

**CHANGING COURSE: UNDERSTANDING JUDICIAL INDEPENDENCE  
IN PAKISTAN**

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*To the loving memories of my father and comforting presence of my mother, sister and wife as well as my son Shais Adnan, who are the light in my life!*

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# **Abstract**

## **Changing Course: Understanding Judicial Independence in Pakistan**

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Pakistan has experienced an unprecedented wave of judicial activism since 2005. The judiciary in Pakistan has, for most of its existence, been subservient to the executive and has a history of validating unconstitutional acts by powerful players, including a number of coups d'état by the military. Since mid-2000s, however, it has evolved a doctrine of judicial activism and challenged the military regime and successive governments with unprecedented rulings in a number of politically important cases. Standard models in literature claim that political competition and fragmentation lead to judicial independence by creating a vacuum within which the judiciary can assert itself; such models suggest that democratisation must precede judicial independence. Others emphasise the role of the ideological orientations and attitudes of judges, or constitutional principles and precedents, to explain judicial behaviour. None of these models adequately explain the Pakistani case. The judicial resistance to executive power started at a time when the ruling junta faced few political challenges. Indeed, it was judicial activism, and the ensuing conflict, that spurred widespread resistance against the regime and led to democratisation.

This thesis seeks to explain the change in judicial independence in Pakistan since 2005. Using a sociological lens, this study locates the change in judicial behavior within the broader social contestation and emphasises the link between institutional change and social structural transformation. It argues that the surge in judicial activism since 2005 is primarily explained by the emergence of a sizable, aspirational, urban middle class—a social structural change that is reflected strikingly in the changing class composition of the judiciary, among other institutions. This change coincided with the rapid spread of information and communication technologies (ICTs), particularly the liberalization of electronic media and proliferation of mobile internet devices. These developments, in turn, facilitated greater dissemination of information and convergence of views and values between the judiciary and the expanding middle class that it identified with and viewed as a support base. The result was the development of a shared class consciousness between the judges and the middle class. This shared class consciousness combined with the global rise in judicial activism explains the degree and nature of the change in judicial behavior in Pakistan since 2005. So, while the judiciary may have used a range of legal precedents or doctrinal tools including those that originated elsewhere, its interpretation and application of these tools, however, depended on the shared class interests and worldview of the judges and their support base. This shared worldview also explains why the middle class came out so strongly in support of the judiciary when it challenged the ruling regime and defied its court-packing plans, culminating in the historic Lawyers' Movement (2007-09) that eventually led to the fall of military regime and return of democracy.

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# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

On the 6th of February 1979, under the watch of General Zia-ul-Haq, Chief Martial Law Administrator of Pakistan, a full bench of the Supreme Court of Pakistan in a majority verdict of four to three, handed down the infamous judgement that confirmed the death sentence passed on the first elected Prime Minister of Pakistan, Zulfiqar Ali Bhutto. Bhutto had been deposed by General Zia in a coup d'état that overthrew the elected government. The judgement went down in history as 'judicial murder' and led to the Supreme Court being branded a 'kangaroo court'. On 20th July 2007, almost three decades later, and under the watch of another military dictator, General Pervez Musharraf, another full bench of Supreme Court comprised of thirteen judges, acted to declare its independence and issued a unanimous verdict that declared the sacking of Justice Iftikhar Chaudhry illegal and ordered for his reinstatement as the Chief Justice of Pakistan. Widely believed to have marked the assertiveness of judiciary and its independence from the military regime, the judgement was hailed as a 'historic', 'landmark' and 'watershed moment' in the judicial history of Pakistan. This event provided the catalyst for protests that, seven months later, helped bring down the military regime of General Musharraf.

In Pakistan, the higher judiciary has traditionally been subservient to the executive, especially during military regimes, which have ruled the country for most of the period since independence. It has validated military coups, allowed appointment and dismissal of judges at the executive's whim and showed little resistance to any regime's

unconstitutional excesses. However, since the events taking place between 2005 and 2009, the judiciary has taken up a number of politically significant cases against powerful intelligence agencies and former Army Chiefs, including the indictment of General Musharraf on charges of treason. The judges did not shy away even from effectively dismissing an elected Prime Minister by convicting him for contempt of court, thereby revoking his membership of the Parliament, when he repeatedly refused to implement one of the court's directions. The court's order was duly accepted and implemented by the executive, forcing the Parliament to elect a new prime minister. The judiciary also successfully defused a number of political crises – such as the 'Memogate' scandal, 2014 protests over alleged election rigging and the 'Panama Leaks' affair – by intervening at a time when the country appeared on the brink of a meltdown. The Court sought to institutionalise its new role by purging the judiciary of all judges who had sided with the military regime and indemnified the imposition of a 'state of emergency' in November 2007. An attempt was made to correct historic wrongs by reviewing judicial precedents, such as the 'doctrine of necessity' historically used by judges in Pakistan to validate an unconstitutional act. Changes were made in judges' appointment procedures, giving them unprecedented control over promotions and appointments. In sharp contrast to the past, all judges sacked by the military regime in 2007 were recalled.

This significant change in judicial behaviour raises the question of how, and why, the judiciary in Pakistan has been able to assert its independence during the last decade in Pakistan. In an attempt to answer this question, this thesis explores institutional and structural factors that resulted in recent judicial empowerment in Pakistan, and its

implications for Pakistani society at large. In doing so, the thesis contributes to the literature on judicial politics by explaining how and why institutional change takes place.

