CHAPTER ONE

THE JUDICIARY, RULE OF LAW AND THE MILITARY

INTRODUCTION

Pakistan's military has been the country's dominant power centre for most of its post-colonial history, shaping the politics and policies of the state. But the military's dominance is neither unconstrained nor uncontested. The military is unable to maintain its authority and influence without relying on a coalition of allied bureaucrats, judges, political parties, urban and rural capitalists and civil society organizations. In Pakistan, many use the shorthand term 'the establishment' to describe this entrenched coalition of formal institutions, associations and interest groups, aligned around a mutual interest in supporting the military's political agenda. On the other hand, other political parties and segments of civil society have long worked to limit the military's authority and counter its political agenda. The struggle over maintaining or displacing the military as the primary power centre within the political system has been the axis around which Pakistan's politics has revolved for decades.

In the last fifteen years, this civil–military dynamic has been disrupted by the emergence of another power centre: the judiciary. Pakistan's judiciary is no longer the 'junior partner' of the military or a site upon which the military and its political allies and opponents compete for political leverage. The judiciary is now a power centre in its own right, seeking to expand and legitimize its authority, influence policymaking and compete with civilian and military authorities to shape the state. The emergence of the judiciary as an assertive and active centre of power has been the most consequential feature of

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Pakistan's new political system, and the military has had to adapt its ambitions and strategies accordingly.

This book maps out the evolution of the relationship between the judiciary and military in Pakistan to explain why Pakistan's high courts shifted from loyal deference to the military, to open competition, and confrontation, with military and civilian institutions. To understand the emergence of the judiciary as an assertive power centre within Pakistan's political system, I delve into the processes by which the preferences that underlie judicial behaviour towards the military shifted over time. Judges are both officers in formal judicial institutions and members of a legal community embedded in informal social and professional networks. Both these identities place judges in a web of formal and informal relationships with other institutions and networks. The ties that connect the judiciary to institutions and networks within both the state and society shape judges' understanding of their role, ambitions and repertoire within the political system. Delving into these relationships, and the processes by which these relationships evolve, allows us to understand how shifts in these relations shape the institutional preferences of the judiciary. Locating the military within the judiciary's web of formal and informal relationships allows us to understand how judicial norms and preferences towards the military emerge and evolve. This chapter develops the theoretical apparatus necessary to accomplish this task. I introduce the concept of judicial 'audiences', originally coined by Lawrence Baum (2007), to better describe the dynamics of the relationship between judges and external actors in state and society and their influence on judicial behaviour. I then demonstrate how variation in the relationship between the judiciary and the military is best explained by variation in the extent to which the military acts as a critical audience linked to the internal workings of the judiciary and shaping judicial preferences. Finally, I probe the applicability of this theory for explaining the evolution of the judiciary's relationship with the military in Pakistan and the emergence of competition and confrontation between these two unelected institutions.

Although the analysis is primarily focused on Pakistan, it was motivated by and speaks to broader theoretical concerns. The task of establishing the 'rule of law' is both urgent and complex in many authoritarian and post-authoritarian states because of the testing political circumstances typically found in these states (Teitel 2001). Where democracy has not been established, authoritarian rulers rule in a state of legal exception without many constraints, or they construct legal and

judicial frameworks to project and entrench their power and control (Ginsburg and Moustafa 2008; Helmke 2009). 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). 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 and Martinez 2017). Therefore, given that strong coercive institutions and weak representative institutions characterize most authoritarian and post-authoritarian states today, understanding the conditions under which the judiciary is willing to challenge a ruling or formerly ruling military is essential to understanding how the rule of law can be established (Rios-Figueroa 2016).

THE MILITARY'S JUDICIAL AGENDA

What relationship does a politically powerful military seek with the judiciary? Unlike political parties, the military is a state institution, and remains a state institution during periods of democracy and dictatorship. This means the military seeks to sustain a wide range of institutional prerogatives, regardless of regime type, although the scope of prerogatives varies depending upon regime type.[1]

When military regimes come to power, they set about reorganizing state institutions so as to consolidate and project their power.[2] Military regimes can use judiciaries to exercise state power against the opposition, advance administrative discipline within state institutions, maintain cohesion among factions within the ruling coalition, bolster regime legitimacy and facilitate market transitions (Ginsburg and Moustafa 2008; Trochev 2008; Moustafa 2014; Hamad 2019). However, the regime will only choose to empower the judiciary to carry out such functions once it can limit any risk that the judiciary will act assertively against the regime. The regime has two options: it can create either a

[1] By military prerogatives, I mean the powers the military presumes it has.

[2] There is an expansive literature on how military regimes create rubber-stamp parliaments through rigged elections and the engineering of loyal political parties (Gandhi and Prezworski 2007; Gandhi and Lust-Okar 2009; Boix and Svolik 2013).

weak judiciary *unable* to act assertively against the regime or a loyal judiciary *unwilling* to act assertively against the regime.

The literature on judiciaries under authoritarian regimes has focused on the tactics regimes used to weaken judiciaries. This includes fragmenting the judicial system by creating parallel judicial systems, immunizing regime actions from judicial scrutiny and reducing judicial authority by altering legal standing requirements, the structure of the judiciary and the scope of judicial review (Ginsburg and Moustafa 2008; Crouch 2020). All these actions ensure the judiciary fulfils the functions the regime needs it to but weaken the judiciary's ability to challenge the regime itself.

However, the military seeks to retain authority and influence during periods of both military rule and civilian democracy. During democratic periods, the military has moved out of a position of formal power and cannot legislatively weaken the judiciary's authority. If the military is interested in preserving its prerogatives it must ensure the judiciary does not challenge its interests, even during periods of civilian rule when the judiciary's powers are restored. Thus, the ideal relationship is one where the judiciary would uphold military interests, both when the judiciary's powers are weakened and when the judiciary's powers are restored. Thus, it is important to understand how military regimes shape a judiciary's ability to ensure their loyalty, rendering them unwilling to act assertively against the military.

