Selective assertiveness and strategic deference: explaining judicial contestation of military prerogatives in Pakistan

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Abstract

How do we explain variation in judicial assertiveness towards politically powerful militaries? This article argues that the judiciary's willingness to assert itself against the military is contingent upon the type of military prerogative being challenged. Focusing on Pakistan, I find that courts are more willing to contest military prerogatives connected to the military's political authority, than prerogatives connected to its institutional autonomy. This selective assertiveness is strategic, as concerns about military retaliation against the judiciary are more likely to outweigh judicial preferences, on questions of the military's institutional autonomy than on questions of the military's political authority. I test this hypothesis using an original dataset of 720 high court and supreme court judgments pertaining to military prerogatives from Pakistan. I then discuss a sample of judgments selected from the dataset to demonstrate how variation in judicial assertiveness is guided primarily by strategic concerns about the likelihood of military retaliation against the judiciary. In studying the interactions between the judiciary and the military in Pakistan, the article provides a new perspective on the sources of judicial assertiveness and restraint, and the role the judiciary can play in bringing militaries under civilian control in authoritarian and post-authoritarian states.

Keywords:

Civil-Military Relations, Democracy, Judicial Politics, Law and Courts, South Asia, Pakistan, Post-Authoritarian States, Rule of Law

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Introduction

Can judiciaries bring politically powerful militaries under civilian control? A core dilemma in state-building is the tension between building a strong, efficacious military, and ensuring the military remains under civilian control.[1] Scholars and policymakers alike have dealt with the challenge of developing an effective military that also accepts limited prerogatives and democratic civilian control.[2] This article seeks to understand the role the *judiciary* can play in building civilian control over the military.

Understanding when courts are willing to act assertively against the military provides crucial insights into the role the judiciary can play in bringing powerful militaries under civilian control. The weakness of political parties in much of the developing world means they are often ill-equipped to bring established powerful militaries under control, placing a greater responsibility on the judiciary. Establishing democracy and rule of law in these contexts, requires understanding the judiciary's distinct role in building civilian control.

Focusing on Pakistan, I argue that the judiciary's willingness to assert itself against the powerful military is contingent upon the type of military prerogative being challenged. Military prerogatives refer to powers or privileges the military claims to have, to participate in state activities.[3] When the military is under civilian control, civilians alone determine the nature and extent of military participation in state activities.[4] The judiciary's assertiveness varies based on the extent to which the military prerogative being challenged is connected to the military's maintenance of its *institutional autonomy* or its *political authority*.[5] On questions pertaining to the military's institutional autonomy, concerns about military retaliation will trump judicial preferences for civilian control over the military. This is because judges anticipate the military is likely to retaliate against any action undermining its institutional autonomy, even if that

retaliation is costly for the military. However, on questions pertaining to the military's political authority, judicial preferences for civilian control over the military will often outweigh strategic concerns about military retaliation, and the judiciary will therefore be more likely to assert itself. Thus, strategic concerns about the way the military distinguishes between prerogatives shapes the judiciary's selective approach to challenging these prerogatives.

Pakistan is an excellent case for studying judicial-military relations as it belongs to a group of states in which a powerful military wields a wide range of political, economic and institutional prerogatives, but power remains contested and negotiated between civilian and military power centres, placing the judiciary in a prominent role as an arbiter of civil-military contestation.[6] This article is unique in studying judicial-military relations across military prerogatives in Pakistan. While focusing on Pakistan, it connects and contributes to scholarship on judicial politics and civil-military relations in two ways. First, it shows how militaries discriminate between prerogatives, revealing where civilian institutions *can* assert civilian control over the military. Second, in disaggregating the study of civil-military relations across state institutions, it reveals the distinct considerations that shape the willingness and ability of the judiciary to assert civilian control over the military and the strategies the military uses to resist or oppose judicially-driven civilian control.

In this article, I first outline why judicial decision-making is more likely to be shaped by military preferences on questions of the military's institutional autonomy than on questions of the military's political authority. I use a mixed-method approach to test my argument. I test my hypothesis of selective assertiveness using an original dataset of 720 Pakistani High Court and Supreme Court decisions pertaining to military prerogatives from 1973 to 2015. I then use information gleaned from case law research, archival newspaper research and interviews with

lawyers and judges to discuss a series of salient judgments selected from this dataset.[7] This sample includes judgments dealing with the military's institutional autonomy, economic and political authority prerogatives. Together they demonstrate that the judiciary's selective assertiveness is guided primarily by strategic concerns about military retaliation against the judiciary and show how the weight given to these concerns varies depending on the military prerogative.

Military, judiciary and the rule of law

The judiciary plays a critical role in mediating the border between civilian and military spheres, as it i) must interpret the law governing military prerogatives, and ii) must hold the military accountable when it takes actions that exceed their legally prescribed prerogatives. Rios-Figueroa points out that courts must resolve uncertainty over legal exceptions and exemptions provided to the military, and the legal consequences of military actions.[8] Therefore, the judiciary determines the manner and extent to which the law enables or constrains military authority and discretion.

The limited scholarship dealing with judicial-military relations focused either on the judiciary's role in challenging or legitimizing military dictatorships or, in the case of democracies, on the success of efforts to hold the military accountable for human rights violations under former authoritarian regimes or during security operations.[9] This study explores dynamics of the judicial-military relationship across authoritarian and democratic periods, to understand the conditions under which the judiciary contests military prerogatives.

