Mubarak, in placing a member of the executive branch at the helm of the Supreme Constitutional Court, sought to control the judiciary by establishing stronger institutional interlinkages with the judiciary.

What was the source of the growth in judicial activism during the 1990s? Earlier, during Mubarak's regime the executive institutions had accepted a limited role within the judicial hierarchy, undoing Nasser's earlier intrusions into the judicial hierarchy. Under this system, the main audience, both for the career trajectory of judges, and reputation building, was the community of judges which had retained its relatively liberal values. In the absence of significant executive interventions into the judiciary, the liberal judges were able to move towards positions of authority within the judiciary. This is evidenced by the positions taken by the Judges' Club. During the late 1980s and early 1990s, the Judges' Club was led by activist judges who wanted to disentangle the judiciary from any executive influence, reducing the interlinkages between the two branches of government (Bentlage 2010). Later, in 2002, judges' disgust with the regime's blatant electoral rigging "congealed into an electoral upset" in the Judges' Club (El-Ghobashy 2016). Judges who toed either a path of supporting the regime or avoiding confrontation with the regime, were upset by a coalition of activist judges who pushed for confrontation with the regime. The Judges' Club took on both the executive branch and judges who were collaborating with the regime's actions. In 2002, the Judges' Club issued a "Black List" of 13 judges who allegedly collaborated with the executive branch to engage in electoral fraud (Aziz 2016). In 2004, when the Supreme Judicial Council (now comprised of regime loyalists thanks to Mubarak's intervention) reprimanded the activist Justices Al-Ghiryani and Mekky, the Judges' Club publicly criticized the Supreme Judicial Council (Aziz). In 2005, the Club disseminated reports on the conduct of elections that embarrassed the Mubarak regime. Thus, similar to the role bar associations played in Pakistan as the key audience for the judiciary, the Judges' Club, as the key audience for the Egyptian judiciary, advocated for an assertive and independent judiciary that placed

checks on executive institutions. In retaliation the regime suspended subsidies provided to the Judges' Club and investigated judges who spoke to the press about electoral fraud. In 2006, judges came out in the streets in front of the Judges Club to protest against the regime's actions against fellow judges. The judges' protest was supported by other pro-democracy movements in the country and became a major challenge for Mubarak's regime (Brown & Nasr 2005; Rutherford 2008; El-Ghobashy 2016).

From Contestation to Collaboration

The decision of the Supreme Constitutional Court to monitor the elections and confrontation between the regime and the Judges' Club led to Mubarak's determination that the regime had to reshape the judiciary. First, as explained earlier, Mubarak placed the judiciary directly under the charge of his Minister of Justice, Naguib who then handpicked judges who were deferential to executive power, ending the liberal majority on the Court. Thus, Mubarak, in placing a member of the executive branch at the helm of the Supreme Constitutional Court, sought to control the judiciary by establishing closer utilitarian interlinkages with the judiciary.

Second, the regime sought to bring the Judges' Club under control. The government promised financial benefits to the Club if government loyalists were elected to the Judges' Club board. Then more assertive and independent judges were pressured into retirement. Government-controlled media delegitimized the judicial independence movement by accusing movement leaders of having links to the Islamist opposition party, the Muslim Brotherhood. As a result of this campaign to delegitimize or force out activist judges from the Club leadership, a coalition of pro-regime judges won the elections of the Judges' Club. This loyalist group then targeted and expelled leading dissident judges within the Judges' Club on grounds of linkages with the Muslim Brotherhood, and decisively started

to reshape the judicial community (Aziz 2016). Thus, from 2009 onwards, the regime and its allies in the judiciary sought to establish a more collaborative judicial community. Most members of the judiciary that had stood up to Mubarak in the late 2000s were purged out of the judiciary and the regime recruited judges from outside the traditional judicial community, including police academy graduates (Aziz 2014; Aziz 2016). By the end of Mubarak's regime, the internal culture of the judiciary decisively shifted, as the executive built closer institutional interlinkages with the judiciary and ensured that the key audiences for shaping judicial norms and preferences were more closely tied to the regime.

Hence the rise and decline in activism by Egypt's judiciary during Mubarak's regime highlights the role audiences play in shaping and changing judicial norms and preferences and explaining the interactions between the judiciary and a military regime. During Mubarak's early years, the judiciary had limited institutional interlinkages with the military-led regime, and its main audience was the judicial community which preserved the norms of the constitutional liberal elite that ran Egypt before the revolution. The structure of the judiciary during this period ensured that the more liberal norms and preferences of this judicial community guided the decision-making of the courts, and this led to the growing assertiveness of the judiciary, challenging the regime's actions and policies, the president's prerogatives, and some of the military's institutional privileges. Once Mubarak decided to bring the judiciary under control, he did so by i) increasing the executive's role in the appointment and supervision of judges, and ii) favouring judges who were from outside the more liberal judicial networks, promoting networks that were more likely to collaborate with the regime. Thus, he sought to alter the audiences that were shaping the norms and preferences of the judiciary in order to create a more controlled, and loyal judiciary.

Today, the judiciary has played a critical supportive role to the military regime led by General Sisi, helping him target and purge the country's political landscape of the Muslim Brotherhood. It has

been an active collaborator in upholding Egypt's military regime. I argue that the judiciary's swing towards collaboration is rooted in the actions taken by Mubarak to reshape the internal norms and preferences of the judiciary in his final years. Thus, in Egypt, we see the courts move in the reverse direction from Pakistan, and the sources of this variation lend credence to the importance of judicial audiences in shaping the relationships of the judiciary with the military and military regimes.

In Egypt we also see a pattern of selective assertiveness as observed in Pakistan. Even during periods of high judicial contestation, the Supreme Constitutional Court and the administrative courts remained largely deferential on questions of national security, which the Supreme Constitutional Court calls actions to "preserve the state domestically or abroad." These actions have been deemed "acts of sovereignty" (Rutherford 2008), beyond the judiciary's purview. The Supreme Constitutional Court, for example, acquiesced to the broadening of the jurisdiction of military courts in 1993 (El-Ghobashy 2016). Rutherford (2008) argues that the judges recognized that "if the courts attempted to confront the regime on core security matters" then they may face retaliation. He argues that the judiciary showed deference to the military on national security decisions and prerogatives simply in response to the political environment and the fear of retaliation from the judiciary. Thus, the Egyptian judiciary provides evidence both for how audiences shape the norms and preferences of the judiciary, and how judges discriminate between prerogatives and selectively assertive themselves to avoid retaliation.