UNDERSTANDING JUDICIAL BEHAVIOUR

How can the military shape judicial behaviour? Judicial behaviour is shaped by preferences and interests. There are two types of preference: (1) policy preferences and (2) legal preferences. Policy preferences refer to judges' preferences on questions of state actions and policymaking, and legal preferences orient a judge's approach to sources of law and legal procedure and condition their understanding of their role and the reach of the judiciary (Epstein and Knight 1998; Ocantos 2016). Judicial interests refer to judges' interest in (1) preserving and expanding their authority to realize their policy preferences, (2) advancing their careers and (3) building esteem (Epstein and Knight 2012). Scholarship on judicial behaviour is divided between strategic scholars, who focus on how external actors shape the judiciary's willingness to act on its preferences, and attitudinalists and institutionalists, who focus on the content of legal and policy preferences underlying judicial

actions and the processes through which these preferences are constructed within the judiciary.

Strategic scholars pay special attention to how judges, motivated by their interest in realizing policy preferences, will (1) act on their sincere policy preferences when they can but (2) will adjust their behaviour 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 and Gabel 2014; Vanberg 2015). Accordingly, courts are unlikely to assert themselves against the military when political power within the political system is centralized within the military and allied political institutions, strengthening the military's ability to undermine the authority of the judiciary. Conversely, courts are more likely to assert themselves against the military when political power is fragmented across the political system, weakening the military's ability to undermine the authority of the judiciary (Tsebelis 2002; Ferejohn et al. 2007; Rios-Figueroa 2007). The assumption that judicial behaviour is shaped by external political conditions leaves rational-choice institutionalists ill-equipped to explain why courts engage in high-risk confrontations with other branches of government, even when they are unlikely to win these contests, or how courts select legal justifications for interventions and judgments.

Attitudinalists and institutionalists look closely at the role of ideas about law and policy in the judicial decision-making process. Attitudinalists use judges' individually held policy preferences to explain assertive decisions (Segal and Spaeth 2002). 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.

Institutionalists do not treat judicial preferences as exogenously determined but seek to explain the historical and sociological processes through which judicial preferences are constituted (Clayton and Gillman 1999; Whittington 2007; Ocantos 2016). They shift the explanatory focus to the institutional design, norms and internal culture of the judiciary, to explain the construction of judicial preferences shaping judicial behaviour. The judicial 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 1999; Ginsburg and Garoupa 2009). Institutional settings guide the behaviour and expectations of judges by determining which actors' norms and understandings of justice and rationality gain primacy and become entrenched as the norms and preferences of the institution over time (March and Olsen 2011). 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 the judicial education and training and promotion systems within which judges are trained, and the professional community of judges, prosecutors and lawyers within which judges work and socialize, to understand how these systems and communities facilitate the development of a particular conception of the role of the courts among judges (Hilbink 2007; Woods 2009; Ocantos 2016).

However, attitudinalist and institutionalist scholars' focus on the judicial institutions, the policy and legal preferences held by judges and the formation and institutionalization of these preferences leaves out the role of external actors. Instead, the extant literature primarily views state institutions and societal actors as actors upon which the judiciary seeks to exert its authority (Vondoepp 2006; Moustafa 2007; Kapiszewski 2012) or against which the judiciary seeks to protect its authority (Vanberg 2000; Ginsburg 2003; Helmke 2005). But external actors outside the judiciary do not simply constrain judicial strategies, they also constitute judicial preferences, and while institutionalists acknowledge that groups within the legal community can play a role in entrenching legal preferences (Kapiszewski 2010; Ocantos 2016), the process through which external actors construct judicial preferences remains inadequately theorized. This preference-shaping role has critical implications for understanding judicial behaviour, as, for example, if the military succeeds in shifting judicial preferences, it can ensure favourable jurisprudence over time, even after the authority of the military to influence the judiciary wanes.

Therefore, in order to fully understand and explain judicial interactions with other state institutions, and variation in judicial decision-making towards other state institutions, it is not enough to focus either

on the power of external actors to compel the judiciary to act with strategic restraint or on the preferences of judges to act assertively or with restraint. We need to understand the role of external actors in *shaping* judicial preferences to act assertively or with restraint. Therefore, I propose a theory for explaining the role external actors play in shaping judicial preferences, predicated on two claims. First, judges' interests and preferences are interlinked, and the pursuit of judicial interests shapes the process through which certain preferences gain primacy, while entrenched judicial preferences shape the approach judges take in pursuing their interests. Second, each judge carries a combination of policy and legal preferences, which typically varies from judge to judge, but there is a certain combination of policy and legal preferences around which the judiciary builds an institutional consensus and that judges within the institution will largely adhere to, for both sincere and strategic reasons. Using this theory, I explain how external actors can shape institutionally held judicial preferences.

JUDGES AND THEIR AUDIENCES

The audience-based explanation for judicial decision-making builds on the awareness that individual judges are not simply interested in policy maximization, they are also interested in reputation-building. Ginsburg and Garoupa (2015 : 15) define reputation as the 'stock of assessments about an actor's past performance'. Judicial reputation conveys information about the quality of the judiciary and fosters esteem for the individual judge. Baum (1997) introduced the concept of audiences: the political institutions, civil and political organizations or social and professional groupings that are attentive to the decisions that judges make and with which judges seek to build a reputation when making decisions. Why do judges care about their reputation? Reputation-building has both material and non-material purposes. Materially, judges seek to advance their careers by gaining promotions and increasing pecuniary and non-pecuniary benefits. Therefore, they would seek to build their reputations with audiences who are in a position to control the process of appointment, promotion and budgetary allocation for the judiciary. Non-materially, judges also seek to build their reputations as 'able' judges to gain the esteem of those social and professional networks they are closely tied to, as their own esteem and satisfaction in the job is tied to gaining such respect (Cass 1995; Drahozal 1998; Posner 2010; Epstein and Knight 2012). Thus, judges

will seek to build their reputations with the groups and networks within which they have been socialized and which they identify with or interact with regularly. The judicial interest in reputation-building creates the opportunity for institutions outside the judiciary to shape judicial preferences.