Judges are aware of the conditional nature of their influence and are protective of their

policy-making authority, making them attuned to the interests of other branches of government.[10] Kapiszewski argues that judicial decision-making is characterized by *tactical balancing.*[11] That is, in making each decision, judges choose between their own preferences and concerns of other political institutions.

Military concerns trump judicial preferences when the military i) deems an adverse judicial decision to be costly to its own interests, and ii) is willing and able to retaliate against the judiciary.[12] During military rule and democratic periods following military rule, the military can retaliate against the judiciary by i) undercutting the powers of courts directly, or through political allies in the executive or legislature, ii) leveraging its public credibility to delegitimize the judiciary for being unpatriotic, iii) using its intelligence and surveillance apparatus to smear judges, and/or iv) directly threatening the careers and lives of judges.[13] But defying or undermining courts, both during periods of dictatorship and democracy. is not cost-free for the military. Military regimes that undermine courts may compromise international and domestic legitimacy. In Egypt, the military dictatorship of Anwar Sadat strengthened the independence of the judiciary to gain international legitimacy and attract foreign investment.[14] Similarly, during democratic periods, undermining the judiciary may prompt backlash from political or social allies of the judges. In Pakistan after the resumption of democracy in 2008, when the Chief of Army Staff issued a statement criticizing the judiciary for "not staying in its place," the Chief Justice publicly chastised the army for undermining democracy and received media coverage and support.[15] Thus, we must understand where the military is more or less likely to bear potential costs incurred by retaliation. In deciding whether to decide a case based on its own preferences or the military's preferences the strategic judiciary must ask: when is the military likely to retaliate against the judiciary?

Scholars of civil-military relations have shown that both during authoritarian and post-authoritarian periods, the military has a vested interest in maintaining and expanding prerogatives. Fitch differentiates between prerogatives insulating the military from government control of its activities and prerogatives enabling the military to exert political influence or control over civilian leaders.[16] Building on this insight, I distinguish military prerogatives based on whether they are connected to the military's institutional autonomy or political authority.[17] By *institutional autonomy,* I mean the discretion the military deems necessary for organizing itself and carrying out its national security mission (in short, preventing civilian intervention into the military).[18] The key 'institutional autonomy' prerogatives pertain to the military's control over its internal organization, security policy and operations and institutional resources.[19] These prerogatives are non-negotiable, and the military is likely to retaliate against interventions into its institutional autonomy, *even* when such retaliation might be costly. On the other end of this spectrum of prerogatives are those pertaining to political authority. By *political authority,* I mean the military's discretion to influence administration and regulation of the political, social and economic life of the state (in short, expanding military interventions into the civilian domain). Military prerogatives do not all fit into these two categories but fall on a spectrum between these two end points.

I argue that, on questions of institutional autonomy, the tactical balance will tip in favour of the military's preferences. Even an otherwise assertive judiciary with preferences that do not align with the military, will strategically defer to the military. However, *as the prerogative's connection to military autonomy decreases, the tactical balance is less likely to tip in favour of deference to military preferences, thus raising the likelihood of judicial contestation*.

It could be argued this deference is not a product of judicial strategy but is built into the

state's legal framework. Formal prerogatives describe the legally granted prerogatives to the military, whereas informal prerogatives are actions the military chooses to take without legal authorization.[20] Given the high value placed on institutional autonomy by the military, it would be intuitive to expect that the state's legal and constitutional framework accommodates the military's preservation of its professional autonomy and limits the military's assertion of its political authority. However, this does not mean the judiciary's deference on questions of institutional prerogatives should be inevitable or even expected. When a case comes before courts, there is usually a conflict of interpretation over whether a military action is legally authorized, and thus is a formal prerogative, or not. The dispute will boil down to whether the court defers to the military's interpretation of the scope of its formal prerogatives. Deference therefore does not simply refer to deference to formally granted autonomy, but deference to the military's *interpretation* of its formally granted institutional autonomy.

Thus, this tactical balancing framework incorporates insights from scholarship on civil-military relations and judicial politics regarding institutional priorities of the military and strategic motives of judges, to explain variation in judicial assertiveness towards the military, and thus understand the nuanced role *courts* can play in building civilian control over politically powerful militaries.

Judicial-military relations in Pakistan

Since Pakistan gained independence in 1947, the state swung between military dictatorship and democracy. This has included 33 years of direct military rule. Even during periods of formal democratic rule, the military remained a powerful stakeholder, wielding political influence.[21] Pakistan's military possesses a range of prerogatives, including:

i) 'Political authority' prerogatives pertaining to the military's authority to intervene in and manage recruitment to government institutions and the making of public policy.

ii) 'Institutional Autonomy' prerogatives pertaining to the military's management of its organization and operations and formulation of national security policy (external and internal), shielded from political interference.

iii) 'Economic' prerogatives pertaining to the military's discretion in acquiring and administering economic assets and businesses. Pakistan's military possesses a wide range of economic interests including military lands, housing societies, fertilizer factories, cement factories, banks, a welfare trust for members of the military, to name a few, which provide the military institution with significant revenue.[22] Economic prerogatives can be divided into i) *wealth prerogatives*, which includes powers to acquire and repurpose land, expand into revenue generating activities and gain tax exemptions for commercial activity, and ii) *administrative prerogatives*, pertaining to the regulation of civilians within these economic assets, which includes the administration of employees, tenants and landowners in military-run housing societies, cantonments and commercial organizations. While not institutional autonomy prerogatives, wealth prerogatives are more closely tied to institutional autonomy than administrative prerogatives, as the acquisition of land and generation of commercial revenue are an important source of revenue for the military organization, and thus are an institutional concern, and the military would be keen to prevent civilian interference in its supply of wealth.