Indonesia

Indonesia, under General Suharto, saw the expansion and consolidation of a powerful and ruthless military regime, and this regime met little resistance from the Indonesian judiciary. Thus, unlike the case of Pakistan where the judiciary shifted from collaboration to assertiveness, and the case of

Egypt, where the judiciary shifted in the opposite direction, Indonesia is an example of consistent loyalty and subservience. Focusing primarily on Indonesia's Supreme Court, I will show in this section that this loyalty was a product of deep institutional interlinkages between military and judiciary under Suharto, which ensured that the military was, indisputably, the most important audience shaping the internal dynamics of the Indonesian judiciary.

The foundations of Indonesia's modern judiciary were laid during Dutch colonial rule. Under Dutch rule the Indonesian Supreme Court was established, and was kept relatively weak, but remained technically independent with limited interference from the colonial government (Lev 1973; Tahyar 2012). However, after independence, Indonesia's new government favoured a strongly executive-biased Constitution. The 1945 Constitution gave the military a formal role in the country's political system, as members of the armed forces were appointed to the parliament to represent the interests of the armed forces. The army's formal entrance in the political system laid the groundwork for the introduction of *dwifunsgi* or 'dual function' by which the army justified its participation in both civilian and military affairs of the state (Jenkins 1983). From the late 1950s, the military sought to build close institutional interlinkages with the judiciary and placed the Department of Justice under the supervision of the Department of Defense, on the grounds that justice was a national security affair (Tahyar). Under Indonesia's founder, President Sukarno, the government outlined the concept of a 'guided judiciary' under which the political goals of Indonesia's nationalist revolution overrode standard jurisprudential rules.

Sukarno was overthrown by General Suharto in a military coup in 1965, and his military regime ruled Indonesia for the next 31 years till 1998. During Suharto's regime, the military's penetration into state institutions and society reached unprecedented heights. Under Suharto, military officers came to occupy offices in the higher central bureaucracy, and also penetrated many programmatic sectors of government (Macdougall 1982). After 1974, Suharto accelerated the

military's seizure of the civilian bureaucracy, and by the 1980s, there was no department of government which the military was not suitably placed to control.

When Suharto took power initially, he criticized Sukarno's efforts to subjugate the judiciary and claimed to desire a restoration of the rule of law (Pompe 2005). In the initial years, the Judges' Association, the professional association of lower court judges, supported Suharto's regime, and advocated for legal reforms that would enshrine an increase in the status and independence of the judiciary, believing that Suharto was amenable to these demands. The courts remained active during this period, even overturning certain legislative provisions that were deemed unconstitutional (Pompe 2005). However, this period of judicial activity was short-lived.

To help give his 'New Order' a constitutional basis, Suharto turned to a group of military lawyers and legal scholars and developed a new ideological framework for the state. These military lawyers developed the idea of the state as an organic whole, working towards the same ends, which came to be known as the 'integralistic' state (Tahyar 2012). This integralist state was 'nurtured' in the Military Law academy and Military Law College, and then implemented by these military lawyers as part of the constitutional design under Suharto's New Order (Tahyar). Under this ideology the judiciary was not meant to be a check on the power of the government, but to carry out judicial functions within the context of a dominant state ideology. The next step for Suharto's government was to ensure this ideology molded the norms and preferences underlying Indonesian judicial behavior.

Utilitarian interlinkages:

Under Suharto, in 1971 the Ministry of Justice seized primacy in managing the finances, appointments, transfers, promotions and discipline of the judiciary, pushing the Supreme Court out of

these roles. Judges typically joined the judiciary straight out of law school and, for the most part, remained within the judiciary throughout their professional careers. Typically, judges began their career by doing administrative tasks in district courts, sometimes by serving as court clerks (Pompe 2005). After training as clerks, these judges were then posted to district courts to hear and decide cases. After serving in a less important district court, a judge would then be transferred to a more important district court. In addition to transfers, judges also advance through promotions up the career ladder that ends at the Supreme Court. Thus, the judiciary was run as a very hierarchical bureaucracy, and the Ministry of Justice at the helm controlled this bureaucracy (Tahyar).

The power to control a judge's career development gave the government significant leverage with which to control judicial behavior. A 'wrong' decision in a politically sensitive case could jeopardize the promotion of an aspiring junior judge. The Ministry of Justice primarily promoted loyalty to the regime and its ideology as the key criterion for promotions of judges to attractive positions.

After 1974, the government moved further in entrenching military interlinkage with the judiciary. Prior to the New Order, all Supreme Court chief justices had been appointed from within the judicial hierarchy. Between 1974 and 1992, the Chief justice was appointed from the outside, and the majority of these appointments were from the military (Tahyar). Thus, military figures were formally placed at the helm of the judicial hierarchy. After 1985, a law was passed to limit recruitment to the Supreme Court to career judges, but the apex position remained in the hands of army generals until 1992, ensuring that only judges who were compliant and subservient to military supremacy moved up the ranks. Under the control of military judges, and a powerful Ministry of Justice, the careers of judges remained almost entirely in the hands of the military-run executive branch.

Normative interlinkages:

Pompe (2005) writes that the number of outsiders in the senior judiciary, i.e. prosecutors and military judges, were always a distinct minority but they were placed in leadership positions within the judiciary. Most senior judges appointed till the late 1980s came from the same tightly knit social network of judges. Class, family and shared geographical origins shaped judicial networks. Many senior judges came from the central Javanese elite, were educated in the same two universities, took most of their class together, and later married into each other's' families (Pompe 2005). Thus, there were strong ties of loyalty and respect within this judicial network, and they belonged to the old Javanese bureaucratic elite that were beneficiaries of Suharto's regime. Within this network there was little support for opposing or challenging Suharto and foregoing the opportunities and monetary benefits that came from maintaining ties with the regime.