Institutional interlinkages are links to the internal rules and processes of the judiciary that allow other institutions to shape the internal structure and culture of the judiciary. There are two types of institutional interlinkages crucial to this discussion: *utilitarian* and *normative* interlinkages.[3]

Where two institutions share utilitarian interlinkages, one institution is in a position to shape the material benefits offered to, and material costs imposed on, members of another institution. Those who appoint, sanction and remove judges at the lower rungs of the judiciary can significantly affect the political and jurisprudential leanings of those judges (Kapiszewski 2012). If the military or allied institutions and elites have a role in the appointments, promotions, transfers and disciplining of judges, I describe this as a utilitarian interlinkage with the judiciary. This utilitarian interlinkage will allow the military and allied elites to appoint, promote and materially benefit a judge who builds a reputation for making decisions in line with the preferences of the military.[4] These preferences include both policy preferences, regarding the political agenda of the military and the military's role in the political system, and legal preferences, regarding the appropriate role for the judiciary and the correct sources of legal authority and forms of legal interpretations.

The social and professional networks from which judges are recruited, and with which judges seek to build esteem, have normative interlinkages with the judiciary, as they set the norms with which judges have to comply in order to build a reputation and gain esteem. The idea that the social and professional networks from which judges are recruited, and with which they regularly interact, shape the values and ideals of these judges is well established among socio-legal

[3] 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).

[4] This is, in some ways, similiar to the notion of the military being part of what Brinks and Blass (2018) call the 'Constitutional Governing Coalition.'

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scholars (Ladinski 1965; Edelman 1992; Hirschl 2004).[5] The superior judiciary of any state is typically recruited from one or a combination of sections of the legal complex. The 'legal complex' describes the cluster of related legal actors related to each other in dynamic structures and 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 2011). The legal complex includes 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. Scholars of the legal community have demonstrated the importance of legal professionals and associations as a key support structure for the judiciary, mobilizing to seek the implementation of its decisions and to protect it from executive retaliation (Epp 1998; Halliday et al. 2007, 2012; Moustafa 2007; Ghias 2010). In this study, I show that the legal community is both a support structure and an audience with which judges seek to craft reputations, which thus influences the internal culture and behaviour of the judiciary.[6] 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 from outside the bureaucracy, typically from the legal profession (Epstein et al. 2001; Pompe 2005; Ginsburg and Garoupa 2009). It is through these networks that new ideas regarding policy and legal preferences diffuse to the judges (Hilbink 2007; Ocantos 2014). Woods (2009) highlights how the communities or networks in which judges are embedded shape the thinking of judges through processes of informal interactions. Judges train, work and socialize with these networks prior to being appointed and continue to be embedded within these networks even after being

[5] 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. Hirschl (2004) argues that across South Africa, Israel, Canada and India, the elite background of judges helps explain their support for an increasingly neoliberal approach to managing the economies of these states.

[6] See also Moustafa 2007; Woods 2009; Ocantos 2014; Ocantos 2016.

appointed. These networks shape judges' perceptions of what are acceptable and unacceptable actions for judges to take. For example, networks of state bureaucrats that depend on regime support and are disconnected from civil society may be more inclined to endorse deference to executive institutions. Thus, we must pay attention to the social characteristics and legal and policy preferences of the section of the legal complex from which judges are recruited. If judges are recruited from sections of the legal complex that are tied to the military, or benefit from military supremacy, I describe this as the military's normative interlinkage with the judiciary. Normative interlinkages mean that only judges who make decisions in line with the preferences of the military gain the esteem of the pro-military sections of the legal complex from which judges are recruited. Thus, judges will seek to make decisions in line with the normalized pro-military preferences of the section of the legal complex in which they have been socialized, and which they identify with or interact with regularly, in order to gain the esteem of that section.[7]

Audiences that are salient in the processes of career and esteem building shape the institutional 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. When we ask which judge develops a reputation as an able judge, deserving of promotion and of professional esteem in a judicial system, the answer is: it depends on who the audience for that judge is. Therefore, judges who sincerely share the audiences' preferences, and judges who strategically endorse the audiences' preferences, will advance in their careers and build esteem. 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 gain esteem as judges, the preferences of these audiences become normalized within the judicial system and form the institutional preferences of the judiciary. 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).

[7] While my focus here is on the military's interlinkages with the judiciary, this same argument applies to any institution, whether it be the military, a particular political party or a significant civil society organization. Any of these external actors can have normative or utilitarian interlinkages with the judiciary and be a crucial audience for the judiciary.

The audience-based approach addresses the limitations of the strategic approach, as it (1) expands the number of judicial interests and motivations to provide a more accurate understanding of judicial behaviour, (2) explains how societal groups can actually shape the norms and preferences of the judiciary when they serve as audiences for the judiciary and (3) explains high-risk judicial activism.[8] It also improves on current ideas-based explanations. Recognizing the fact that salient audiences lie at the heart of this process of preference formation also helps shed light on how external actors outside the judiciary shape the development of institutional legal and policy preferences. It also provides an explanation for how these preferences evolve and change over time. 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. By examining the process by which the actors controlling judicial careers, and the networks within which judges seek to build esteem, change, we can understand how institutional preferences are reconstituted and trace how these new preferences affect changes in the judiciary's behaviour towards the military.