Figure 1

I argue the military is likely to retaliate against judicial interventions into its institutional autonomy, *even* when such contestation might be costly for the military, making these prerogatives non-negotiable for the military. The military will only act to protect 'political authority' prerogatives against judicial contestation when the cost of retaliation is not high.

Accordingly, I argue that, on questions of the military's institutional autonomy, the tactical balance will tip in favour of the military's preferences. Even an otherwise assertive judiciary, with preferences that do not align with the military, will strategically defer to the military. However, as the prerogative's connection to military autonomy decreases, the tactical balance is less likely to tip in favour of deference to military preferences, thus raising the likelihood of judicial contestation.

This is not to say that the judiciary will always assert itself against the military's political authority. Pakistan's history is replete with decisions where the judiciary sided with the military, including validating military coups, but focusing on these judgments does not allow us to assess how judicial assertiveness varies across military-related jurisprudence.[23]

Testing hypothesis

In testing my hypothesis, I collected and coded all reported High Court and Supreme Court decisions pertaining to the military and subsidiary institutions. Pakistan is a common law jurisdiction, and the superior judiciary is comprised of a High Court for each province, and a

Supreme Court. The High Courts have appellate jurisdiction over civil and criminal petitions, and original jurisdiction in dealing with constitutional petitions. The Supreme Court has appellate jurisdiction over decisions decided by the High Courts and original jurisdiction over questions of public interest concerning fundamental rights. I include judgments based on two criteria. First, I select judgments from 1973 to 2015 because Pakistan's courts have been under the same constitutional framework since 1973.[24] Second, I select judgments that challenge the interests or actions of the military and its subsidiary institutions.[25] Based on these criteria, I included 720 reported High Court and Supreme Court judgments that pertain to the authority and actions of the military and institutions and organizations attached to it or under its control.

Measurement and estimation

I use the ordinal variable *Contestation.* I follow Kapiszewski's suggestion that we examine the intensity with which courts endorse or challenge the exercise of military powers.[26] A dichotomous variable does not adequately capture the intensity of the judiciary's contestation of the military, or the way the content of the decision redistributes military power. The ordinal variable, *Contestation*, by distinguishing between decisions that contest military actions, and decisions that contest the military's actions *and* authority, captures this consequential distinction. There are three possible outcomes in each judicial decision.

i) The court rules in favour of the military, not challenging the military's authority or actions (0).

ii) The court rules against a particular exercise of military power but does not challenge the military's power to carry out such actions (1).

iii) The court rules against the military's action *and* shifts the authority of the military to carry out such actions either partially or completely to another institution (2).

For instance, a civilian court has to rule on an appeal challenging a decision by the military's

own court martial proceedings. The court can:

i) dismiss the appeal

ii) grant the appeal, ruling against the particular action taken by the military courts on procedural grounds (e.g. the court did not carry out any evidentiary hearings during the proceedings), but not contesting the military court's decision-making power; or

iii) grant the appeal, determining that the appellant does not fall under the jurisdiction of the military courts, thus contesting the military court's authority to try this class of accused.

Table 1

To test my hypothesis, I code judgments based on the type of prerogative they deal with. I code judgments dealing with the military's control over national security policy and security operations and organization of military forces as "institutional autonomy" judgments (1). The majority of judgments in this category deal with the internal organization of the military, and internal security policy and operations, as only 10 reported judgments deal with matters of external security (namely, rules of military combat, and international espionage trials).[27] I code judgments dealing with exemptions for military run or owned economic organizations, procedures for promoting and dismissing civilian employees, the authority of military-run organizations to acquire and repurpose lands, and administer residents and commercial enterprises on military lands, and the judiciary's jurisdiction over these assets and organizations, as "economic prerogatives (2)". I code judgments pertaining to the non-security executive, legislative and judicial functions of the military as "political authority prerogatives (3)". This category includes judgments pertaining to formal seizures of executive power, military regime amendments to the law and constitution, informal interventions in the political recruitment

process, recruitment of military officers into civilian bureaucracies and policy-making institutions, and summary military courts dealing with civilian criminal cases.

I run an ordinal regression with *Contestation* as the dependent variable, to test the hypothesis that courts are *less* likely to contest the military's 'institutional autonomy' prerogatives.

Within the subset of judgments pertaining to economic prerogatives, I also use a dummy variable, '*Wealth Prerogative'* to indicate if the case deals with a prerogative related to the military's discretion in acquiring wealth or not. If the prerogative deals with i) the authority and discretion of military-run organizations to acquire and repurpose lands and run commercial and industrial enterprises, or ii) the provision of tax exemptions for military-run or owned commercial organizations, I code these as 1. I expect to find the judiciary will act more deferentially towards the military's wealth prerogatives, as the military sees the acquisition of land and revenue as an important source of wealth for the military, and thus as an institutional concern.