Further, Suharto successfully reshaped the Judges' Association, the leading association of Indonesian judges. In the late 1960s, when the Association became a venue for advocating for judicial independence and authority, the OPSUS, Suharto's secret service, carefully cultivated close ties with leading members of the Association. These judges became leaders of the Judges' Association and collaborated with the military to stifle the push for judicial independence, and they were then promoted to the Supreme Court. Thus, Suharto's regime coopted both the bureaucratic networks from which judges were recruited, and individual judges who took leadership roles within the judicial community, which ensured that a norm of collaboration with and deference to the military regime was upheld.

Persistent Judicial Loyalty

Under Suharto's regime, the judiciary became a tool within his integralist state. The military enjoyed relationships with leaders in the networks of judges and members of the military were in positions of direct authority over the judiciary. This ensured that the military was the critical audience for shaping the norms and preferences of the judiciary. The result was the judiciary upheld the integrationist ideology that granted the regime unchecked power and authority to act as it chose. The judiciary developed a reputation for collaboration with, and subservience to the regime.

Even after Suharto stepped down in 1998 in the face of widespread popular opposition, the judiciary remained unwilling to assert itself against Suharto's allies. The Supreme Court discredited itself by swearing in Suharto's Vice President as President after Suharto's resignation, even when protesters demanded his withdrawal (Butt 2015). When protesters were beaten up by security forces in front of the Supreme Court, this further undermined the Supreme Court in the eyes of the public. After democratization, the superior judiciary was unwilling to take up any serious challenges against the actions of the former regime, and few had any faith in the credibility and competence of the judiciary (Meitzner 2010). Finally, in 2001, the parliament decided that the judiciary needed to be empowered to carry out judicial review but determined that this power should not be given to the "sitting judges," and a new constitutional court was established (Meitzner). The new legislation also sought to disrupt the hold that the preexisting networks of career judges held over decision-making by introducing a new appointment mechanism for the constitutional court. Nine judges were appointed, with the president, the parliament and the Supreme Court each nominating three judges for the bench (Butt 2015). Through this new system judges being appointed to the Constitutional Court did not exclusively come from the hierarchy of the judicial bureaucracy, and often came from the network of private professional advocates who had not been coopted by the former regime. Thus, the establishment of the Constitutional Court as opposed to the empowerment of the Supreme Court, and

the development of a new appointment system to disrupt the grip of the pre-existing network of career judges over the superior judiciary, together show how Indonesia's new democratic rulers sought to alter the norms and preferences of the loyal judiciary by shifting the audiences shaping those norms and preferences.

Generalizing the Audience-Based Framework

The two cases discussed above demonstrate how the audience-based explanation can be generalized to explain both contestation and deference towards the military in other authoritarian and post-authoritarian systems, as well as explain transitions from contestation to deference over time. The audience-based framework can also be applied to understand judicial behavior beyond the context of judicial-military interactions in authoritarian and post-authoritarian states. In India, for example, the judiciary shifted towards a highly activist stance against India's civilian governments, expanding its role in public interest decisions, and clashing with the central government in important policy-making domains during the 1990s. Mate (2014) argues that this norm of judicial activism emerged through interactions between the judiciary and the surrounding community of legal elites, including senior advocates, legal scholars, intellectuals and civil society activists, who formed the social and professional milieu with which judges interacted and engaged on a regular basis. Thus, in India, an important part of the explanation for the growth in judicial activism lies in understanding the changing norms and preferences of the community that formed the key audience for judicial decision-making during this period. Hence, the audience-based explanation provides a generalizable systemized framework for understanding judicial behavior in multiple contexts.

Broader Implications of the Argument

Finally, I assess the implications of my findings for broader debates in comparative politics and public law. First, this study adds to recent scholarship on judicial politics that calls for a reconsideration of judicial motivations beyond simply the realization of policy preferences (Drahozal 1998; Posner 2010; Epstein & Knight 2013). Scholars have emphasized the importance of loosening the assumption of one overriding motivation behind judicial behavior and researching how other judicial motivations shape judicial behavior. Institutionalist studies of judicial behavior have emphasized the influence of actors whose approval is required to build careers as judges, on judicial behavior (Hibink 2007, Kapiszewski 2012). Baum (2007) finds that judges are also motivated by a desire for respect and approval from their 'audiences.' This study incorporates insights from both rational choice and historical institutionalist literatures to show how judges respond to at least two types of critical audiences: the ones that shape their careers and the ones that can shape their reputations, affirming the need to look beyond policy maximization in order to understand judicial behavior.

The Pakistani case clearly shows how judges are willing to override legal constraints and political considerations to win the respect and support of consequential audiences. This is not to say that judges do not also want to realize their policy preferences and preserve or expand the authority of the judiciary in order to realize policy preferences. But the career and reputational motivations help shed light on the directions in which the judiciary chose to expand their jurisdiction, or the issues upon which they fought to preserve their authority. Focusing on the career and reputational motivations of judges also helps better conceptualize and empirically observe the ways in which judges understand and seek to establish their legitimacy. In public law there is an extensive debate regarding the nebulous concept of judicial legitimacy, particularly regarding what it is and how it is

acquired (Grossman 1984; Shapiro 1986; Gibson, Caldeira & Baird, 1998; Kunzler 2012). This study contributes to that debate by showing who this legitimacy is acquired from, and what impact the quest for legitimacy has on judicial behavior. For most judges, 'legitimacy from below' may not simply be a matter of gaining acceptance from an abstract 'public' that rarely pays attention to most judicial decisions, and whose approval is unlikely to manifest itself in a way that directly affects the career prospects or self-esteem of an individual judge. Instead, judges are more likely to seek acceptance from the networks that judges interact with both professionally and socially, the people who populate their courtrooms, barrooms and households. These are the reference groups for judges, the key audiences from whom judges seek legitimacy. The analysis therefore suggests that those interested in understanding or encouraging judicial behavior should turn to the audiences that judges seek to gain support from to advance their careers, or to build their reputations.