Courts are increasingly becoming assertive political actors around the world, especially in transitional societies. As a key pillar of the state, an independent judiciary is considered an important bulwark against the transgressions of powerful actors in politics. It has a critical role as the defender of constitution, guarantor of human rights and protector of the rule of law (North and Weingast, 1989). In transitional democracies, institutionalisation of rule of law (i.e. submission of the state to law) serves two important purposes: it realises a clear break from the past and it helps develop a constitutional culture that makes more difficult the transgression of legal boundaries for partisan political gains (Larkins, 1996; Mazzone, 2005; Werner-Muller and Scheppele, 2008). Without establishing the rule of law, key dimensions of democracy, such as rights, equality and accountability, cannot be guaranteed and citizens remain subject to obstruction and intimidation from powerful state actors. Subjecting executive authority to the law of the land also lowers the stakes of holding power (North et al., 2000). Transition to a democratic order, therefore, remains incomplete without a strong judiciary which has the ability to apply the letter and spirit of the law, thereby providing a check on the exercise of executive authority (O'Donnell, 2004).

The quest for judicial independence, however, has remained elusive in many countries. There is a need to develop a deeper understanding of change (or lack thereof) in judicial independence and assertiveness. Pakistan represents an important case in this regard, one where the judiciary strove for its independence from a military regime at a time when it faced little political opposition. This defies traditional literature that posits democratisation as a precondition for judicial independence. The study adds to growing scholarship on this

topic in developing countries, particularly in Latin America, and provides a break from the traditional dominance of studies based on the United States judiciary. The case of judicial resurgence in Pakistan, therefore, deserves special attention, due to both the lack of literature on judicial politics in that country and the insights it can offer to other post-colonial transitional societies plagued by authoritarian regimes with rubber-stamp judiciaries.

Traditionally, judicial behaviour has been explained using the legal, attitudinal and strategic models. Rooted in legal studies, early research focused on constitutional principles, legal texts and judicial opinions as the key considerations that shape judicial decisions (Gillman, 2001). The influential work of the likes of Pritchett (1942) and Dahl (1957) marked a departure from the legal perspective, presenting judges as key policy makers with incentives and constraints not dissimilar from those of the members of Congress. This prompted an 'empirical turn' in the study of judicial politics, bringing the personal attitudes and preferences of judges and external influences on judicial decision making into the fray (Keck, 2007). The attitudinal model explained judicial behaviour on the basis of the ideological preferences and personal values of individual judges (Segal and Cover, 1989; Segal and Spaeth, 2002). However, the model was found inadequate in explaining instances of judges voting against their ideological preferences.

The strategic model, therefore, has emerged as the dominant explanation of judicial behaviour. It emphasises judges' strategic calculations about the anticipated reaction by other political players to their judgement while taking up or deciding important cases (Epstein and Knight, 2000; Spiller and Gely, 2007). The underlying assumption is that, like other political players, judges seek to maximise their utility within constraints posed by the

perceived preferences of other political players. They therefore exhibit rational or strategic behavior to advance their interests by calculating the effects of their decisions on key political players and chances of their acceptance and implementation (Marks, 1998). This means that judicial independence cannot be viewed in isolation and must be situated in the political context of a country and the relative strengths, weaknesses and influence of other stakeholders. A key weakness in this perspective, however, has been a tendency to over-emphasise the external political influence, to the extent of neglecting the possibility of a court exercising agency and taking relatively independent institutional action. A number of scholars have therefore criticised the model for its underlying structuralist bias, its assumption that judges are always able to accurately predict the behavior and policy choices of other players and its inability to explain instances where judges ruled against the declared positions or interests of other powerful players (Segal and Spaeth, 2002; Keck, 2007; Baum, 2009; Pacelle, 2011).

In response, this thesis, while partially agreeing with perspectives mentioned above, builds on the evolving literature exploring both the institutional dynamics and the structural factors that shape judicial behavior. Using a sociological lens, it locates the change in judicial behaviour within the context of broader social changes and emphasises the link between institutional and social change. The thesis puts the support for judiciary among key sections of society, that may culminate into social movements at the centre of the debate on judicial independence. It adds to the evidence that, at times, the judiciary actively seeks to cultivate a support base and builds alliances with key social groups by taking populist stances on key issues. The judiciary may use a range of legal precedents, including some that originate elsewhere, but their adaptation and interpretation depends

on the shared class consciousness of the judges and their support base. This shared class consciousness, therefore, is the critical factor in explaining the contours, scope and limits of the use of legal doctrines and hence the degree and nature of judicial activism or restraint in a country.

The case of Pakistan shows that judges historically identified and aligned themselves with the ruling elites and indemnified their actions using the doctrine of 'state' (or 'elite') necessity. From 2005 onward, however, a new tranche of judges from relatively modest backgrounds actively forged an alliance with emerging urban middle classes by taking an aggressive stance on issues such as corruption, abuse of power, nepotism and despotism to challenge the ruling elites. The judges employed a number of legal tools, such as *suo motu* actions and Human Rights Cell, to evolve a doctrine of judicial activism that allowed them to cultivate their support base directly. They borrowed heavily from legal innovations that evolved elsewhere, such as public interest litigation and expansion in the scope and application of human rights laws to areas ranging from legislation to public policy. The use of judicial activism to increase the accountability of ruling elites earned them the support of the rapidly urbanising and expanding middle class, a class that demanded a greater share in power and resources and was growing increasingly frustrated with the state of affairs in Pakistan. This support culminated in the 'Lawyers' Movement' (2007–2009), which brought diverse interest groups together under the slogans of 'rule of law' and 'judicial independence' to reverse the military-led government's 'court-packing' attempts. This thesis discusses the role of social movements in deriving new constitutional meanings and views courts as arenas for wider social contestations. The thesis therefore identifies the changing class origins of judges as a part of wider social processes, with urbanisation, the

expansion of an educated middle class, a demographic 'youth bulge' and a shared class consciousness that has developed as a result of greater information flow due to liberalisation of media and diffusion of information and communications technologies, emerging as the key independent variables that shaped judicial independence.