Running both regression models helps confirm the underlying logic of the argument, that the greater the functional distance of the prerogative from the military's institutional autonomy, the more likely the judiciary is to contest the prerogative.[28]

I also control for five potential influences on the judiciary's decision-making. Following the insight of the strategic approach that the judiciary can act more assertively when political power is fragmented, the courts should be more deferential to the military during periods of military rule, when military power is not fragmented or diluted, than during periods of civilian rule.[29] Accordingly, I use a dummy variable, *Democracy*, for whether the state is under formally civilian democratic rule or not.[30]

During Pakistan's military regimes, the military would initially suspend the constitution for several years, before restoring an amended constitution. The judiciary should be deferential to the military when military regimes suspend the constitution, restricting the jurisdiction of the judiciary and removing constitutional safeguards protecting judicial independence.[31] Accordingly, I use a dummy variable, *Constitution,* for whether the 1973 constitution was fully in place or not.

I also control for the identity of the petitioner moving the action against the military or respondent against whom the military moves the action, capturing the notion that quality of legal representation should vary according to the plaintiff or respondent type, and using the assumption that political status is a reasonable proxy for litigant resources.[32] Controlling for the challenger's identity involves estimating a seven-category variable, *Challenger,* which accounts for a large number of categories of petitioner. The base category of the variable is the modal challenger, a private individual.[33]

Fourth, I control for cases decided during the tenure of Chief Justice Iftikhar Chaudhry (2007–2013). Justice Iftikhar Chaudhry was renowned for assertive decisions, and scholars explain some of the Pakistani judiciary's most assertive moments as a product of his activism.[34] Therefore, I use a dummy variable *Chaudhry,* for whether judgments were made during his tenure or not.

Finally, I control for internal military conflict, given the judiciary may be willing to extend more discretion to the military during times of internal conflict. Accordingly, I use the UCDP/PRIO Armed Conflict dataset to code for whether Pakistan was involved in an intrastate conflict.[35] I use a dummy variable, *Conflict,* and code the absence of any major conflict as 0, and the presence of major conflict leading to over 1000 battle deaths in a year as 1.[36] Most of the

years of major internal conflict occurred during the period of country-wide conflict between the state and the religious militants of the Taliban since 2006.

One concern that could arise would be whether the distinction between contestation of military actions and contestation of military action and authority is sufficiently objective and apparent in each judgment. To address this concern, I also test the main hypothesis by running a logistical regression using the dichotomous variable, *Outcome,* which only considers whether the judiciary ruled for or against the military or not.

Analysis

Table 2 presents the regressions for the likelihood of the judiciary contesting the military's prerogatives in Pakistan. All statistically significant results are provided in bold. Model 1 is the ordinal regression, testing the main hypothesis with all control variables. Model 2 is logistical regression that presents the likelihood of the judiciary simply deciding against the military. Model 3 is a logistical regression that presents the likelihood of the judiciary deciding against the military's economic prerogatives.

Table 2 shows strong evidence for my hypothesis. In all models the sign on political and policy making prerogatives is positive and significant at the 0.05 level or lower. This means courts are more likely to contest military prerogatives when the prerogative pertains to political authority than when it pertains to institutional autonomy. Similarly, in nearly all models the sign on economic prerogatives is positive and significant at the 0.05 level or lower, which suggests that the courts are more likely to contest the military's prerogatives when the prerogative is an economic prerogative than when the prerogative pertains to institutional autonomy. The results of Model 3 pertaining only to economic prerogatives also show that the courts are less likely to challenge economic prerogatives tied to the military's accumulation of wealth.

Table 2

The substantive effects of this relationship are quite large. The first two coefficients in Figure 3 suggest that the likelihood of the judiciary deciding against the military increases considerably if the prerogative is tied to the military's political authority rather than its institutional autonomy. This indicates that the type of prerogative being challenged substantially alters the probability of judicial contestation in a particular case.

Figure 2[37]

The control variables add further robustness to the findings. The most unexpected result is that the judiciary is less likely to assert itself against the military during democratic rule than authoritarian rule. This may be because, during periods of authoritarian rule, the military wields more political and economic prerogatives, and therefore a larger proportion of judgments during dictatorships deal with these prerogatives. If the type of prerogative shapes judicial decision-making more than the regime type, perhaps it is not unexpected that there would be more assertive decisions during periods of dictatorship. However, this finding merits further scrutiny. During periods where the constitution was absent the judiciary was less likely to make decisions against the military, indicating that the lack of judicial independence during these periods did deter the judiciary.

These findings strongly suggest the distinction between prerogatives tied to the military's institutional autonomy and those tied to the military's political authority, guides the courts' decision-making. (Three further robustness checks, one using a multinomial regression, one controlling for variation across different courts, and one adding additional coding for external

conflict, are provided in Appendix A).

Selective assertiveness as a judicial strategy

In this section, I examine a series of Pakistani High Court and Supreme Court judgments which reveal the role of tactical balancing in explaining selective assertiveness towards the military. I chose a set of decisions that are representative of challenges to the military's institutional, economic and political prerogatives. I choose cases from the same time period (2009 to 2015).[38] I do this to control for the possibility that variation in judicial approach can be explained by time, especially given the development of norms favouring judicial activism in this period.[39] Based on this, I selected a sample of cases pertaining to i) oversight of the military's security operations, ii) the scope of the civilian role in the military's administration of its cantonment, and iii) penalties for direct political interventions by the military. I analyse these judgments to discern reasoning behind the choices judges made. I also use newspaper articles and interviews to situate these decisions in their political and legal context and better understand the motivations driving these decisions. In doing so, I demonstrate, how, when dealing with prerogatives tied to the military's institutional autonomy, judicial deference was shaped by fears of military retaliation, whereas when dealing with other prerogatives, concerns about retaliation did not outweigh judicial preferences.