The second important implication is that the judiciary's institutional relationships with state institutions and society do not simply shape judicial strategy, but also shape judicial norms and preferences. New institutionalist literature has shown institutional conditions shape and constrain judicial behavior (Helmke 2004, Helmke and Levitsky 2005; Hilbink 2007). Hilbink (2007: 243) argues that that we must pay attention to how institutional settings shape the way judges understand what they "can and ought to do." A full understanding of these institutional settings means locating the institution in terms of its relations with both the state and society. Thus far, the study of the political environment shaping judicial outcomes has focused on how the judiciary strategically responds to the distribution of power across political institutions and distribution of judicial support across sections of society (Caldeira 1986; Vanberg 2000; Ferejohn, et al., 2007; Rios-Figueroa 2007). Where political power is fragmented across institutions, or where the judiciary enjoys widespread public support or critical support from civil society the judiciary is more likely to assert itself against other state institutions. However, this dissertation shows that the political environment also

constitutes and constrains judicial norms and preferences. State institutions, civil society organizations, and social and professional networks may not simply be in positions to impose costs and benefits on the judiciary as institutions, they can also pose impose costs and benefits on individual judges. The institutional interlinkages that enable these institutions, organizations and networks to impose costs and benefits on judges are the mechanisms by which they shape the norms and preferences of the judiciary. These actors will ensure that judges who either sincerely or strategically uphold the actors' preferences, advance their careers and improve their reputations. As this process repeats itself over time, and more and more judges who express these preferences enter and move upward in the judicial hierarchy and build reputations as judges, the preferences of these audiences become normalized within the judicial system and form the institutional norms and preferences. Thus, this study sheds new light on how the political environment shapes judicial norms and preferences, and also provides a systemized explanation for how institutional norms and preferences change.

Third, in bringing society into the study of judicial norms and preferences, this dissertation also emphasizes the importance of political sociology in the study of institutional conditions and settings. Whereas in the past the sociology of judges played a role in the study of judicial behavior (Grossman 1966; Edelman 1992) most recent scholarship has focused on institutional design and inter-institutional relationships in explaining the development of judicial norms and preferences. This study emphasizes the importance of the sociological backgrounds of judges, not simply to understand the preferences of judges, but also to understand the reference groups that form critical audiences for judicial behavior. Hence, this study incorporates insights from political sociology into the study of institutionalist settings and conditions, to provide a more complete understanding of the development of institutions norms shaping behaviour. Using political sociology to better understand institutional behavior also has important policy implications as it helps law makers understand how to structure

and design judicial institutions, as different institutional designs connect different societal groupings, both formally and informally, to the inner workings of the judiciary. Lawmakers must debate which sections of society they want the judiciary to be most responsive to, and thus how can they ensure that the judiciary is best equipped to equally accommodate the varying needs and interests of different groups in society. Hence, by integrating political sociology with the study of institutional rules, scholars and policymakers can determine the institutional design best suited to ensuring the judiciary can uphold the rule of law.

Fourth, examining the relationship between judges and their audiences also provides a better understanding of judges as political actors. As mentioned earlier, institutionalist studies concern themselves with what judges "can and ought to do" (Gibson 1986; Hilbink 2007). This means that, first, when judges work out what they *can* do, they must determine how legal precedents and jurisprudential rules and norms constrain their decision-making. In Pakistan, I showed how judges emerging from the locally-educated middle class of lawyers were less concerned about or constrained by these jurisprudential rules and norms because the audience of the bar of professional lawyers was more focused on judicial outcomes. Thus, the judicial procedures grew more relaxed and the jurisdictions more expansive. Secondly, this means that when judges work out what they *ought* to do, they must determine what their audiences expect from them. In Pakistan, I showed how, just as the significance of procedure diminished and judicial jurisdiction expanded, the substance of judgments grew more populist in terms of both outcomes and rhetoric. The populist judiciary is a highly political institution, that uses its authority in an overtly political manner to benefit the societal groups it deems as its constituencies and pays limited heed to legal and jurisprudential constraints. As the judicialization of politics has become a global phenomenon, there is also a growing interest in the emergence of populist judiciaries around the world including Brazil, Colombia and. India. Thus, the

Pakistani case helps shed light on how a populist judiciary emerges, what it looks and acts like, and what its consequences are for the development of democracy and the rule of law.

Finally, this study also has important implications for understanding the ideal institutional setting for reining in politically powerful militaries and facilitating democracy and the rule of law. There is a robust literature on the strategies military regimes use to coopt and control political institutions in order to consolidate their rule (Gandhi & Prezworski 2007; Gandhi & Lust-Okar 2009; Geddes, et al., 2014). Another strand of literature examines how during democratic periods, post-authoritarian militaries carefully manage their political capital to preserve their prerogatives within the political system (Hunter 1997; Pion-Berlin 2001). Neither of these literatures pay adequate attention to how militaries strategize to coopt, control or resist *judiciaries* to consolidate their rule or preserve their prerogatives.

By studying judicial-military interactions as a distinct relationship within political systems, this study makes three contributions. First, it shows how militaries discriminate between prerogatives connected to their institutional autonomy and those connected to their political authority. This distinction has important policy implications, revealing where civilian institutions *can* assert civilian control over the military and where they *ought* to assert civilian control, in order to maintain the stability of newly established democratic orders.

Second, powerful militaries operating outside a legal or constitutional framework are frequently responsible for significant human rights violations. If the judiciary cannot hold militaries accountable for such violations, democracy and the rule of law are both undermined (Pion-Berlin 1994; Pereira 2005). Therefore, policymakers interested in the enforcement of human rights must pay close attention to the conditions under which courts can enforce the observance of human rights by powerful militaries.

Third, the study also shows how the considerations that shape the willingness and ability of

the judiciary to assert civilian control over the military differ from those of the elected political institutions for whom the primary concern remains maintaining popular electoral support. Both Pakistan and Egypt show that in many states, the judiciary can play a far more consequential role in confronting and even reining in politically powerful militaries than political parties. The weakness of political parties in much of the developing world, means that they are often ill-equipped to bringing established powerful militaries under control, which places a greater responsibility on the judiciary to assume this role. Therefore, in order to determine the conditions under which militaries are brought under control, in the presence of weakly developed political parties and ineffective legislatures, building an effective judiciary, is essential to building civilian control over the military. This study shows that designing an effective judiciary for this purpose requires paying attention to both the formal institutional independence and authority of the judiciary, and also to the informal relationships the judiciary builds with state institutions and society. Thus, this study sheds light on both the ideal formal and informal institutional designs necessary to building civilian control over the military and consolidating democracy and the rule of law.