The next section introduces the case of Pakistan and further elaborates the puzzle that this thesis aims to solve. This is followed by a detailed account of the research methodology employed in this thesis. Finally, the chapter ends with an outline of the rest of the thesis.

## **1.2 The Case of Pakistan**

Pakistan has traditionally been dubbed in the mainstream literature as a country in a perpetual state of crisis (Ahmed, 2002; James, 2009), in a 'descent into chaos' (Rashid, 2009), 'on the brink' of disaster (Rashid, 2013), a failing state (Ranis, 2013) and the most dangerous place on earth (Newsweek, 2007). The Pakistani state is mostly conceptualised as the 'National Security State' (Siddiqa, 2007), a 'Garrison State' (Ahmed, 2013) or a 'Praetorian State' (Gardezi, 1983). All these studies discuss the way a small elite, commonly referred to as 'The Establishment', has directly or indirectly ruled the country since its independence from British rule in 1947. Cohen (2004) defines it as 'an informal political system that [ties] together the senior ranks of the military, the civil service, key members of the judiciary, and other elites', with the last including the feudal aristocracy, industrial elites and the religious right. Membership of this military-dominated oligarchy, according to Cohen (2004), requires adherence to a common set of beliefs. Some of the key components of these shared beliefs are the centrality of the armed forces as the saviour of the nation and the defenders of its 'geographical and ideological' frontiers, the conceptualisation of the country as a bastion for Islam, the framing of neighbouring India

as the 'arch enemy', support for the liberation struggle in Indian-held Kashmir, establishing a friendly government in Afghanistan under the doctrine of 'strategic depth', and protection of country's nuclear capability. The establishment has resisted large-scale social reforms such as land redistribution (Weiss and Gilani, 2001), influenced policy making in all areas and, as a result, built a vast business empire that serves the interests of its key constituents (Siddiq, 2007). Furthermore, it has resulted in direct military rule for over 30 years of Pakistan's post-colonial history and frequent behind-the-scenes interference in politics during the rest. The dominance of the military is rooted in the weak development of Pakistan's nationalist movement in the areas now comprising Pakistan, compared to the stronger development of Indian nationalism in the areas that became independent India (Tudor, 2013). Military recruitment in British India was heavily concentrated in a few districts in north-central Punjab and the North West Frontier Province (now Khyber Pakhtunkhwa) that resulted in a disproportionately strong army (vis-à-vis other institutions) being inherited by independent Pakistan. A lack of programmatic political parties, the early demise of the nation's founder Muhammad Ali Jinnah and the ensuing conflict with India in Kashmir also created an environment where security considerations trumped constitutional development. All these factors combined to give the military a pre-eminence in the country that continues to the present day.

The perpetuation of this regime relies on the establishment's disproportionate control of state resources and the development and sustenance of a narrative that legitimises the military's dominant role in the country's politics. Most scholars agree that Pakistan is bound to lurch from one political crisis to the next, with a military coup always around the corner to plunge the country back into authoritarian rule – as was the case after the returns

to civilian/democratic rule in 1971 and 1989, both of which were followed by another coup after few years. Unsurprisingly, therefore, most of the contemporary works remain security/terrorism-centric and military's unquestionable hold over power dominates such narratives, as is the case with Aqil Shah's (2014) *The Army and Democracy: Military Politics in Pakistan*. T.V. Paul's (2014) *The Warrior State: Pakistan in the Contemporary World* likewise uses a geopolitical framework of analysis to argue that excessive war-making efforts have drained Pakistan's limited economic resources without making the country safer or more stable. *Fighting to the End: The Pakistan Army's Way of War*, Christine Fair's (2014) critique of the military's role in Pakistan, is premised on the regional priorities of an external power, as are Bruce Riedel's (2013) *Avoiding Armageddon*, Hussain Haqqani's (2013) *Magnificent Delusions* and Ahmed Rashid's (2013) *Pakistan on the Brink*.

Despite elements of truth in all the studies mentioned above, the debate on Pakistan has remained in the binary narrative of military versus electoral rule. Most studies above contend that the primary contest in Pakistan continues to be between the largely industrial or feudal political elite and the military, while the rest of the society has been mostly ignored or considered mere pawns, deprived of agency, in the game of high politics. Yet there are some indications of change in the polity and, indeed, the society of Pakistan over the last decade and a half that require careful, systematic and fresh analysis, free from the stereotypes now firmly accepted about the country around the world. These changes make the latest process of democratisation in Pakistan substantially different from those in the early 1970s or 1990s.