Scope of judicial oversight of security operations

Enforced disappearances refer to the

> arrest, detention, abduction…by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a

> refusal to acknowledge the deprivation of liberty, or concealment of the… whereabouts of the disappeared person, which place such a person outside the protection of the law. (*Dawn*, October 3, 2017).

In Pakistan hundreds of people have reportedly been disappeared after being abducted and secretly detained by security agencies. The targets of enforced disappearances have primarily been ethnic dissidents from the provinces of Balochistan and Sindh and suspected religious militants. The Supreme Court first took up the issue of enforced disappearances in Pakistan in 2005, when it took notice of a news report citing the growing number of enforced disappearances. But until 2013, there were no judgments, prosecutions, or convictions related to 'missing persons' petitions (*Dawn*, July 29, 2013). In an interview, a lawyer who represented families of people who had gone "missing" narrated one incident. He said,

> In F-10 (Islamabad), they came wearing police uniforms, but they had Vigos (an expensive car indicating they probably were not from the police). A 40-year-old man was picked up, and his computer and laptops, and folders with documents were all taken…Journalists, policemen, everyone was scared the moment they knew it's the (military intelligence) agencies (that took him). Police put these cases in the smaller offences bracket, because if it was classified as a bigger offence police would have to act quickly on these cases. The family was fearful because the only lawyer they knew at the time said nothing can happen, and there was no point going to the courts.[40]

Why were lawyers, judges and police all unwilling to act against this highly unpopular practice? The case of Yaseen Shah reveals how military authorities would defy and delay and misdirect the courts to maintain its detention of suspects. Yaseen Shah's brother petitioned the Court after Yaseen went missing in 2010 during a joint police-military operation. The state first denied Shah's detention, then said he was detained in an undisclosed military-run internment centre. When the Court asked for him and his fellow detainees to be produced, military authorities refused to comply, and after repeated delays in December 2013, only seven of the 35 missing persons allegedly at the internment centre were produced.

In its judgment, the Court held that that "enforced disappearances were violative of the Constitution of Pakistan"[41] It also held that any responsible military personnel should be dealt with "in accordance with law".[42] In subsequent implementation hearings, Justice Khawwaja threatened to hold high ranking functionaries of the civilian government in contempt of court if they did not act against those responsible (*Pakistan Today*, March 18, 2014) . However, little progress was made and no military officers were booked. After May 2014, the Court stopped pushing for more accountability, did not pursue cases against security officials, and Yaseen Shah remained in detention.

The case highlights the challenges judges faced in holding the military accountable for its conduct in security operations. Judges initially ordered the production of those who went missing but were unwilling to push for the implementation of decisions and for military accountability. The military had no interest in complying with judicial oversight of security operations. And judges knew the military was willing to take drastic action to protect its security prerogatives.[43] The military benefited from having developed a formidable intelligence collecting apparatus which extended beyond the surveillance of security threats to include politicians, judges, and activists among others.[44] This ensured the military had a monopoly over intelligence, which it used in two ways to get its way in cases in which it took an active interest. First, during the proceedings of this case, members of military intelligence shared unverifiable intelligence that could prejudice judges against the detainees, and also remind judges of the military's strong interest in the case outcome.[45] Second, if this did not work, military intelligence would remind judges of private information they collected on judges. As one former judge explained "Judges have skeletons in their closets. Military intelligence looks into them and keeps their tabs. And judges know this".[46]

Justice Khawwaja had been a forceful advocate for accountability in Missing Persons cases. He soon became the subject of a malicious campaign. Mysterious banners appeared all along Constitution Avenue, the most secure road in the capital city Islamabad upon which all major government buildings were constructed. These banners questioned the Justice Khawwaja's patriotism and integrity.[47] His wife's financial integrity was also brought under scrutiny by media figures known for the pro-military slant.[48] After his retirement the Court's interest in pursuing Missing Persons cases waned.

Thus, the military was not willing to broker challenges to the conduct of its security operations, and judges were expected to show deference to the military's interpretation of its autonomy in carrying out security operations. Those judges who chose to push for more oversight and accountability suffered consequences. The courts stayed strategically cautious, persisting in tracing 'Missing Persons', but not on holding the military accountable.[49]

This case reveals the reasons behind selective assertiveness when dealing with the military's institutional autonomy. Given the military's interest and the resources at its disposal, judges strategically defer to the military's interpretation of its prerogatives to avoid the repercussions of assertiveness. Where some judges crossed red lines with the military, they paid the price.

Scope of civilian participation in cantonment administration

When courts dealt with prerogatives that were not tied to the military's institutional autonomy, the courts acted more assertively. As mentioned earlier, the military owned and ran cantonment lands across the country. The cantonments began as garrison stations but grew exponentially, and include civilian populations as well as residential and commercial areas. These cantonments had

their own laws and were often exempted from rules and regulations that applied to other jurisdictions. The judiciary frequently held exemptions for cantonments up to scrutiny.