Thus, my project contributes to a growing literature that seeks to understand the judiciary as a political actor, with a range of motivations and ambitions, and formal and informal relationships with state and society. These different aspects of its politics interact to shape its behavior in ways that are consequential for the political trajectory of authoritarian and post-authoritarian states. A comparison of the Pakistani case to Egypt and Indonesia teaches us that once we recognize that judges are political actors and understand the mechanisms by which judges both shape and are shaped by the politics of the state, it becomes apparent that creating a political system where a judicial elite is insulated from mass politics may actually undermine the cause of democracy and rule of law. On the other hand, a judiciary more attuned to mass politics and preferences, may deviate

from our conventional understanding of the role of the judiciary, but may actually prove beneficial for the establishment of a more democratic polity.

Appendix 1: Structure of Pakistani Judiciary

Pakistan's superior judiciary is composed of the Supreme Court, five High Courts (four until 2010) and the Federal Shariat Court. These High Courts include the Lahore High Court (in the province of Punjab), the Sindh High Court (in the province of Sindh), the Balochistan High Court (in the province of Balochistan), the Peshawar High Court (in the province of Khyber Pakhtunkhwa, formerly North-west Frontier Province), and the Islamabad High Court (for the capital city region).

Article 199(1) of the Constitution of 1973, the High Court accepts five types of writ: the writ of *habeas corpus*, the writ of *mandamus*, the writ of *certiorari*, the writ of *quo warranto*, and the writ of *prohibition*. The writ of *habeas corpus* is issued to executive authorities compelling them to release someone from detention and bring them before the courts. The writ of *mandamus* is issued to lower courts or government officials when judicial or executive officers are not following the laws, to ensure that they do. The writ of *certiorari* is issued when a decision made by a lower court is accepted for appeal.[337] The writ of *quo warranto* is issued when the person claims any power without legal authority or when an official does any act without the backing of law. When the lower courts accept a case outside their jurisdiction the higher courts can issue a writ of *prohibition* to stop the lower court's proceedings. Beyond its writ jurisdiction the High Courts also has a Rights jurisdiction. Under article 199(2) of the Constitution, High Courts can be moved for the enforcement of any fundamental Rights that have been abridged.

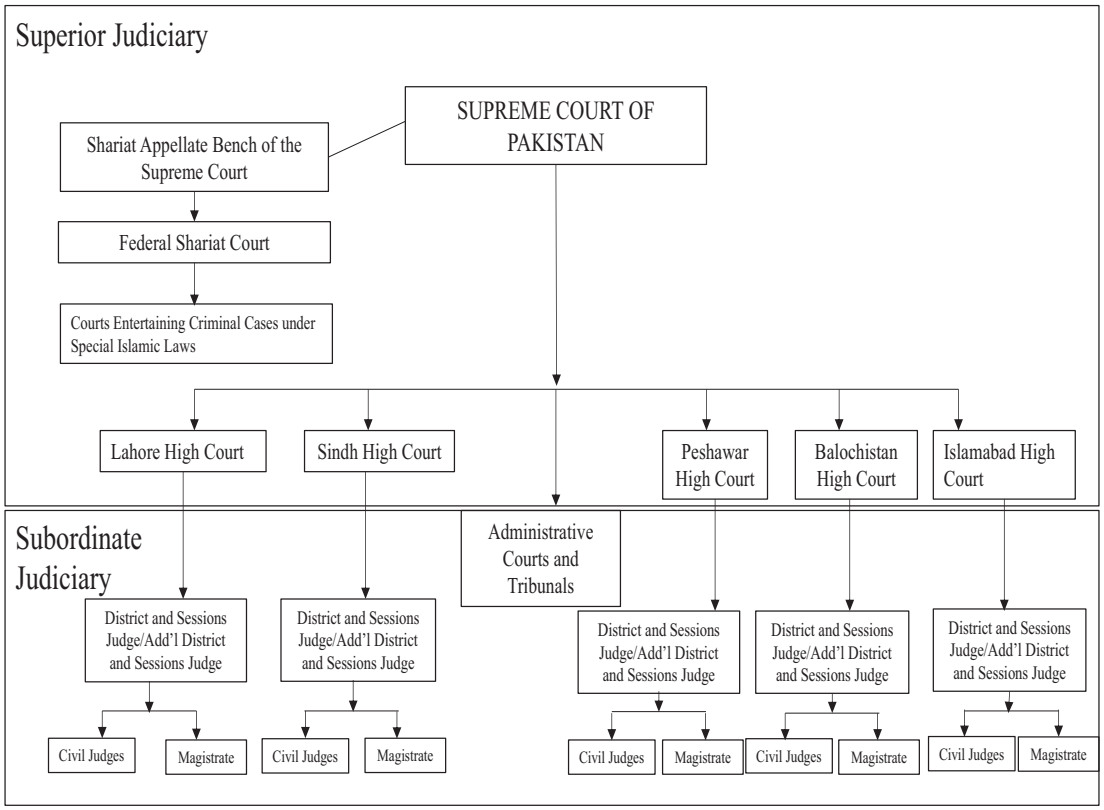
The Supreme Court has three types of jurisdiction: original jurisdiction, appellate jurisdiction, and advisory jurisdiction. Under the original jurisdiction the Court can directly hear cases pertaining to

[337] There is a range of lower courts from which appeals can be made to the High Courts including sessions courts, anti-terrorism courts, labour tribunals, service tribunals, to name a few.

disputes between two or more governments, i.e. the federal and/or provincial governments, and it also can issue orders on questions that it decides are question of public importance involving the enforcement of fundamental rights. Under its appellate jurisdiction, the Court can hear and determine appeals from judgments, decrees, final orders or sentences by the High Courts. Finally the President can gain an opinion from the Supreme Court on any question on which he considers of public importance, although this advisory jurisdiction is rarely invoked.