THE MILITARY AS JUDICIAL AUDIENCE

Militaries vary in the degree to which they sustain utilitarian and normative interlinkages with the judiciary. This variation determines the degree to which the military constitutes the dominant audience shaping the norms and preferences underlying judicial behaviour. Where the military and its allies constitute the dominant audiences, only judges who sincerely share or strategically endorse the preferences and values of the regime will advance their careers and enhance their esteem. Thus, the military can ensure that the legal and policy preferences underlying judicial behaviour align with the military's interests. In its decisions, the judiciary can support the military either by legitimizing the prerogatives and political agenda of the military, or by deferring to the military's actions and authority. Alternatively, it can act assertively

[8] Judges might advance their interests in career-building and esteem-building by behaving in accordance with the legal and policy preferences that have been normalized within the judiciary by the relevant audiences, even when adhering to these preferences carries a high risk of jeopardizing their interest in avoiding retaliation from powerful actors.

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against the military by challenging the regime's agenda and authority in its decisions. To capture this variation in military–judicial interlinkages and its impact on judicial behaviour towards the regime, I propose a four-part typology. Each configuration of military–judicial interlinkages should result in a varied mix of judicial deference, legitimization and assertiveness, but with one form of judicial behaviour more common than the others.

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 institutions and elites tied to, or allied with, the military, that is, the military is a key audience for the careers of judges. Each judge's career depends upon ensuring the continued support of the military or affiliated elites. Where the military and affiliated elites shape the career advancement of judges, they will recruit and promote judges who either support the military or are, at least, risk-averse and pliable enough to avoid challenging the military. Hence, a controlled court will be characterized primarily by a pattern of deferential support to the military where the judiciary reads its jurisdiction narrowly, avoiding taking up litigation challenging the military, and refraining from intervening in the actions of the military when it does. 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 were hostile to their interests and ensured a silent, deferential judiciary (Oko 2005).

A collaborative court shares normative interlinkages with the military, that is, the judiciary comprises judges recruited from social and professional networks that benefit from, and are supportive of, the military. When the judiciary is recruited from, and embedded in, a professional network that is tied to, and supportive of, the military, we should see a collaborative judiciary, as judges are socialized to support the agenda of the military, and their esteem with these networks would suffer from challenging or delegitimizing the state. Hence, collaborative

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courts will be characterized by a pattern of legitimization of the military's agenda, where the judiciary will take up litigation challenging the military and rule in favour of the military, articulating a legal rationale that legitimizes the agenda of the regime. Through the 1960s, the Turkish superior judiciary was a collaborative court.[9] The military, bureaucracy, Republican Party, universities and judicial community comprised what Belge (2006) calls the Republican alliance. They adhered to the Kemalist republican principles of secular top-down modernization and sought to place limits on majoritarian institutions where left-wing and identity-based political parties could undermine this political project. Through a Kemalist legal education and the bureaucratic judicial structure, Kemalist norms and preferences were reproduced in the professional networks staffing the judiciary, and judges seeking to build esteem within these networks would adhere to these Kemalist norms (Benvenuti 2011). Accordingly, after the coup of 1960, when the military regime established the Turkish Constitutional Court, the court used its powers expansively as the guardian of the military's ideological agenda (Belge 2006; Shambayati and Kirdis 2009). Close normative interlinkages between the republican elites and the judiciary ensured the judiciary collaborated in upholding the military's Kemalist political agenda.

The *loyal court* is 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 who are interested in building esteem are expected to endorse the institutional preferences that serve the military's interests, and over time, as more and more judges endorse these preferences, it becomes normalized within the judiciary. The loyal court's jurisprudence is characterized by deference to the authority of the military and legitimization of its agenda. The judiciary will read its own powers and jurisdiction narrowly to provide the military maximum autonomy, and where the judiciary takes up litigation, it will rule in the military's favour, legitimizing the military's actions and agenda. Under General Suharto's military-led regime, Indonesia's superior judiciary characterized a loyal court. This loyalty was a product of deep institutional interlinkages between the military and judiciary. Suharto's Ministry of Justice had direct control over judicial appointments and

[9] I provide further detail on this in Chapter 7, where I discuss the Turkish case in more detail.

promotions, and it used loyalty to the regime's integrationist ideology as a key criterion for promotions to attractive positions (Pompe 2005). Most judges were recruited from the close-knit Javanese bureaucratic elite – beneficiaries of Suharto's regime – and Suharto co-opted the Judges' Association, to which most judges belonged (Lev 1972). Thus, through close utilitarian and normative interlinkages, the regime became the primary audience shaping judicial norms and preferences. The result was a loyal judiciary that actively endorsed Suharto's integrationist ideology and granted the military regime almost unchecked power and authority.

The fourth is the *confrontational court*. In the confrontational 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 preferences of the judiciary. I call this the confrontational court because this court will not see itself as subordinate to the military, nor necessarily subscribe to the military's ideological agenda, and will only support the military where the interests of the two institutions align. It is therefore less likely to read its powers narrowly to avoid challenging the military, or to uphold the agenda of the military. Where their interests clash, that is, where the prerogatives of the military clash with the interests and ambitions of the judiciary, the judiciary is more likely to confront and clash with the military. In the later years of General Franco's regime, the Spanish judiciary was a confrontational court, in which judges challenged the regime even at great personal and professional risk. Under Franco, regime control over the appointment process was limited, as the selection of new judges was largely entrusted to the judiciary itself (Taharia 1975). Further, in the 1960s, the legal community within Spain increasingly endorsed new norms of democracy and human rights. These norms diffused into the legal community through its ties to a liberalizing Catholic church, opposition parties within Spain and activist lawyers and judges in neighbouring democratic European states (Hilbink 2012). Thus, the regime's limited control of the judicial appointment process, and the growing support for democratic and human rights within the networks from which judges were recruited, led to the emergence of a confrontational court in Spain. In his survey of Spanish judges in the 1970s, Taharia (1975) found that a majority of judges had a perspective on state–society relations that was considerably at odds with the ideology of the

TABLE 1.1 A typology of judicial relationships with the military

		Normative interlinkages	
		Yes (Social and/or professional networks judges are recruited from are aligned with the military)	No (Social and/or professional network judges are recruited from are not aligned with the military)
Utilitarian interlinkages	Yes (Appointing authority(s) aligned with the military)	*Loyal court* (Support for the military's agenda and deference to military authority)	*Controlled court* (Deference to military authority)
	No (Appointing authority(s) independent from the military)	*Collaborative court* (Support for the military's agenda)	*Confrontational court* (Assertiveness against the military)

Franco regime. By the 1970s, a growing a number of judges belonging to the pro-democracy professional association, Justicia Democratia, took up important positions within the judiciary, and the judiciary became a site for high-risk assertiveness against the Franco regime (Hilbink 2012).