Each cantonment is run by a board which typically comprises 12 elected civilians, 12 selected civilian and military officers, and one presiding military officer. Unlike other local body elections, however, military authorities sought to limit the entrance of political parties into cantonment administration, by only permitting elections on a non-party basis to cantonment boards (*Dawn,* August 22 2013). In 2001, General Musharraf's military regime (1999-2008) further reduced civilian involvement, as cantonment boards were run exclusively by unelected officials, with military officers at the helm (*Dawn,* March 12, 2015). In 2015, after 13 years without local government elections, Pakistan organized local government elections, at the insistence of the Supreme Court. Initially the cantonment boards sought to resist complying with the Court order to carry out elections. However, in *Rab Nawaz v Federation of Pakistan*, the Supreme Court threatened to hold the Secretary of Defence in contempt of court if cantonment elections were not held.[50]

While jurisdictions across the rest of the country were holding party-based elections, the cantonment elections were initially not party-based. The Lahore High Court contested the prerogative of military cantonments to keep political parties out of cantonment boards, ruling that not allowing people to form and operate political parties in local elections, violated "inalienable rights guaranteed by the Constitution".[51] Thus, the courts contested the prerogative to maintain unelected military-dominated cantonment boards, opening up these boards to participation by elected political parties.

This stands in contrast to the judiciary's largely deferential approach to land acquisitions by military subsidiaries. In the case of disputed land claims, the military leadership has been

willing to interfere when it is a question of "land ownership with a strong connection to the Armed Forces".[52] The military leadership saw the acquisition of land as an important source of wealth for the military, and thus as an institutional concern which it wished to keep away from civilian intervention. In such cases, the military leadership would use resources at its disposal to ensure a favourable result, often sending members of the ISI (Inter-Services Intelligence) to proceedings of these cases, to signal its interest in the outcome.[53] Therefore, strategic deference in cases of land acquisition contrasted with assertiveness in cases of cantonment administration.

Penalty for political interventions by the military

In March 2013, Pakistan's former military dictator, General Musharraf, returned to Pakistan, after years of self-exile, to run for elections. Musharraf, who seized power in 1999, declared a state of emergency in 2007, in an attempt to weaken and purge the judiciary, even arresting and detaining judges, after the Supreme Court took several activist decisions that undermined his regime.[54] The clash between Musharraf and the judiciary triggered a nationwide movement for democracy, that led to Musharraf's downfall in 2008. The military facilitated Musharraf's return in 2013, on the "hope his political success" in the upcoming elections would be beneficial to the institution.[55] There were several charges against Musharraf, particularly for his emergency declaration, and the actions his regime took against judges, political parties, and militants. Musharraf's ambitions were soon quashed by the High Courts. The Peshawar High Court disqualified Musharraf from standing for election in 2013, and the Islamabad High Court rejected his bail application, ordering his arrest.[56] The decisions against Musharraf were not directly relevant for the military's institutional prerogatives, but the substance of the rulings, and

the penalties the High Courts imposed on Musharraf, served to underscore the judiciary's rejection of the military's prerogative to politically intervene and suspend or amend the Constitution.

The Peshawar High Court disqualified Musharraf from holding elected office and stated Musharraf had, "trampled the…Constitution", and likely committed "High Treason". The judgment went further, declaring that *all* military rulers "created serious problems within the country…where the law of rule was order of the day and not the rule of law". Similarly, the Islamabad High Court, in rejecting Musharraf's bail application, and ordering his arrest, held that the former regime's purging of the judiciary and arrests of judges in 2007, *prime facie* constituted an 'act of terrorism.' The High Court held that Musharraf's actions against the judges "spread fear…insecurity...and terror". This led to the dramatic scene of Musharraf fleeing the courtroom to avoid immediate arrest.[57] The High Court also added that those co-accused in the cases were culpable, including several military officers. Thus, while both petitions dealt with Musharraf as an individual, the High Court judges used these cases to take a broader stand against the military's political interventions and raise the penalty for such interventions.

These judgments did not sit well with the military, who saw these cases as "embarrassing for the institution" since "Musharraf still represented the army".[58] There was significant pushback from the military against the notion of judges holding military chiefs accountable.[59] However, in spite of this, Musharraf's trial for treason continued, and in 2019, a Special Court authorized to try Musharraf, found his actions in 2007 amounted to treason, sentencing him to death.[60] The majority opinion also called for the investigation and prosecution of military officers who collaborated with Musharraf. Thus, the judiciary continues to oppose the military's

direct political interventions. As one lawyer explained, for judges there is "a clear difference" between the military's political interventions and other actions.[61]

Therefore, when dealing with prerogatives that were not tied to the military's institutional autonomy, the courts were less deferential to the military's interpretation of its prerogatives. The same judges that deferred to the military on questions regarding military security operations, actively contested these prerogatives. These case studies clearly showed that when judges did not anticipate likely military retaliation, their preference for bringing militaries under civilian control trumped concerns about military retaliation.

Conclusion

This article uses quantitative and qualitative evidence from Pakistan to understand when judges will contest prerogatives of politically powerful militaries in authoritarian and post-authoritarian states. Drawing on a dataset of military-related jurisprudence, the evidence suggests judges are sensitive to distinctions the military makes between prerogatives that are tied to the military's maintenance of its institutional autonomy, and those that are not, and defers to the military's interpretation of the nature and scope of its institutional autonomy. The discussion of a selected sample of judgments provides evidence that strategic deference to military preferences trumps the judiciary's preferences on questions of institutional autonomy.