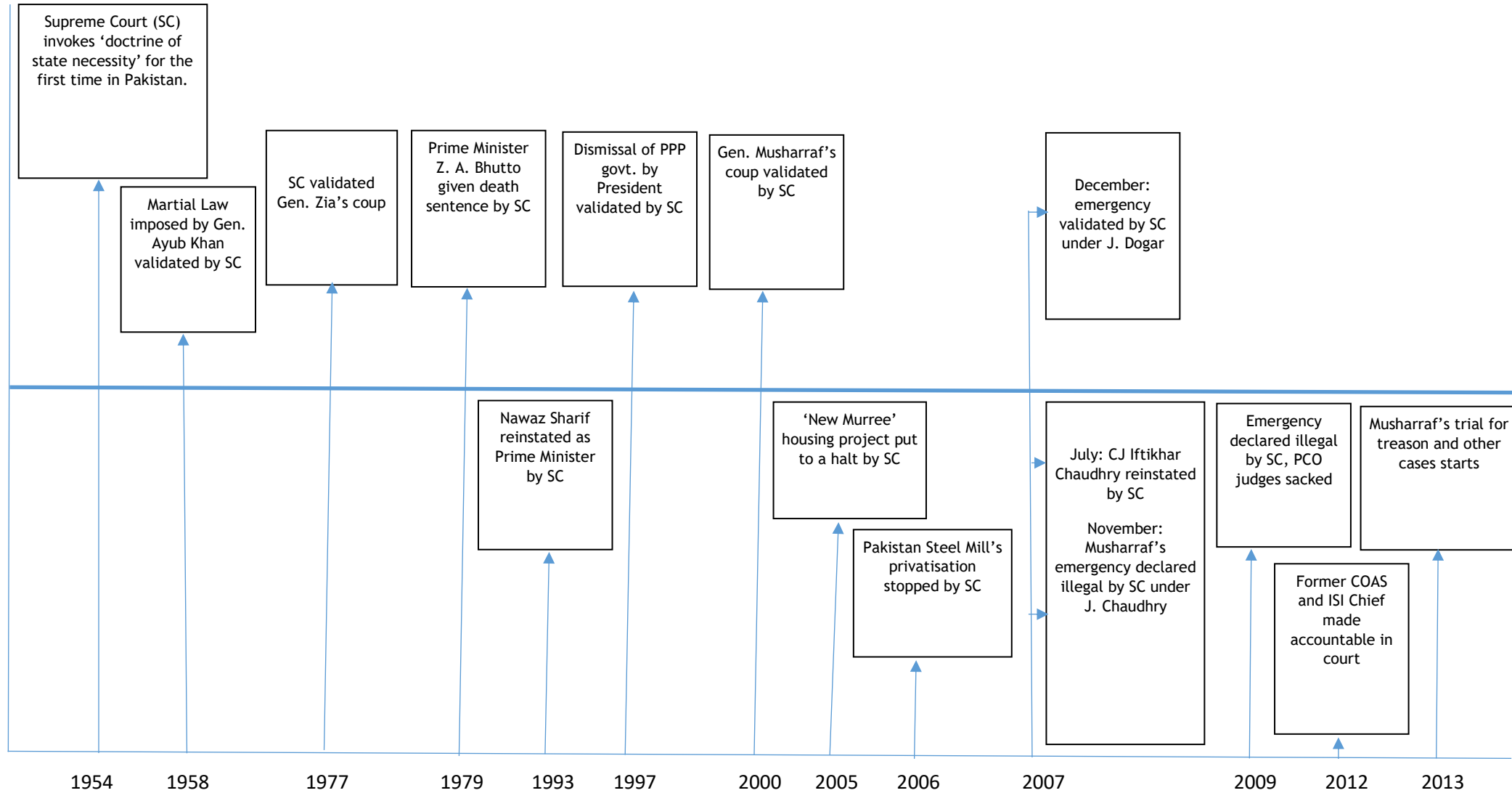
One of the most credible indications of departure from the politics-as-usual of Pakistan was the saga around the dismissal, reinstatement, removal again and second return to

power of the judges deposed by the Musharraf regime between 2007 and 2009. Figure 1.1 shows a timeline of key cases in which the judiciary decided either according to or against the wishes of the military establishment. A clear trend can be noted since 2005, when a number of decisions in key cases of political nature were given against the military regime and military rule in general. This was the first time in the history of the country that the judiciary repudiated a military regime, and it led to a number of unprecedented and improbable events culminating in the demise of the Musharraf regime and the re-establishment of a democratic order. The trial of General Musharraf on charges of treason for abrogating the constitution is currently underway; orders have been issued for the trial of a former Army Chief and a former head of Inter-Services Intelligence on charges of rigging the 1990 elections; judges who took oath under the Provisional Constitutional Order (PCO) promulgated by General Musharraf when he imposed emergency rule in 2007 have been sacked; and the judiciary has established itself as a major power broker.

Figure 1.1: Timeline of key events in Judicial History of Pakistan

Decisions in accordance with Establishment's wishes

Decisions against Establishment's wishes



The media, especially the electronic media, now considered one of the most vocal and critical in the region, played a pivotal role in achieving the restoration of democracy and has since emerged as a powerful player in its own right. Media organisations derive their power from their ability to shape national discourse and cultivate public opinion. Intense rivalry and cut-throat competition, however, has resulted in alignments between various media houses and different power centres in the country, giving these media houses a permanent seat in the power plays that ensue. Since drafting the historic 'charter of democracy' in 2006, politicians have also proved on a number of occasions since the latest return to democratic rule that there is much wider and more meaningful consensus and collaboration among them to keep the democratic project afloat (Rumi, 2016; Ahmad, 2017). This resulted in the completion, for the first time since independence, of a full term by an elected government and the first ever transition from one elected government to another in the history of the country. One of the landmark achievements of the legislature, during this tenure, was to pass the 18<sup>th</sup> constitutional amendment by consensus. This amendment repealed the changes made to the constitution by General Musharraf – including President's power of dismissing an elected government – devolved more powers to the federating units and reformed the appointment procedures for senior judges, among other changes.

Despite these democratic gains, it is not yet possible to give a definite verdict on the long-term future of Pakistan's latest democratisation project. However, the facts mentioned above deserve a systematic study to understand whether or not they represent a substantial and permanent shift in the trajectory of the country's politics. A number of changes in the behaviour of the key institutions – judiciary, media, civil society and the various political parties – already suggest a notable departure from the practices of the past. The narrative

that has traditionally supported and legitimised military rule has been challenged by a rival narrative emphasising the 'rule of law', and a number of technological and socio-economic developments represent a markedly different pattern of resource distribution across various segments of the society, creating new aspirants to political power. It is, therefore, pertinent to examine here whether there are indeed some tectonic shifts in the socio-economic and political realities of the country and, if so, to understand the contours, extent and implications of these.