Three disclaimers are necessary. First, the categories in Table 1.1 represent ideal-types that approximate reality. The category that each state most closely approximates will depend on how dominant an audience the military is for the judiciary in that country, that is, how strong the normative and utilitarian interlinkages between the military and the judiciary are, in comparison to other external actors and the judiciary in that state. But it is unlikely that, in any state, the military will be the sole audience for the judiciary or, alternatively, will have no interlinkages with the judiciary. Thus, judiciaries in different states may share characteristics with multiple categories, but only one category will best approximate the judiciary–military interlinkages found in each state. Second, it is unlikely that a loyal court will produce no assertive jurisprudence that challenges the military, nor is it likely that a

confrontational court will produce no jurisprudence that defers to, or legitimizes, military power. However, the pattern of judicial behaviour in a loyal court will, in aggregate, lean significantly more towards deferring to, or legitimizing, military power, than the pattern of judicial behaviour in a confrontational court. Third, just because a judiciary is more willing to confront military power does not mean it will be more supportive of an elected democratic constitutional order. The confrontational court's preferences regarding democracy promotion will depend on the preferences of the confrontational court's audiences.

The framework outlined here also explains the mechanism by which the judiciary's legal and policy preferences towards the military shift. Institutional preferences shift when the institutional arrangement under which these preferences gets entrenched and keeps reproducing itself is disrupted. This would happen when the judiciary shifts between the categories outlined in this chapter. The question is: how do institutional interlinkages between the military and the judiciary get disrupted? First, the pool from which judges 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 allied with, or beneficiaries of, the military. Second, the appointment authority, or the values held by that appointing authority, can change over time as well. A shift in legal and policy preferences only begins once the place of new audiences in judicial career- and esteem-building processes is institutionalized, and it happens gradually as new audience preferences become hegemonic within the judiciary.

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 preferences towards the military and shows how judicial preferences vary depending upon the audiences implicated.

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JUDICIAL–MILITARY RELATIONS IN PAKISTAN

In this book, I study variation in the judiciary's military jurisprudence over time, across different types of military prerogative. Pakistan's high courts and Supreme Court have issued judgments dealing with three broad categories of military prerogative. Therefore, any comprehensive account of judicial–military relations in Pakistan must account for both High Court and Supreme Court jurisprudence.

1. *Security prerogative judgments*. This includes judgments dealing with the military's control over formulating national security policy and carrying out security operations, and oversight and discipline of the forces involved in carrying out this security mission. These forces include the military, military and interservices intelligence and several associated paramilitary outfits that fall under the military's control, including the Frontier Corps, the Pakistan Rangers, the National Guard, the Anti-Narcotics Force and the Airport Security Force.[10]
2. *Economic prerogative judgments*. This includes judgments pertaining to the military's acquisition and administration of its economic assets and the regulation of its economic activities. Pakistan's military economy comprises three distinct segments: major public sector organizations controlled by the army; the commercial subsidiaries that ostensibly provide for the welfare of the army; and the vast real estate empire owned and administered by the army and a subordinate civilian bureaucracy.
3. *Political and policymaking prerogative judgments*. These judgments deal with the role the military plays in policymaking and political processes, unrelated to security. Thus, it covers the granting of non-security executive, legislative and judicial functions to the military. 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

[10] 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. High courts frequently had to determine what classes of civilian, military and paramilitary personnel fall into this category of armed forces, and what actions are covered by this article and therefore fall out of their jurisdiction.

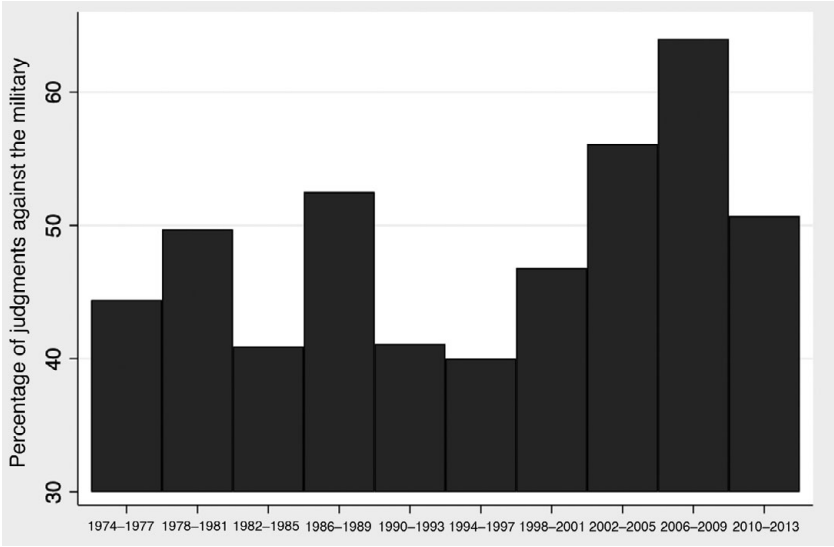

Figure 1.1 Judicial assertiveness against the military over time (1974–2013).
Note: (n=704).

laterally into civilian bureaucracies. Legislatively, military regimes seek to create news laws and amend the constitution. And judicially, summary military courts have also been established at different times to deal with criminal cases.