This study demonstrates which aspects of military power the judiciary is willing and able to contest, and the role courts can play in bringing the military under civilian control. This selective assertiveness remains evident in the Pakistani judiciary's approach towards the military. In December 2019, the Supreme Court swiftly backtracked after intervening in a case regarding

rules governing the tenure of the chief of army staff, a question pertaining to the military's internal organization, but continued to support the Special Court running the treason trial against Musharraf's political interventions, even amidst military pressure to postpone or cancel the trial.[62]

These findings are generalizable beyond Pakistan. In Egypt we see a similar pattern of selective assertiveness. In the 1990s and early 2000s, during Mubarak's regime, the courts accumulated a large body of rulings seeking to limit the power of the regime and military, striking down Mubarak's referral of civilians to military tribunals, and later overruling the military's expulsion of the residents of a mid-Nile island. [63] Between 1995 and 2008, administrative courts became an important venue for challenging the regime and military prerogatives. However, even during periods of high judicial contestation, courts remained largely deferential on questions of national security. Rutherford argues that judges recognized that "if the courts attempted to confront the regime on core security matters" then they may face retaliation.[64]

Thus, this study shows that the judiciary can play an important role in using the law to limit the military's political prerogatives and regulate some economic activities. At the same time, it highlights limits on the judiciary's willingness to contest politically powerful militaries. The judiciary's strategic deference on questions of the military's institutional autonomy has contributed to the sustenance of the military's exceptional status within Pakistan. In countless countries around the world, from dictatorships such as Egypt and Thailand to young democracies such as Indonesia, and Nigeria, militaries continue to hold positions of power, and judicial deference over questions of institutional autonomy undermine the rule of law.

Notes

1. Feaver, "Civil-Military Relations,"; Brooks, "Civil-Military Relations Subfield."
2. Stepan, Rethinking Military Politics: Brazil; Hunter, Military Influence in Brazil; Fitch, "Military Attitudes Towards Democracy," 59-85; Jaskoski, "Control of Armed Forces," 70-91; Eldem, Guardians Entrapped and Croissant and Keuhn, "Patterns of Civilian Control," 187-217.
3. Military prerogatives do not simply refer to military involvement in these activities, on the orders of the civilian government, but to the military's prerogative to determine its own participation in state activities. See Stepan, *Rethinking Military Politics* and Trinkunas, "Crafting Civilian Control," 161-193.
4. Croissant et al., "Beyond Fallacy of Coupism," 950-975.
5. I use the term 'formal democracy', because even during periods of elected civilian rule, the military continued to wield political influence and authority, See Adeney, "Understanding Pakistan's Hybrid Regime," 119-137.
6. Other states in this group include Turkey, Colombia, Egypt and Indonesia, to name a few. See Rios-Figueroa, *Constitutional Courts as Mediators* and Newberg, *Judging the State*.
7. To protect anonymity, interviews with judges and lawyers are assigned the letters J and L, respectively, and a random number between 1 and 100 generated and assigned to each interview. All interviews are referenced by that code and the interview date.
8. Rios-Figueroa, *Constitutional Courts as Mediators*.
9. On authoritarian states, see Pereira, *Political (In)Justice*; Helmke, *Courts under Constraints* and Moustafa and Ginsburg, "Courts in Authoritarian Politics," 1-22. On democratic states, see Pion-Berlin, "To Prosecute or Pardon?" 105-130; Pion-Berlin and Arceneaux, "Tipping the Civil-Military Balance," 633-661; Pereira, "Virtual Legality," 555-574; Rios-Figueroa, *Constitutional Courts as Mediators* and Rios-Figueroa and Aguilar, "Justice Institutions in Autocracies," 1-18.
10. Epstein and Knight, *The Choices Justices Make*; Helmke, *Courts under Constraints*; Vanberg, "Courts in Comparative Perspective," 167-185 and Epstein and Jacobi, "Strategic Analysis of Decisions," 341-358.
11. Kapiszewski, "Tactical Balancing," 471-506.
12. Vanberg, "Constitutional Courts in Perspective," 341-358.
13. Moustafa and Ginsburg, "Courts in Authoritarian Politics." 1-22; Croissant, et al., "Beyond Fallacy of Coupism," 950-975; Brooks, "Civil-Military Relations Subfield," 379-398.
14. Moustafa and Ginsburg, "Courts in Authoritarian Politics." 1-22
15. Masood, "Pakistani Generals and Judges."
16. Fitch, "Military Attitudes towards Democracy."
17. Pion-Berlin, "Military Autonomy and Emerging Democracies," 83-102; and Croissant et al., "Beyond Fallacy of Coupism," 950-975.
18. Military organization could include force size and structure, education and training, procurement and production of equipment and technological resources. See ibid.
19. Pion-Berlin, "Military Autonomy and Emerging Democracies," 83-102
20. See Stepan, *Rethinking Military Politics: Brazil* and Croissant et al., "Beyond Fallacy of Coupism."
21. Shah, "Constraining Consolidation," 1007-1033.