The figure below outlines the structure of the Pakistani judiciary.

Figure A1.1: Structure of Pakistani Judiciary



Appendix 2: List of Supreme Judges (1950-2007)[338]

Table A2.1: List of Supreme Court Judges (1950-2007)

S#	Name	Date of Appointment	Date of Retirement	Prior Professional Background	Education
1	Justice Sir Abdul Rashid	27-06-1949	29-06-1954	Professional Lawyer	Law Tripos/LLM (Cambridge University)/Inner Temple (London)
2	Justice A.S.M. Akram	15-02-1950	27-02-1956	Lower Judicial Service	Educated in the UK
3	Justice Muhammad Munir	10/01/1951	05/02/1960	Professional Lawyer	Government College, Lahore
4	Justice Alvin Cornelius	10/10/1953	29/02/1968	Civil Service	Cambridge University
5	Justice Muhammad Shahabuddin	10/04/1953	12/05/1960	Civil Service	University of Madraas
6	Justice Muhammad Sharif	13/4/1954	04/01/1958	Professional Lawyer	Punjab University
7	Justice S.A. Rehman	02/02/1958	02/03/1968	Civil Service	Oxford University/University of Cairo
8	Justice Amiruddin Ahmed	03/12/1956	21/12/1960	Civil Service	East Pakistan Educated
9	Mr. Justice Fazle Akbar	18/05/1960	17/11/1968	Lower Judicial Service	University of Calcutta/Lincoln's Inn (London)
10	Justice Badi-uz-Zaman Kaikaus	25/7/1960	01/03/1966	Professional Lawyer	Punjab University
11	Justice Hamood ur Rahman	22/12/1960	31/10/1975	Professional Lawyer	Univesity College London
12	Justice Muhammad Yaqub Ali	01/04/1966	31/10/1977	Professional Lawyer	University of the Punjab
13	Mr. Justice Sajjad Ahmad Jan	18/03/1968	31/03/1973	Professional Lawyer	AliGarh Muslim University
14	Justice Abdul Sattar	06/04/1968	28/02/1971	Professional Lawyer	University of Calcutta
15	Justice Mujibur Rahman Khan	18/11/1968	23/11/1971	Civil Service	Dacca University
16	Justice Waheeduddin Ahmad	22/09/1969	02/06/1979	Professional Lawyer	Delhi University
17	Justice Salahuddin Ahmad	12/04/1970	31/12/1976	Professional Lawyer	Calcuttta University
18	Justice S. Anwar-ul-Haq	16/10/1972	25/3/1981	Civil Service	Punjab Univeristy/D.A.V. College/Oxford University
19	Justice Muhammad Gul	14/4/1973	31/12/1976	Lower Judicial Service	University of Punjab
20	Justice Muhammad Afzal Cheema	10/08/1974	31/12/1977	Professional Lawyer	Foreman Christian College, Lahore

[338] The study is missing information for 6 judges who also served during this period.

21	Justice Abdul Kadir Shaikh	10/08/1974	24/03/1991	Professional Lawyer	Universitty of Bombay
22	Justice Malik Muhammad Akram	26/12/1975	31/09/1979	Professional Lawyer	University Law College, Lahore
23	Justice Dorab Patel	01/02/1976	25/03/1981	Professional Lawyer	Bombay University/London School of Economics
24	Justice Muhammad Haleem	01/07/1977	31/12/1989	Professional Lawyer	Lucknow University
25	Justice Qaisar Khan	01/07/1977	30/07/1978	Lower Judicial Service	Peshawar/Aligarh Muslim University
26	Justice G. Safdar Shah	10/10/1977	16/10/1980	Professional Lawyer	S.M. Law College/Lincoln's Inn (London)
27	Justice Aslam Riaz Hussain	01/12/1978	23/08/1988	Professional Lawyer	Government College Lahore/ Lincoln's Inn (London)
28	Justice Muhammad Afzal Zullah	14/06/1979	18/04/1993	Professional Lawyer	Punjab University
29	Justice Nasim Hassan Shah	18/05/1977	14/04/1994	Professional Lawyer	Punjab University/University of Paris
30	Justice Shafiur Rehman	14/06/1979	15/02/1994	Civil Service	UK educated
31	Justice Maulvi Mushtaq Hussain	06/02/1980	25/3/1981	Professional Lawyer	AliGarh Muslim University
32	Justice Fakhruddin Ebrahim	06/07/1980	25/03/1981	Professional Lawyer	S.M. Law College
33	Justice Shah Nawaz Khan	04/05/1981	07/01/1982	Lower Judicial Service	AliGarh Muslim University
34	Justice S.A. Nusrat	08/04/1981	30/04/1989	Professional Lawyer	Lucknow University
35	Justice Zafar Hussain Mirza	08/04/1981	10/09/1991	Professional Lawyer	S.M. Law College
36	Justice M.S.H Quraishi	30/07/1981	30/09/1985	Civil Service	Educated in Pakistan
37	Justice Mian Burhanuddin Khan	03/02/1982	17/12/1987	Professional Lawyer	Educated in Pakistan
38	Justice Javed Iqbal	10/05/1986	10/04/1989	Professional Lawyer	University of Punjab/Cambridge University/Lincoln's Inn (London)
39	Justice Saad Saood Jan	10/05/1986	30/06/1996	Civil Service	University of Punjab
40	Justice Ghulam Mujadid Mirza	25/03/1987	31/03/1990	Professional Lawyer	Punjab University Law College, Lahore
41	Justice S. Usman Ali Shah	12/08/1987	14/09/1991	Professional Lawyer	S.M. Law College
42	Justice Naimuddin	09/04/1988	11/09/1991	Professional Lawyer	S.M. Law College
43	Justice Abdul Shakurul Salam	13/12/1988	31/03/1993	Professional Lawyer	Punjab University/University College London/Yale Law School