The military is likely to be more protective of its security and economic prerogatives as these are more crucial to maintaining its institutional autonomy. By institutional autonomy, I mean the military's discretion to organize, acquire resources and conduct operations that it deems necessary to carry out its mission to protect national security without external interventions (Pion-Berlin 1992; Croissant et al. 2010). Therefore, the military is most likely to retaliate against judicial challenges to these prerogatives, making judicial contestation of the military's economic and security prerogatives especially high risk (Kureshi 2021).

Figures 1.1 and 1.2 sum up military-related jurisprudence between 1974 and 2013.[11] Figure 1.1 shows that the judiciary grew more assertive

[11] I begin from 1974 because Pakistan's courts have been under the same 1973 Constitution since then.

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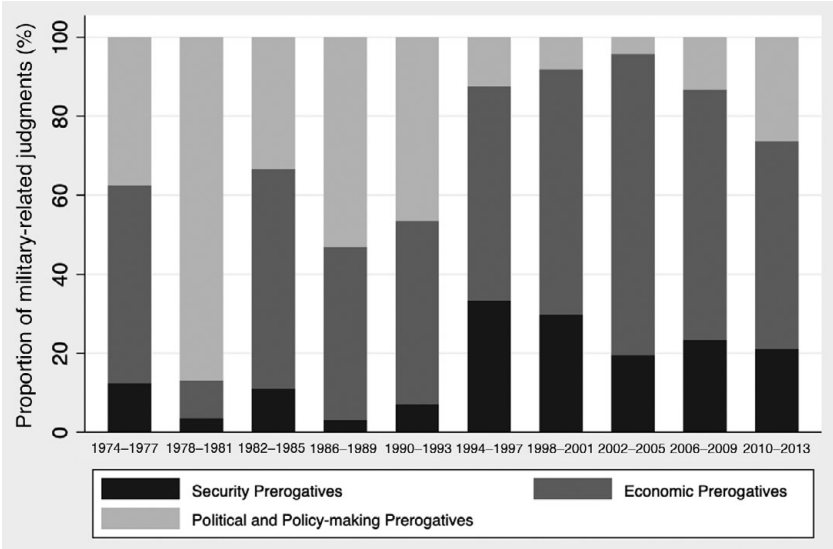

Figure 1.2 Judicial assertiveness against the military, by prerogative type (1974–2013)
Note: (n = 704).

towards the military, particularly after 2002, demonstrating that while 2007 clearly represented a high watermark in judicial assertiveness against the military, increased judicial assertiveness did not just begin in 2007, but built up in the preceding years.

Figure 1.2 differentiates assertive jurisprudence based on the military's three types of prerogative. The figure shows that over time, a growing proportion of rulings against the military dealt with economic and security prerogatives, making the increased judicial assertiveness against the military after 2002 shown in the figure above even riskier.

Taken together, the two figures provide preliminary evidence of the judiciary's increased willingness to act assertively against the military over time, at least up till 2013. Although the trajectory in the judiciary's assertive jurisprudence has not always followed an entirely linear pattern, a finding substantiated by scholars of the Pakistani judiciary, including Newberg (1995), Khan (2015) and Cheema (2018b, 2021), there is a gradual but marked increase in high-risk judicial assertiveness over time that merits explanation.

The relationship between the military and the judiciary in Pakistan has been the subject of much analysis over the years. In this section, I present possible explanations for the shift in judicial behaviour

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towards the military summarized earlier, as discussed in this literature, and argue that, while each of the factors discussed within this literature has had a significant impact on the jurisprudence of the judiciary towards the military, each of these explanations only partially explains the changes in the judiciary's relationship with the military. I then argue that a shift in judicial audiences away from the 'military establishment' played a critical role in explaining the increased judicial contestation of military prerogatives.

Legal Doctrines

A judge's professional understandings of the nature of the law and the tools of legal interpretation play an important role in shaping their decisions. Scholars who focus on the explanatory power of dominant paradigms of legal theory have noted that the prevalence of 'legal positivism', is an important feature of deferential courts in authoritarian regimes (Hilbink 2007; Ocantos 2016). Legal positivism is a legal theory that expects judges to adhere to, and implement, the law and legal procedures, regardless of how they enable the executive or constrain the judiciary. A shift from positivism to a natural rights–based discourse in many legal systems has been noted as a cause for judiciaries shifting from deferring, to contesting, powerful authoritarian regimes (Hilbink 2012; Ocantos 2016). The Pakistani judiciary has also, in recent years, shifted from articulating its decisions in the language of legal positivism, to demonstrating a greater inclination to relax procedure, discard legal standing requirements and strike down laws, acting in what it deems to be the 'public interest' (Khan 2015).

This turn in legal norms is important for understanding the judiciary's increased assertiveness towards other state institutions, including the military. However, we need to understand what motivated this shift in the judiciary away from a positivist commitment to legal norms and procedure and towards an emphasis on prioritizing a judicialized notion of the public interest. Further, a diminishing commitment to legal positivism is not enough to explain the shift in assertiveness, as even during the era of judicial collaboration with the military, judges did not always adopt a positivist approach. Judges were 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

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military in the civil–military balance. Therefore, a shift in legal norms from legal positivism to outcome-based activism is important, but, on its own, does not provide a complete explanation.