As mentioned above, some emerging differences represent a departure from past practices in the behaviour of the media, political parties and other actors. The most important transformation, however, has been in the role of the judiciary from a subordinate of the establishment to a challenger. Given the importance of judicial independence for the transition towards, and the sustenance of, a stable democratic order, it is imperative to understand the underlying factors behind the recent resurgence of the judiciary in Pakistan. This thesis identifies key factors that affect the actions of the higher judiciary in Pakistan and attempts to develop a deeper understanding of changing judicial behaviour. In doing so, particular attention has been paid to the degree of legitimacy, and thus influence, enjoyed by the institution in comparison with other players in the country in recent times. A number of contextual factors, such as public opinion, prevailing economic conditions, power equations between and aspirations of various social groups, and the realpoliticking between different political players, has been analysed. Changing institutional dynamics within the country, particularly the enhanced influence of the judiciary, will yield key insights into the latest return to democracy in Pakistan. The judiciary's falling out with the establishment can be interpreted as disintegration within the ruling elite, with various factions struggling for more

power, and also as a brewing revolution in which an emerging elite may completely overthrow the incumbent by transforming current political and economic structures. Instead of taking these extreme positions, this thesis argues that the changes currently shaping politics in Pakistan are evolutionary in nature and denote the emergence of a new middle class that desires increased political power and social recognition and is more demanding of the state.

During the course of this study an encouraging academic debate around this has emerged; led by Zaidi (2014), with most recent contribution by Armytage (2016), this debate calls for a rethink of Pakistan's political economy and the resistance to the ruling elite by what Akhtar (2008) terms the 'intermediate classes'. Other noted analysts and authors have also pointed to the changing power dynamics in the country. Prominent analyst Moeed Yusuf (2012), for instance, argues that Pakistan's traditional power balance consisted of a 'veto-wielding' military and a divided and submissive judicial and political elite. However, over the last ten years or so, a number of 'profound changes have... thrown the field open for recalibration of the power balance' (Yusuf, 2012; n.p) When the Sharif government decided to indict General Musharraf on charges of high treason, Asim Sajjad Akhtar argued, 'We need to focus less on Musharraf's person and think deeply about the evolving structure of power in Pakistan that has thrown up an event as momentous as Musharraf's indictment' (Akhtar, 2014; n.p). Senior academic Akbar Zaidi opined:

The military's hegemony has been questioned, and at times even challenged, since 2007, by institutions which have not until now, been able to do so. The judiciary, parliament and to some degree the media, have tried to assert their independence and sovereignty over the public and political domain, in effect pushing the military aside, and making elbow room at the table for themselves (Zaidi, 2014a; n.p).

While the transition underway is 'partial, tentative and reversible, one is beginning to see the

power of the military in Pakistan... diminish as a different transition allows for alternate contenders of power. Like all transitions, this one will also be disruptive, contentious and long-winded, yet the direction may have been established' (Zaidi, 2014b; n.p).

Noted analyst Cyril Almeida writes:

[N]ew players have arrived on the scene and the motivations and strategy of the oldest player, the army, are in flux... Welcome to the new Pakistan, where power centres are diffused, outcomes less certain and no grand conspirator to make it all come together, or fall apart, at the appropriate time (Almeida, 2012).

There are some who present the current political dispensation as a 'civil-military hybrid' and do not share the optimism expressed by the authors mentioned above. Rizvi (2015; n.p), for example, argues that:

[T]he military has expanded its domain of action because of the inability of the civilian leadership to command the management of internal security, especially when it comes to the eradication of terrorism and dealing with external security threats. Nawaz Sharif has therefore found it convenient to give space to the military in policymaking and policy enforcement in security, foreign affairs and internal security and administration.

According to Haider (2015; n.p):

With the socio-political evolution on the civilian side, the military has adapted and evolved its strategy. It makes no sense to get into the driver's seat when it can safeguard its core interests without doing so. It has gotten out of the rough patch in which Musharraf had landed it and is now once again center-stage. And its greatest advantage is that if things go wrong, it can get to blame the civilians.

A middle ground between these positions also exists, one which acknowledges the changes in institutional dynamics but refuses to underestimate the power that the military still wields to achieve its objectives. As described by Wolf:

[B]oth sides, military and PM Sharif, are aware that options to stage a coup against an elected government have been significantly reduced. Therefore, for now, the military may still retain the capability to destabilise the government, but it cannot dethrone it. This does not however mean that civilian supremacy has been achieved. Far from it, it means that the civil–military power equation remains in a flux, and the relations between both can be expected to remain tense, with both civilians and the military trying to outmaneuver each other. (Wolf, 2014)

Coming from prominent scholars on Pakistani politics, these accounts are important. However, most of these have been expressed in opinion pieces in leading newspapers and magazines, and a detailed, in-depth and systematic study to investigate these assertions is required. This thesis attempts to bridge this gap in the literature by providing a rigorous academic analysis to develop deeper understanding of contemporary realities in the country through the case of the higher judiciary.

### **1.3 Research Methodology**

The study follows a critical realist approach (Cecez-Kecmanovic, 2001) and takes a middle ground between purely positivist and purely interpretivist research. Combining realist ontology with a constructivist epistemology, it believes in an objective and mind-independent reality; however, the role of perception and cognition in shaping the social reality is also acknowledged (ibid.). The study will follow retroductive logic of reasoning that treats the theoretical perspectives used for analysis as a ‘conceptualisation’ rather than an ‘ordering framework’ (Danermark, 2002). The aim is not to test the model (deduction) or to build a formal theory (induction), but rather to use theoretical tools for systematically analysing the phenomenon. For this purpose, the thesis uses a longitudinal case study method and mainly relies on qualitative methods of gathering data (Yin, 1994; Voss et al, 2002) along with the use of some secondary quantitative data.