44	Justice Ajmal Mian	13/12/1989	30/06/1999	Professional Lawyer	University of Karachi/Lincoln's Inn (London)
45	Justice Rustam Sidwa	14/12/1989	31/08/1992	Professional Lawyer	Punjab University Law College, Lahore
46	Justice Abdul Hafeez Memon	12/12/1989	22/07/1997	Professional Lawyer	S.M. Law College/Lincoln's Inn (London)
47	Justice Muhammad Afzal Lone	13/08/1990	07/03/1993	Professional Lawyer	Punjab University Law College, Lahore
48	Justice Sajjad Ali Shah	11/05/1990	16/02/1998	Lower Judicial Service	Lincoln's Inn (London)
49	Justice Muhammad Rafiq Tarar	17/01/1991	11/01/1994	Lower Judicial Service	Unveristy law College Lahore
50	Justice Saleem Akhtar	25/03/1991	22/03/1997	Professional Lawyer	University of Alahabad
51	Justice Wali Muhammad Khan	28/10/1991	31/10/1994	Professional Lawyer	Law College, Peshawar
52	Justice Saeeduzzaman Siddiqui	23/5/1992	26/01/2000	Professional Lawyer	Univeristy of Karachi
53	Justice Fazal Elahi Khan	04/03/1993	31/12/1997	Civil Service/Professional Lawyer	Khyber Law College, Peshawar
54	Justice Manzoor Hussain Sial	26/05/1993	24/03/1996	Professional Lawyer	University law College, Lahore
55	Justice Fazal Karim	06/07/1994	31/07/1996	Lower Judicial Service	University law College, Lahore
56	Justice Muhammad Munir Khan	15/06/1994	08/06/1996	Professional Lawyer	S.M. Law College
57	Justice Muhammad Ilyas	15/06/1994	30/09/1996	Lower Judicial Service	Zamindara College/ Stanford University
58	Justice Mir Hazar Khan Khoso	19/07/1994	29/09/1996	Professional Lawyer	S.M. Law College
59	Justice Mamoon Kazi	22/02/1995	26/01/2000	Professional Lawyer	S.M. Law College
60	Justice Mukhtar Ahmed Junejo	19/10/1994	19/02/1998	Lower Judicial Service	Educated in Pakistan
61	Justice Raja Afrasiab Khan	22/2/1995	14/01/2000	Professional Lawyer	Univeristy Law College, Lahore
62	Justice Nasir Aslam Zahid	28/01/1994	26/01/2000	Professional Lawyer	Cambridge University/Middle Temple (London)
63	Justice Munawar Ahmed Mirza	17/11/1996	24/11/1999	Professional Lawyer	University Law College, Lahore
64	Justice Khalil ur Rehman Khan	17/12/1996	26/01/2000	Professional Lawyer	Punjab University
65	Justice Sheikh Ijaz Nisar	29/05/1997	15/06/2000	Lower Judicial Service	Punjab Univeristy Law College
66	Justice Wajihuddin Ahmed	05/05/1998	26/01/2000	Professional Lawyer	S.M. Law College
67	Justice Kamal Mansur Alam	22/04/1999	26/01/2000	Professional Lawyer	Karachi University

68	Justice Rashid Aziz Khan	04/04/2000	07/07/2001	Professional Lawyer	Punjab University
69	Justice Muhammad Arif	11/04/1997	01/09/2002	Professional Lawyer	Punjab University/University of London
70	Justice Sheikh Riaz Ahmad	11/04/1997	31/12/2003	Professional Lawyer	University Law College, Lahore
71	Justice Irshad Hasan Khan	11/04/1998	01/06/2002	Professional Lawyer	University Law College, Lahore
72	Justice Bashir Jehangiri	11/04/1998	31/01/2002	Lower Judicial Service	Peshawar University
73	Justice Munir Sheikh	11/04/1997	31/12/2003	Professional Lawyer	University Law College, Lahore
74	Justice Qazi Muhammad Farooq	02/04/2000	31/12/2003	Lower Judicial Service	University Law College, Lahore
75	Justice Nazim Hussain Siddiqui	02/04/2000	29/06/2005	Lower Judicial Service	Univeristy of Hyderabad/University of Karachi
76	Justice Karamat Nazir Bhandari	09/07/2002	13/09/2006	Professional Lawyer	University Law College, Lahore
77	Justice Tanvir Ahmed Khan	27/09/2000	16/01/2004	Professional Lawyer	University College, London
78	Justice Mian Muhammad Ajmal	28/04/2000	14/08/2004	Professional Lawyer	University of Peshawar
79	Justice Syed Deedar Hussain Shah	28/04/2000	12/10/2004	Professional Lawyer	University of Sindh
80	Justice Hamid Ali Mirza	28/04/2000	13/09/2007	Lower Judicial Service	University of Sindh
81	Justice Iftikhar Chaudhry	02/04/2000	12/11/2013	Professional Lawyer	University of Hyderabad
82	Justice Rana Bhagwandas	28/04/2000	13/09/2007	Lower Judicial Service	University of Karachi
83	Justice Muhammad Nawaz Abbasi	01/10/2002	06/06/2008	Professional Lawyer	Punjab University, Lahore
84	Justice Falak Sher	09/07/2002	21/09/2008	Professional Lawyer	University law College, Lahore/Gray's Inn (London)
85	Justice Syed Jamshed Ali	14/09/2005	30/09/2008	Lower Judicial Service	University Law College, Lahore
86	Justice Saiyed Saeed Ashhad	04/05/2005	10/07/2008	Professional Lawyer	S.M. Law College
87	Justice Abdul Hameed Dogar	28/04/2000	21/03/2009	Professional Lawyer	Punjab University
88	Justice Faqir Muhammad Khokhar	01/10/2002	08/08/2009	Professional Lawyer	Punjab University
89	Justice M. Javed Buttar	29/07/2004	08/08/2009	Professional Lawyer	Punjab University Law College
90	Justice Ghulam Rabbani	14/06/2006	19/10/2011	Professional Lawyer	Sindh University
91	Justice Khalil ur Rehman Ramday	01/10/2002	17/02/2011	Professional Lawyer	Punjab University Law College