Attitudes and Policy Preferences

An attitudinal explanation would focus on the policy preferences of judges and consider how they shape the judiciary's behaviour (Segal 2008). In this view, the judiciary's past collaboration with the military reflects the preference of the judiciary for military policies. Similarly, the change in the judiciary's decision-making in recent years would be explained by a shift in judicial policy preferences. I find evidence of a preference for a strong executive and a disdain for democratic party politics from leading judges during the 1950s and 1960s, both in their judgments and in their off-bench speeches. Similarly, in recent years, judges, in their words, both on and off the bench, have exhibited greater opposition to an unconstrained military. However, while there is certainly evidence of an attitudinal shift in the judiciary away from a preference for upholding military supremacy, this explanation is incomplete for two reasons. First, we need to explain why the shift in judicial preferences happened. Second, Pakistani judges' new assertiveness is not simply a product of changing policy preferences, as judges also seem to be imbued with new legal preferences and a new conception of their role as powerful stakeholders in the political system, with an ambition to reshape both state and society. Third, my research showed that, during the Musharraf's regime (1999–2008), 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 behaviour. Thus, the realization of policy preferences, the prime focus of the attitudinal approach, does not adequately explain the judiciary's confrontational turn.

Political Fragmentation

A strategic explanation would focus on the surrounding political environment, as courts act more assertively against other state institutions when the political system is weaker or 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). In this view, the historic deference shown towards the military was a product of the military's political dominance of the political system

for much of this history, and the powers the military had to retaliate against adverse judicial decisions, particularly at the times when military rule was at its most unfettered (Newberg 1995; Kalhan 2013). Similarly, periods of relative judicial assertiveness could be explained by increased political fragmentation, either when weakening military regimes faced growing opposition, or during democratic intervals, when power was fragmented between elected political parties and an unelected military. During these periods of political fragmentation, the judiciary would likely have more space to act assertively (Cheema 2018b, 2021). Scholars including Newberg (1995), Siddique (2006), Kalhan (2013) and Cheema (2021) attribute the increased judicialization of politics during the 1990s and assertive decision-making to the increased fragmentation of authority during democratic rule. Similarly, Khan (2015) attributed increased assertiveness in the latter part of Zia's and Musharraf's regime to late-stage military regimes in decline, facing greater opposition and, thus, fragmentation.

Undoubtedly, judges in Pakistan are strategic actors carefully navigating an uncertain political environment, showing deference when necessary to avoid backlash and acting assertively when the political environment provides the opportunity to do so. However, the political environment only provides a partial explanation for both the manner and timing of the assertion of judicial authority. As I explain in subsequent chapters, Pakistan's courts engaged in high-risk judicial assertiveness, more often than perhaps these accounts give credit for. Whether it was during the early years of General Zia-ul-Haq's repressive dictatorship, or during the latter period of General Musharraf's dictatorship, the courts periodically acted assertively when it was risky, and paid the price for it. Further, as already shown, there is a steady increase in judicial contestation of the military over time that does not map neatly on to the variation in political fragmentation over this history. As Cheema (2018b, 2021) points out, there was a non-linear but clear expansion of judicial power over time, and this historic shift cannot be explained only by the waxing and waning of executive authority.

Further, the manner in which the courts exercised authority also mattered. As already shown, over time courts were increasingly willing to contest prerogatives they would not have disputed before. Also, as shown in subsequent chapters, the content of the decisions shows that over time the judiciary increasingly sought to play a different and more expansive and authoritative role in the political system. Thus, any

explanation for the shift in the assertiveness of the judiciary, and the changes in the content of its jurisprudence, requires also paying attention to shifts occurring within judicial institutions, changes occurring in its relationship with state and society, and the impact these had on the values and preferences that emerged within judicial culture and shaped judicial decision-making.

The Media and Public Support

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, and helped it generate public support. Scholars of the strategic approach would highlight how judiciaries are more willing to act assertively when they are confident of public support. 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 (Ginsburg 2003; Vanberg 2005).

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. Ghias (2010) explains that 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 was always 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 pre-eminence but had actively played a role in enhancing and legitimizing military authority, indicating there had been a shift in the preferences of the judiciary, which could not have been prompted by the opportunities created by the media.

Instead, I argue that the proliferation of private electronic media had a more indirect role to play in increasing judicial willingness to contest state institutions. Electronic 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 the 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?

The Chief Justice

Chief justices can play a critical role within the institutional setting of the judiciary to shape the behaviour of the judiciary, through their powers to assign benches for cases, circulate judges, select judges to write opinions and set the agenda and norms of the court, (Epstein and Knight 1998; Davis 1999; Dyevre 2010; Abeyratne and Porat 2021). Pakistan's chief justices wield considerable power in appointing and elevating judges, selecting judges for benches and determining the extent of the original jurisdiction of the Supreme Court. 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 (Gilani and Cheema 2015; 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 important insights into why the judiciary started contesting military prerogatives with increased frequency. But what is needed is an explanation for why the superior judiciary entered a phase of assertive decision-making that (1) continued during periods of direct military control and democratic transition, (2) deviated significantly from past precedent and jurisprudential norms and (3) did not significantly diminish after Justice Chaudhry's term ended.

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The Audience Explanation

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 *confrontational court*, seeking to establish its role as an independent power centre in Pakistan's political system. The judiciary aligned with the military when it suited the interests of the judiciary, but confronted and clashed with the military when their interests 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. Even as new judges were often nominated by serving judges, the final decision lay with the executive branch, and judges were often personally interviewed by Pakistan's military dictator, Ayub Khan. Therefore, professional success was linked to pleasing the military rulers and their political and bureaucratic allies. Upward mobility within the superior judiciary depended upon endorsing a strong military-led executive.

Superior court judges at the time were recruited from 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 leading 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 network. The military regime actively sought to preserve the privileges of these elite networks. These lawyers and bureaucrats were trained and socialized in networks that sought to reproduce the British colonial system that institutionalized a powerful executive branch, which preserved elite privileges and kept mass society at a distance (Jalal 1990). Thus, Pakistan's judicial elite was appointed directly by the military regime and came from Pakistan's bureaucrats and post-colonial elite lawyers, both networks that shared close ties with military officers. This system ensured that both the key audiences for career advancement and esteem building had an interest

in promoting the military's authority, thus constructing institutional preferences favouring collaboration with, and deference to, the military, in advancing its political agenda and interests.

