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INTRODUCTION

The will of the people is above the constitution . . . We as judges of the Supreme Court are sitting here as representatives of the will of the people.

Justice Jawwad Khawaja, twenty-third chief justice of Pakistan

Like many other post-colonial states, Pakistan's political system has experienced domination by its military, and other political power centres have needed to define their roles vis-à-vis the armed forces. An especially significant institution, and one whose role vis-à-vis the military has evolved and changed over time, has been the higher judiciary. On 3 November 2007, General Musharraf, Pakistan's fourth 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 and its activist twentieth chief justice, Iftikhar Chaudhry. The regime ordered the judges of the high courts and the Supreme Court to take an oath to uphold his new Provisional Constitutional Order, and dismiss any legal challenge to the powers and authority of Musharraf's military regime. Any judges who refused to take this oath were to be immediately removed from judicial service. Yet, in an impressive show of defiance, a majority of the judges refused to take the oath, and suffered removal from office. The now-iconic image of Justice Chaudhry being manhandled by security officials galvanized public support for the judiciary in its growing confrontation with the military.

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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 former 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 millimetre . . . 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.[1]

The events of November 2007 highlighted just how potent a threat an assertive judiciary posed to the authority and stability of Pakistan's military regime, as well as how willing Pakistan's superior court judges were to confront the regime. What made the events of 2007 so puzzling was that Pakistan's judiciary had historically 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 Pakistan's judiciary shift from collaborating with to confronting Pakistan's military?

This shift by the judiciary demands an explanation for several reasons. First, the courts contested the military's authority at a time when the military regime was relatively stable and without a clear political opening to explain increasing judicial assertiveness. Second, 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. Third, the judiciary's clash with the military demonstrated the importance of

[1] Interview No. L-11, 20 January 2017.

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civil society in shaping interinstitutional dynamics, as the events of 2007 were actively encouraged and even coordinated by Pakistan's community of lawyers.[2]

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, which had been firmly entrenched for eight years. 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. Further, the years since the fall of Musharraf's regime have proven that the surprisingly 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. Instead, the judiciary continued to challenge civilian and, occasionally, military centres of power, even removing two elected prime ministers from office, and thereby furthering the judicialization of politics, as it pursued a preeminent role in Pakistan's political system. Thus, understanding the shift in the judiciary's relationship with the military in Pakistan helps us understand how the quest of judicial power can both further *and* undermine democratization in authoritarian and post-authoritarian states. Therefore, the central theoretical question this book addresses is: *under what conditions do courts muster the willingness to challenge politically powerful militaries?*

In examining the dramatic and consequential transformation in the role of Pakistan's judiciary in Pakistan, this book helps shed light on several questions that are central to comparative politics and public law. These include the sources of high-risk judicial assertiveness, the causes of the judicialization of politics, the sources of judicial preferences and how the construction of the judiciary's role and institutional relationships can impact democracy and the rule of law.

[2] '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. See 'Judges as Heroes', *The News*, 9 November 2007.

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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 in 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 (Ginsburg 2003; Chavez 2004; Helmke 2005; Hilbink 2007; Moustafa 2007; Trochev 2008; Kapiszewski 2012; Trochev and Ellet 2014). The two primary approaches to explaining judicial decision-making focus on *interests* and *ideas* (Woods and Hilbink 2009; Hilbink and Ingram 2019). Interest-based approaches focus on judicial strategies to maintain or expand the authority judges need to realize their policy preferences. Strategic judges will rationally adjust their behaviour in accordance with calculations about how other political actors will respond to their decisions, thereby minimizing any risk to their authority to achieve their policy goals (Epstein and Knight 1998; Helmke 2005; Vanberg 2015). The interests-based approach cannot, however, explain the high-risk judicial activism observed, where the judiciary risks likely defiance and retaliation, but acts assertively anyway. Why would a judge knowingly put his or her interests at risk by acting assertively? Explaining high-risk assertiveness requires engaging with the other interests of judges, interests that go beyond the instrumental preservation and acquisition of power to include reputation-building and job satisfaction.

Ideas-based explanations focus primarily on the sincere attitudes and legal and policy preferences judges hold, and how they motivate or dissuade judicial assertiveness. The attitudinal approach (e.g. Segal 2008) uses individually held policy preferences of judges 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 argue that both ideas and interests are shaped by the institutional setting in which they develop (Hilbink 2009). Institutionalist scholars acknowledge that the legal and policy preferences of judges are not exogenous to judicial institutions but are constructed or constituted within the structure of the judiciary (Clayton and Gillman 1999; Hilbink 2007; Kapiszewski 2012). Different institutional settings allocate power and resources across

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different actors, empowering and constraining them differently. In doing so, institutional settings guide the behaviour and expectations of actors within these institutions by determining both which actors have more authority over the other actors, and which actors' norms and ideas regarding 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 behaviour is appropriate for judges. Institutionalist scholars have shown that the rules of appropriate behaviour are entrenched in the judiciary through history-dependent processes of adaptation, such as learning or selection. Through these processes, the institutional settings encode legal and policy preferences which then guide the actions of the judiciary. However, we need to build on these institutionalist insights, to better understand how external actors in state and society can shape both the formation of, and change in, institutional preferences within the judiciary

In this book I draw on both the ideas-based and interest-based literature to: (1) outline the mechanisms through which actors outside the judiciary, such as the military, can shape the norms and preferences governing appropriate behaviour within the judiciary, and thus guide both sincere and strategic judicial behaviour; and (2) develop a generalizable framework to understand the history-dependent processes through which legal and policy preferences that are encoded within the judiciary can change over time.

OVERVIEW OF THE ARGUMENT

The main argument put forth in this book 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 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 among which judges have reasons to build their reputations. The judiciary's affinity with the military diminishes as the audiences from which judges seek approval grow more independent from the military.