22. Siddiqa, *Military Inc.;* and Mani, "Military Empresarios," 183-197.
23. Newberg, *Judging the State.*
24. During periods when dictators suspended the Constitution, courts were still expected to decide cases as nearly as possible in accordance with the constitution.
25. This criterion excludes judgments that may be based on military law, but in no way challenge interests or actions of the military.
26. Kapiszewski, Challenging Decisions.
27. Only 2 of the 10 decisions pertaining to external security prerogatives went against the military. The limited number of accepted petitions and even more limited number of assertive judgments on external security prerogatives suggests courts are even more deferential on questions of external security.
28. Trinkunas, *Crafting Civilian Control*.
29. Tsebelis, *How Political Institutions Work*; Ferejohn et al., "Comparative Judicial Politics;" and Rios-Figueroa, "Fragmentation of Power in Mexico," 31-57.
30. This is distinct from periods of constitutional rule during military regimes, where, even with limited democratic rule, military rulers remained unelected heads of state.
31. Schedler et al., *The Self-Restraining State*; Widner, "Judicial Independence in Semi-Democracies," 124-143; and Randazzo et al., "Development of Judicial Independence," 583-593.
32. Kevin McGuire, "Repeat Players in Supreme Court," 187-196; and Jeffrey Staton, *Judicial Power and Strategic Communication.*
33. Parties include civil society organizations, private corporations, major political leaders, local government institutions, provincial government institutions and federal government institutions. Where the Supreme Court itself moves the petition (suo motu), I code that as a federal government institution, since the Court is a federal institution.
34. Ghias, "Miscarriage of Chief Justice," 985-1022 and Siddique, "Judicialization of Politics," 159-191.
35. Themner and Wallensteen, "Armed Conflict: 1946-2012."
36. The only significant external conflict during this period is the brief Kargil conflict between India and Pakistan (May-June 1999). Given this conflict lasted only a couple of months, unlike the protracted internal conflicts during this period, it is hard to assess its effect on military-related jurisprudence. However, in the Appendix, I add the Kargil conflict to the coding for 'conflict' and rerun the regression. The findings remain the same.
37. I used the logistical regression on the dichotomous variable Outcome (model 2) for the marginal effects plot.
38. This is not to say selective assertiveness does not characterize other periods of Pakistan's history, even when the judiciary was less known for activism. During Zulfiqar Bhutto's democratic regime (1974-77), we see a similar pattern, with the military only asserting itself in 22% of judgments pertaining to institutional autonomy, while asserting itself in 39% of judgments pertaining to political authority. Comparing three judgments from the same year highlights this point. In *Nishat Talkies v Director/Collector Karachi* (PLD 1976 Karachi 712), the High Court held military cantonments had to share administrative jurisdiction with provincial governments over cinemas built in cantonment areas, and in *Iqbal Ahmed Khan v State* (PLD 1977 1337), the High Court disallowed transfer of civilian cases to special military tribunals, disallowing military interventions in judicial functions. But in *Alla Ditta v State*

(PLD 1976 Lahore 823), the High Court held civilian courts did not have any jurisdiction over military personnel for crimes committed against civilians.

39. Cheema, "Two Steps Forward," 503-526. During this period the Supreme Court took an increasing number of cases of its own volition (suo moto), which underscored the judiciary's increased willingness to intervene in affairs of other state institutions. Only three of these cases dealt with military prerogatives, but in all three the judiciary expanded its involvement in the military's security and commercial operations.
40. Interview No. L-53, December 8, 2016.
41. *Human Rights Case No. 29388-K of 2013*, in the Matter of, PLD 505 SC 2014.
42. Ibid.
43. This was especially evident during General Musharraf's regime, which took overt action against judges who intervened on 'enforced disappearances." In March 2007, the day after Chief Justice Chaudhry issued notice to the government regarding the recovery of 'missing persons, the regime forced his suspension (*News*, March 9, 2007).
44. Shah, "Constraining Consolidation," 1007-1033.
45. Interview No. J-33, March 21, 2016.
46. Ibid.
47. Khan, "Jawwad Khawaja: Poetic Justice."
48. Interview No. J-50, November 16, 2016.
49. Similarly, in *President Balochistan High Court Bar Association v Federation of Pakistan* (2012 SCMR 1958) regarding the forcible disappearance of several lawyers in the province of Balochistan, the Court sided with the petitioners against the military-run Frontier Corps, and ordered an investigation into 'missing persons.' However, the Frontier Corps did not comply and the Court was unwilling to hold it accountable for non-compliance
50. *Rab Nawaz v Federation of Pakistan*, 2014 SCMR 101.
51. *Awais Younas v Federation of Pakistan*, Case no. W.P. 8222/2015.
52. Interview No. J-19, April 232017.
53. Ibid.
54. Kureshi, "Judicial Politics in a Hybrid Democracy," 235-252.
55. Interview No. L-46, March 20, 2017.
56. *Syed Pervez Musharraf v Appellate Tribunal for General Election*, PLD 2013 SC 105; *General Pervez Musharraf v the State*, PLD 2013 SC 66.
57. Zahra-Malik, "Musharraf Flees."
58. "Musharraf's Arrest."
59. This pressure led to the civilian government relenting and permitting Musharraf to leave Pakistan for Dubai. Warraich, "Pervez Musharraf."
60. "Court's Verdict."
61. Interview, No. L-46.
62. Shahzad, "Pakistan Sentences Former Dictator." Interestingly, the Lahore High Court issued a verdict countering the Special Court verdict in 2020, raising concerns about increasing influence of the military over the judiciary, but so far, the Supreme Court has not upheld the LHC verdict, meaning the Special Court verdict still remains the authoritative ruling on Musharraf's fate.
63. El-Ghobashy, "Dissidence and Deference."
64. Rutherford, *Egypt after Mubarak*.

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