### **1.3.1 Research Method**

This study employs a longitudinal case study method to understand the phenomenon. A case study approach helps to provide a rich and multidimensional picture of the situation being analysed. Using the case of the judiciary in Pakistan, the changes in its practices over time and the relationship of those changes to changes in the wider socio-economic environment, the thesis aims to develop a better understanding of changing political dynamics in Pakistan, especially with regard to the drivers of judicial independence and institutional change.

### **1.3.2 Rationale for Case Selection**

The thesis studies judicial behaviour in Pakistan as a particular case in point in time. There is very little literature on the judiciary in Pakistan. In most studies on politics in the country it attracts only passing references to its validation of unconstitutional actions or to high profile cases (such as that of Mr. Zulfiqar Ali Bhutto), wherein it is criticised for rubber-stamping the wishes of the executive. Despite some personal accounts of former judges, lawyers and other officials associated with the institution, there are hardly any studies that systematically analyse the decision-making process, the legal, political and social constraints and the opportunities for judges to form their opinion. It is not surprising, therefore, that the surge in the support for the judiciary epitomised by the Lawyers' Movement, and the subsequent turnaround in judicial practices, has shocked even serious analysts. This remarkable change in judicial behaviour, therefore, warrants detailed study. The resurgence of the judiciary also coincides with a number of key social transformations in Pakistan and provides a fascinating opportunity to explore their link with institutional changes.

Along with its academic importance, this thesis is relevant to a number of internal and external stakeholders. Internal stakeholders include the political parties, who now must take these changes into account while devising their strategies and updating their manifestos and slogans. There are implications also for the military, media, judiciary, bureaucracy, NGOs, landed aristocracy, working classes and other ethnic and sectarian groups. Various international actors – such as the governments and intelligentsia in the United States, India, the United Kingdom and Afghanistan, international donor organisations and other concerned international bodies – must also face and deal with the changing socio-political realities in Pakistan and will thus be interested in the research. The comparisons with similar cases, particularly those with countries in Latin America, will yield critical insights on judicial politics, in particular the relationship between the executive and judicial branches of government and the correlation between judicial independence and democratisation. The theoretical concepts developed and the research methodology used in this thesis will also provide a model to analyze similar social transformation in other countries – for example, the recent uprisings in the Arab world – and comparative analyses should be made with these cases as a direction for future research. The case of Pakistan, therefore, provides an opportunity to explore the phenomenon in a ‘developing country’ context and adds to the emerging scholarship on similar processes in Latin America (e.g. Angell, 2010; Landau, 2015; Ocantos, 2016). It therefore allows comparative analysis and sharing of insights with experiences in those countries as well as others in the region, such as India. Several logistical reasons – such as the familiarity of the author with social, economic and political context in Pakistan, access to data and contacts with key stakeholders – also played a role in the selection of the case of Pakistan for this thesis.

Detailed study of a single case has advantages over traditional studies based on a large N approach (e.g. Helmke, 2005). A single case allows researchers to gather rich contextual data and understand multiple facets of the phenomenon. This is extremely important in correctly interpreting the decision-making logic. Additionally, since judicial independence critically depends on the sensitivity of the cases being selected, single-case study ensures that only relevant cases are selected to bring out political issues with comparable stakes. This isolates such cases from most other cases, in which decisions are made on the basis of legal logic and which, when considered along with those of highly political nature, can skew the results in the former's favour.

Even within the study of judiciary in Pakistan as a single case, it is important to identify relevant decisions/judgements that represent instances of an important political nature. Consideration has been given to this aspect, in identifying cases that shaped the trajectory of judicial-executive relations, particularly those dealing with unconstitutional acts by various military strongmen. Chapter 3 analyses a number of cases in which the judiciary either acceded to or defied the demands of a military- or civilian-dominated executive, allowing us to examine the persistence and change in judicial behaviour.

### **1.3.3 Data**

This thesis relies on both secondary and primary data to understand change in judicial behaviour. Judgements in politically contentious cases (such as those involving the establishment) are used to identify trends in the judiciary's attitude to powerful political players, and any changes are noted (as shown in Figure 1.1). Data was then analysed to identify key factors/reasons contributing to these trends. All primary data used is qualitative in nature, as the research questions posed in this thesis require deeper understanding of the

contextual details. Quantitative data from secondary sources is also used to triangulate and further investigate some findings – in particular, to help in defining and analysing key demographic trends such as urbanisation, the size of the middle class, the ‘youth bulge’, literacy levels and the diffusion of various technologies.

*Data gathering and management techniques:* The thesis uses face-to-face, in-depth, semi-structured interviews using a guiding set of questions in semi-natural environment as its main technique to gather primary data. This was complemented by focus group discussions (FGDs) organised in major urban centres in Pakistan to gauge the views of urban, middle-class youth – identified as an emerging class that shaped judicial independence through mobilisation during the Lawyers’ Movement. Convenience sampling and snow-ball sampling (Easterby-Smith et al., 2002) was used to select the interviewees and focus group participants. The findings were transcribed and translated into English. A comprehensive database was maintained to record and keep track of all relevant data. The author took notes during the interviews and FGDs to record emerging issues and also tape-recorded these where permitted by the participants.