92	Justice Sardar Muhammad Raza Khan	01/10/2002	02/09/2010	Lower Judicial Service	Punjab University Law College
93	Justice Chaudhry Ijaz Ahmed	14/09/2005	05/04/2010	Professional Lawyer	Punjab University Law College
94	Justice Zia Pervez	13/11/2007	31/07/2009	Professional Lawyer	University of Karachi
95	Justice Syed Zawwar Hussain Jaffery	10/10/2000	23/04/2007	Professional Lawyer	Sindh University
96	Justice Rahmat Hussain Jafferi	09/07/2009	21/11/2010	Lower Judicial Service	Sindh Law College
97	Justice Sayed Zahid Hussain	14/04/2009	28/02/2011	Professional Lawyer	Punjab University
98	Justice Raja Fayyaz Ahmed	14/09/2005	31/05/2011	Professional Lawyer	University law College, Lahore
99	Justice Javed Iqbal	28/04/2000	31/07/2011	Professional Lawyer	Punjab University
100	Justice Shakirullah Jan	24/07/2004	08/07/2012	Professional Lawyer	Peshawar University
101	Justice Tassaduq Jillani	31/07/2004	07/05/2014	Professional Lawyer	Punjab University
102	Justice Nasir ul Mulk	04/05/2005	17/08/2015	Professional Lawyer	University of Peshawar/Inner Temple (London)

Appendix 3: Informed Consent Information Sheet

Information Sheet

Judging the Generals

I, Yasser Kureshi, a PhD Candidate at Brandeis University, would like to interview you for a research study. Please read this information carefully. I encourage you to ask questions if you want information about any part of the study.

What is this study about?

This project looks at cases decided by the appellate courts of the country that pertain to the military, and seek to understand why judges have been more likely to decide against the military in some cases, and less likely to decide against the military in others. Therefore, this project seeks to understand when the courts are more likely to challenge the military in countries where the military used to rule and remains very powerful.

What is the reason for this interview?

I would like to interview you because of your knowledge of and experience with the court decision/s that are relevant to the research for this study. This information will be used for my dissertation, and any publications that may be derived from this dissertation research.

What will you be asked to do if you participate?

If you agree to be interviewed, we will have a one-on-one semi-structured interview. The interview will take no more than an hour and can be conducted at a location convenient to you. During the

interview, I will take written notes, if that is acceptable to you.

Are there any risks to participating in this study?

While the study poses minimal risks to you, you may be concerned that some information you may choose to provide may affect your reputation with some of your colleagues. Please note that any information you provide will be used in such a way that it cannot be associated with you. Should I wish to use any of your quotes in a way that might be attributable to you, I will only do so with your express permission. Without your express permission, none of the information you provide will be used in a way that can be associated with you. If you do feel a certain question or topic makes you feel uncomfortable, you are free to skip the question or ask the interviewer to move on to another topic. You can also withdraw from the interview at any time.

Will you benefit from participating in the study?

You will not benefit directly by participating in this study. However, this study will result in a better understanding of how and why judges make decisions on the critical question of the civil-military balance in democratizing states.

Will it cost you anything to participate in this study?

The only cost to you will be your time.

Will you be compensated or receive anything for participating in this study?

No you will receive no compensation for participating in this interview.

How will your information be kept private?

Any information that is obtained in connection with this study and that can be identified with you will remain confidential to the extent permitted by law. Your name will be coded using a random combination of letters and numbers (for example b4h86). The list that connects your name with your code number will be kept separate from the actual data we collect. The list with your name on it will be stored in a locked file cabinet in the researcher's office. The interview notes will be stored in a separate locked cabinet, also in the researcher's office. The coded data I collect (including the interviews) will be stored electronically in a password protected encrypted file. My faculty supervisor and I will be the only ones who have access to your information. When the data from the questionnaire is reported (in publications and presentations), it will be in aggregate form – your information will not be separable from the findings as a whole. Pseudonyms will be used when reporting data from the interviews – no identifying information (name, race/ethnicity, etc.) will be used. No attributable quotations will be used without your express permission. The exact quotation will be specified to you before you provide signed consent. The data collected will be destroyed after the publication of the research findings.

What if you don't want to participate or change your mind partway through?

Participating in this study is completely voluntary. You have the right to refuse to participate in all or a part of this study. Even if you decide to participate now, you may change your mind and withdraw from the study at any time without penalty. You may also refuse to answer specific questions at any time without penalty – simply skip them on the questionnaire or ask the interviewer to move on to another topic.

Who can you call if you have more questions?

If you have any questions about the research being conducted or your participation in the research,

feel free to contact the researcher at yasserkk@brandeis.edu.

If you have any questions about your rights as a subject in this research, would like to speak with someone other than the researcher about concerns you have about the study, or in the event the researchers cannot be reached, please contact the Brandeis University IRB (the University's Committee for the Protection of Human Subjects) at 781-736-8133 or irb@brandeis.edu.

Appendix 4: Universe of Country Cases (n = 44)

The universe of cases to which the theoretical framework discussed in this project can be applied includes all states where the military has been or continues to be a part of the ruling coalition of the state. I list all the country cases of authoritarian and post-authoritarian states that fall within this category. I use the Geddes et al., (2014) dataset to list these cases, which includes all countries where i) the military has ruled or continues to rule, either directly as an institution, or ii) where a leader from the military has ruled or continues to rule directly, or iii) where the military has ruled or continues to rule in conjunction with a political party, or iv) where leaders from the military have ruled or continue to rule in conjunction with, or as part of, a political party. Based on these categories, I list 44 country cases as my universe of cases.

Table A4.1: Universe of Country Cases

Country Case	Country Case	Country Case
Algeria	El Salvador	Nigeria
Argentina	Ethiopia	Pakistan
Bangladesh	Ghana	Panama
Benin	Greece	Paraguay
Bolivia	Guatemala	Peru
Brazil	Haiti	Rwanda
Burkina Faso	Honduras	Sierra Leone
Burundi	Indonesia	Sudan
Central African Republic	Iraq	Syria
Chad	Korea, South	Thailand
Colombia	Lesotho	Turkey
Congo-Brazaville	Madagascar	Uruguay
Dominican Republic	Mauritania	Venezuela
Ecuador	Myanmar	Vietnam, South
Egypt	Niger	

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