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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 behaviour 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).[3]

This book primarily focuses on variation in judicial assertiveness towards the military.[4] In applying the concept of judicial assertiveness to the context of civil–military relations, it describes an increase in judicial assertiveness towards the military, as an increase in the judicial contestation of military prerogatives. Borrowing from the work of Stepan (1988) on civil–military relations and democracy, it defines 'military prerogatives' as the powers or privileges the military presumes it has, and it defines 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 key argument is that an increase in judicial contestation of military prerogatives is a product of a shift in audiences shaping judicial legal and policy preferences, away from the military. As the military's *institutional interlinkages* with the judiciary decrease, the military's role as an audience shaping judicial preferences decreases.

Institutional interlinkages are defined as links to the internal rules and processes of the judiciary that allow the military, and allied elites, to shape the internal structure and culture of the institution. Two types of institutional interlinkages are discussed: *utilitarian* and *normative*. If institutions, organizations or networks have a role in the appointments, promotions, transfers and disciplining of judges, I describe this as a

[3] 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 I show in subsequent chapters, the judiciary grew more assertive as it grew more willing to deviate from established precedents that favoured deference and subservience to the Pakistani military.

[4] The book also discusses jurisprudence pertaining to civilian governments and institutions, where relevant.

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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' esteem 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 audiences with which judges aim to build their reputations, for both material and non-material purposes, and thus are the critical audiences for the judiciary. Through these interlinkages, these audiences shape judicial behaviour.

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 esteem. If the military or allied elites 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 legal and policy preferences underlying judicial behaviour.

The book develops a typology of 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 preferences regarding the military may change over time. When the institutional interlinkages between the military and the judiciary change, judicial preferences in favour of the military shift, and the judiciary moves between the categories in the typology.

The first category is the *controlled court*, where the military and judiciary enjoy utilitarian interlinkages, that is, the military and affiliated elites shape the judicial legal and policy preferences through the appointment and promotion process. The second is the *collaborative court*, where the military and judiciary enjoy normative interlinkages, that is, the military shapes the judicial preferences since judges are recruited 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 *confrontational court*, in which neither the military nor its affiliates are in primary control of

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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 preferences of the judiciary.[5]

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 the course of Pakistan's history, the judiciary's relationship with the military shifted across these categories, as the judiciary most closely approximated a loyal court in the years after independence, transitioned towards a controlled court in the 1980s and finally shifted towards a confrontational 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 legal and policy 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 preferences. The result of this transition has been a concomitant shift in judicial preferences, as the judiciary embraced a less deferential and collaborative approach 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 preferences, which led to increased contestation and confrontation between the judiciary and both military and civilian centers of power. 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 unity and political strength of the

[5] These categories represent constructed ideal-types that approximate reality. In most states, the judiciary will usually have multiple audiences of varying importance, and it is unlikely that the military and affiliated elites will either be the sole audience for the judiciary, or, alternatively, have no interlinkages with the military or affiliated elites. However, 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 are between the military and the judiciary, in comparison to the linkages between other external actors and the judiciary in that state.

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

What processes drove the Pakistani judiciary's movement from loyal court to confrontational court? 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, granted senior judges more control over judicial careers 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. There was a shift in the composition of networks from which judges were primarily recruited, from an elite cadre of lawyers and bureaucrats 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. This shift 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 politically active entities that embraced opposition to unfettered military rule and unregulated electoral supremacy. As the bar had by now 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 and interventionist postures 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 importance audience shaping the legal and policy preferences of the judiciary.

This work deepens our understanding of the process through which legal and policy preferences are formed, institutionalized and disrupted within the judicial system, and provides a systematic explanation for the way in which the judiciary's relationship with external actors shapes this process. The audience-based approach, presented in this book, sheds light on the critical role of reputation-building in shaping judicial behaviour. Understanding the significant role of reputation-

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building helps connect institutions, organizations and networks outside the judiciary to the process of preference formation and transformation within the judiciary. Thus, the audience-based approach properly embeds the judiciary in its political, social and institutional environment, and explains how this environment shapes the legal and policy preferences underlying judicial behaviour. In doing so, it contributes to our understanding of judicial institutions and behaviour in four ways.

First, this study reveals how politically powerful militaries shape the willingness and ability of the judiciary to assert civilian control over the military. There is a robust literature on the strategies military regimes use to co-opt and control political institutions in order to consolidate their rule (Gandhi and Prezworski 2007; Gandhi and 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 pays adequate attention to how militaries strategize to co-opt, control or resist judiciaries, in order to consolidate their rule or preserve their prerogatives. Even the limited scholarship dealing with judicial–military relations has focused either on variation in the political space available to judiciaries under military regimes (Helmke 2005; Pereira 2005; Ginsburg and Moustafa 2008; Hamad 2019), or on the role the post-authoritarian judiciary plays in mediating between the military and elected governments (Rios-Figueroa 2016). This scholarship does not consider how politically powerful militaries seek to increase the willingness of judges to collaborate with, or defer to, military power, that is, how politically powerful militaries shape judicial ideologies. Understanding developments and changes in judicial preferences towards the military requires understanding the judiciary's interactions with state institutions, the legal profession and society more broadly, and locating the place of the military within this web of formal and informal relations that shape the internal culture of the judiciary. The audience-based approach does exactly this, and thus provides a generalizable framework that can explain variation and change in judicial–military relations across authoritarian and post-authoritarian states.

Second, this study highlights the role of the legal community in shaping judicial behaviour. I do not just consider moments where the legal community rallies in support of the judiciary, legitimizing and protecting the judiciary when it challenges politically powerful actors (Epp 1998; Moustafa 2007; Ghias 2010; Karpik and Halliday 2011), but

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