*Data Sources:* A total of 75 interviews were conducted for this research. The interviewees include former and current highranking officials in the judiciary, bureaucracy, military, political parties and professional organisations, including Bar councils and journalist unions. Others include prominent members of the civil society, commentators/analysts (e.g. journalists and academics) and other stakeholders. Table 1.1 provides the breakdown of interviewees in various categories. A corresponding complete list of interviewees has been provided in Appendix-I.

Table 1.1: Breakdown of interviewees by category

No	Category	Number	Description
1	Judges	14	Current and former High Court and Supreme Court Judges.
2	Lawyers	12	Key Leaders of Lawyers' Movement, former and current presidents of SCBA and PBC, Legal representatives of Musharraf Regime.
3	Journalists	12	Prominent journalists who were eye witnesses and commentators of developments during Lawyers' Movement and generally in Pakistan.
4	Academics	12	Notable commentators, analysts and academics who have extensively written on various aspects of research topic.
5	Politicians	13	Politician belonging to all the key political parties in Pakistan who either favoured or opposed judicial activism/Lawyers' Movement.
6	Activists	5	Political activists who campaigned for judicial independence.
7	Bureaucrats	4	Key current and former bureaucrats responsible for district administration and maintenance of law and order.
8	Military Officers	3	High ranking current and former military officers with knowledge of military's perspective on research topic.

The participants of FGDs included both male and female members of society residing in major urban cities including Lahore, Multan, Karachi, Islamabad/Rawalpindi and Peshawar. They were in the age range 20–35 years and university educated at a minimum. They included working professionals and students as well as self-employed and unemployed persons. Ten FGDs were conducted in 2016, two each (one with male and one with female participants) in each of the cities mentioned above. Each group consisted of 7–10 participants with a total of 86 participants including 51 males and 35 females. Sources for secondary data include books,

journal articles, newspaper reports and articles, archival records, organisational reports and televised talk shows. Statistics from the State Bank of Pakistan and other relevant ministries, as well as from non-governmental organisations and international bodies (such as the World Bank), are also used. The author has access to most of the data sources mentioned above due to personal connections.

*Data Analysis:* The data was analysed using hermeneutic iterations. A hermeneutic approach is used to interpret and understand the narratives, and the phenomena they describe, from the interview data collected. It must, however, be remembered that narrative is a perception based on the interviewee's life experiences and includes chosen parts of his/her life. The researcher's experiences and knowledge can also influence the meanings drawn from the data; it is, therefore, important for the researcher to know his/her position and distance him/herself from his/her pre-understandings in order to perceive new meanings (Wiklund et al, 2002). Hermeneutics requires the researcher to have deep understanding of the interviewee's culture and the shared set of symbols and rules in order to fully understand the meanings of the narratives (ibid). This study involves the author's own country and, thus, a deep understanding of its cultural context exists. It was therefore possible to conduct interviews in local language where necessary to encourage free flow of thoughts and ideas. In many hermeneutic iterations, important events in the time periods concerned were recorded and categorised. The data was searched for cross-case patterns and similarities and differences were recorded for the purposes of comparative analysis (Bonoma, 1985).

*Ethical Considerations:* Ethical approval was duly obtained from the relevant University authorities to conduct fieldwork for this thesis. American Political Science Association's guidelines were adhered to during data gathering phase. Written consent was obtained from

the participants of the FGDs as well as the interviewees. All participants were briefed about the aims and objectives of the research as well as the key questions it attempts to answer. No sensitive data was collected during the research that may have infringed on participant's privacy. The research did not involve any physical hazard or dangerous environment that could hurt participants. Some ethical issues however were identified below along with their solutions:

**Misrepresentation:** Transcripts of the interviews were shared with the interviewees to ensure accuracy of data and avoid misrepresentation.

**Researcher Bias:** Focus was on gathering data as objectively as possible leaving aside researcher's own opinion about it.

**Negotiations with Interviewee:** All negotiations were done with care ensuring that academic freedom is maintained while keeping within the laws of libel and as far as possible, meeting interviewees' legitimate concerns.

**Data Storage:** Data gathered during research was kept securely in paper and/or electronic format along with a back-up copy and will be destroyed after 3 years of the successful completion of research.

**Anonymity:** Anonymity was offered to Interviews and some of them preferred to remain anonymous.

**Data Ownership:** It was made clear that the data will belong to the researcher and his institution, however it will be shared with the interviewees to confirm accuracy and a chance to modify.

Data on Flash Drive/CD: It was clarified that data will only be used for research purposes and will not be shared with anyone else without explicit consent of the participant. It will be kept locked in a filing cabinet. It will be labelled as confidential along with the name and contact details of the researcher and will be destroyed after 3 years of the successful completion of research.

Interviews at Interviewees home/work place: Although no particular risk was expected, researcher informed a friend about the schedule of interviews and details such as name and contact number of interviewee as well as day/time and venue of the interview.

#### **1.3.4 Research quality and Limitations**

The thesis uses Guba and Lincoln's (1994) criteria to judge the quality of qualitative research in the social sciences. This includes paying attention to the 'trustworthiness' and 'authenticity' of the research. To enhance the credibility of research, all sources of information were carefully filtered and selected to include only authenticated documents and participants who either have held official positions or are well-known as experts in the relevant field. Triangulation was achieved by consulting more than one source where the credibility of any information was questionable. The study also includes a detailed account of the contextual environment to help compare the findings with other cases. To enhance authenticity, attention was paid to fairness to the viewpoints of all participants and presenting the conflicting viewpoints in an unbiased way. The author's own ontological and epistemological position and personal views are clearly identified as such where presented. Direct quotations from interviews are included as much as possible to put reader in the same position as the author in interpreting meaning and checking his/her understanding with that of the author.