However, three key transitions in Pakistan's judicial structure and recruitment pool led to a change in the key audiences shaping the judiciary's legal and policy preferences:

1- 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 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. These locally educated lawyers were also less focused on positivist legal and constitutional doctrines. This had a counterintuitive effect. Judges were less restricted by formal legal 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: (1) that the judiciary was no longer embedded in Pakistan's post-colonial elite, but in Pakistan's middle class; and (2) that building esteem with this network meant paying less attention to procedure and more attention to popular outcomes.
2- 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 lawyers' community became increasingly involved with the tumultuous political events reshaping Pakistan's political order at the time. These events ended the monopoly certain elite groups had over the state's politics, as mass society, including the legal networks, grew increasingly

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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. One of the first and only venues General Zia permitted to continue with electoral traditions was the bar (for reasons that are explained in subsequent chapters), and the result was that bar associations were among the few spaces available for political activity. Soon this attracted political workers and political party members to the bar associations, and the bar became a site for the development of an oppositional politics that challenged the military regime. An anti-establishment politics favouring judicial activism and confrontation with military and political party elites 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 and cooperate with the military, but presenting one's self as independent from military and political party elites became increasingly important for gaining the esteem of the most relevant sections of the legal complex.

3- 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-thirds of superior court judges came from the bar, while only a 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 made a more decisive break from the executive, when the judiciary asserted greater control over the judicial appointment process. In the consequential *Al-Jehad Trust* case in 1996, the Supreme Court reduced the executive branch's discretion in appointments, and in 2010 it further reduced executive control, with the establishment of a Judicial Commission to manage judicial appointments .[12] This had two important effects. First, the path to judicial

[12] These reforms happened during Pakistan's periods of civilian democratic rule, although the military remained the most powerful state institution.

selection did not necessarily require establishing a reputation with the executive branch, diminishing the role of executive institutions 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 themselves, increasingly consulted and relied on the advice of their fellow lawyers from their respective law firms and bars in making appointments. Thus, alongside reputation with chief justices, reputation within the lawyers' community became an increasingly important consideration in the process of judicial appointments and promotions.

By the late 1990s, the institutional environment of the Pakistani judiciary had been completely rearranged, and the audiences shaping judicial preferences in the 1960s had been largely altered as a consequence of these three processes. In particular: (1) the military, as the primary executive institution, and affiliated elites lost pre-eminence in the judicial appointment process, while judges and bar leaders became more consequential audiences in this process; and (2) 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 esteem building within the judicial system shifted towards authorities and networks that were not closely aligned with the military, the Pakistani judiciary shifted from a *loyal court* to a more ambitious *confrontational court* that was more willing to contest military prerogatives when interests and ambitions clashed. Figure 1.3 charts the evolution of the judiciary from a loyal to a confrontational 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. Three key disclaimers are crucial here. First, this does not mean that the judiciary did not respond strategically to the political environment, and the relative deference towards the military's security prerogative and restraint during the initial years of military rule can be explained by strategic deference. Second, the military's role in the process of judicial appointments had diminished,

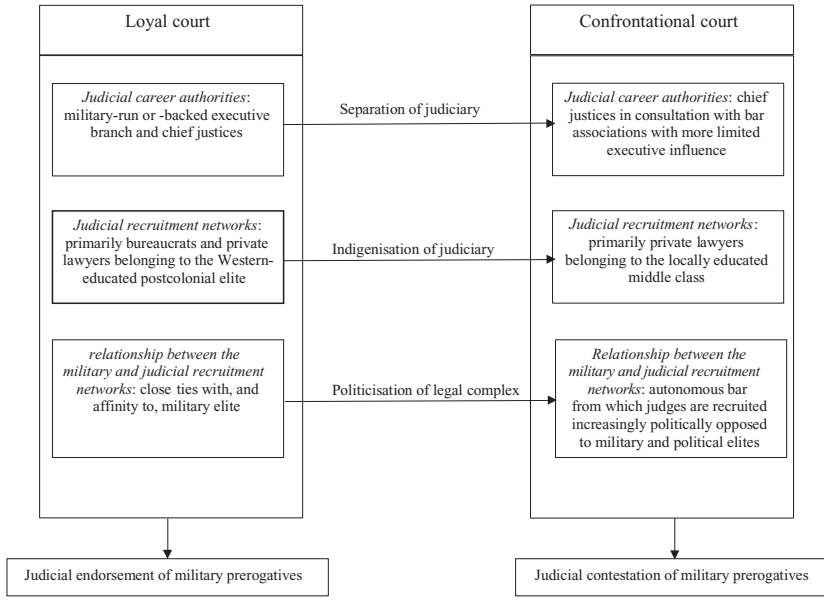

Figure 1.3 Evolution of the Pakistani judiciary.

but was not entirely eliminated, and the military retained informal and indirect links to the judicial appointment process. Third, just because a judiciary is more independent-minded and ambitious, and thus more willing to confront military supremacy, does not mean this judiciary will necessarily embrace elected civilian supremacy. As I show in Chapter 5, the confrontational court that emerged in Pakistan challenged both military regimes and elected civilian governments, with mixed consequences for Pakistan's democratic future.

CONCLUSION

The central claim of this study 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 the judiciary's legal and policy 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 esteem

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building, and that these motivations make different audiences consequential, as these audiences will shape the legal and policy preferences underlying judicial behaviour. Further, this audience-based approach explains how institutional preferences shift. Thus, this approach borrows from both the ideas-based and interest-based frameworks to provide a holistic and unifying framework for explaining variation in the judicial contestation of military prerogatives in authoritarian and post-authoritarian states. In the case of Pakistan, I demonstrate the utility of this theoretical framework in subsequent chapters.

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