Still, due to the inherent limitations of single-case study research, the extent to which the results obtained can be generalised, and what inferences can be made, is debatable. Such research is also considered to be low on construct validity due to the general lack of a sufficient operational set of measures and to the subjective judgement of the researcher. To overcome these challenges, this study compares and contrasts the findings with those of other cases and aims to achieve 'analytical' rather than 'statistical' generalisation. Lastly, the constraints of time and budget also limit the scale and scope of the research, and this has been kept in accordance with the expectations at the DPhil level.

#### **1.4 Thesis Plan**

The thesis is organised into seven chapters. Chapter 1 introduces the topic, specifies the research question, justifies the selection of case and provides a detailed overview of research methodology. The rest of the chapters are outlined below:

**Chapter 2 – Theoretical Perspectives on Judicial Independence:** Chapter 2 defines the dependent variable (i.e. judicial independence) and discusses in detail the literature on judicial behaviour and assertiveness, including *de jure* and *de facto* measures of judicial independence. It critiques key frameworks, such as the legal, attitudinal and strategic models used to explain judicial decision making, and their variants. The chapter then highlights literature on social movements and theorises the role these play in evolving new constitutional meanings. It further explores the link between the institutional and social change and uses resource-based theory and framing theory to understanding the interplay between the two. In so doing, the chapter locates the change in judicial independence within the support for the judiciary among key segments of the society and explores its role in the

wider class struggle. It presents the judiciary as a key arena of social contestation and establishes the link between the class origins of the judiciary and its support base in the wider society.

**Chapter 3 – Judicial Change of Course in Pakistan:** Chapter 3 analyses the historical role of the judiciary in Pakistan, particularly its subservience to the executive, and contrasts this with its resurgence in recent years. The chapter shows the change in the trajectory of decisions in accordance with or against the wishes of the establishment. It divides the history of judiciary into pre- and post-Lawyers’ Movement eras and uses the concepts of *de jure* and *de facto* judicial independence to show that there has been drastic change in the autonomy and influence enjoyed by the judges in the later period. Since the reinstatement of the justices deposed by the Musharraf regime, the higher judiciary in Pakistan has sought to cement its newfound independence by securing considerable say in the appointment, promotion and transfer of judges. Salaries, post-retirement benefits, and the state of judicial infrastructure and other facilities were also largely enhanced. Along with these *de jure* measures, decisions on cases of political significance, including those against powerful intelligence agencies and former military director Pervez Musharraf, show markedly greater *de facto* independence. This was epitomised by the sacking of elected Prime Minister Yusuf Raza Gillani through an order convicting him of contempt of court. The government immediately accepted and conformed to the order, demonstrating the increased influence enjoyed by the courts.

**Chapter 4 – Effects of Social Transformations:** Chapter 4 explores underlying structural changes in Pakistan that are shaping social relations in the country and the impact of those changes on the judiciary. These structural changes include urbanisation, the emergence of a sizable middle class, improved education and a demographic youth bulge. The chapter

analyses how these seismic social changes are contributing to unprecedented instances of urban mobilisation, such as the Lawyers' Movement. The chapter also details the emergence of an urban, educated middle class and explains how it is increasingly shaping the discursive space and electoral landscape in Pakistan. It argues that emergence of electronic media, especially the penetration of mobile phone and internet networks, has provided the major beneficiary of the such media, the middle class, the tools to amplify its voice and articulate its concerns, grievances and demands. This has put the traditional political system, still reliant on patronage networks based on caste, tribe and other kinship ties, under stress. New means of production, especially the rise of the services sector, have given rise to new forms of identity and new mechanisms for collective bargaining. This has essentially changed the nature of bargaining between the state and society in general and is increasingly threatening to change the structure of the state itself. Changing judicial behavior is therefore a manifestation of these deeper social transformations and their impact on state institutions. The chapter calls for more research on the symbiotic relationship between the institutional change and those in the class structure of society.

**Chapter 5 – Genesis of Judicial Activism (2005–2007):** Chapter 5 focuses on the alliance between the superior judiciary and the emerging urban middle class that denotes recent judicial empowerment. It explains how courts cultivated support among key sections of society with that support eventually proving critical in protecting the judiciary from the curbs and court-packing plans of the executive. From 2005, the judiciary increasingly took up issues that resonated with the simmering sentiment in the urbanised middle class. These included key issues of accountability, transparency and abuse of power by ruling elite. In doing so, the judiciary was able to build strong alliance with the urban middle class including civil society,

intelligentsia and opposition political parties. The court effectively used judicial tools such as *suo motu* powers, as well as the Human Rights Cell, to build and serve a large constituency. Key factors that shaped the judiciary's world view on these issues included a change in its own class base. While for most of the country's history the judiciary, like the bureaucracy and military, was dominated by an elite with feudal or industrial backgrounds, first decade of 21<sup>st</sup> century saw the emergence of a number of senior judges who took pride in their humble family backgrounds. Furthermore, they were also affected by the general ideational consensus among the judicial fraternity around the globe, a consensus which saw judges increasingly asserting themselves and expanding the interpretation of constitutional protections such as human rights to include socio-economic security. This was evident from the emerging discourse on these issues in Pakistan's newly liberalised private electronic media, which was itself dominated by and catered to the emerging urban middle class. Therefore, the changing class structure of the judiciary, trends in global jurisprudence and the aspirations and frustrations of the urban middle class represented by the media, together created an environment wherein judges felt obliged and empowered to play a more active role in raising uncomfortable questions for the ruling elite.

**Chapter 6 – Putting It All Together: Lawyers' Movement (2007–2009):** Chapter 6 analyses the central role played by the Lawyers' Movement in empowering the judges, where all the factors discussed in previous chapters came together to create new constitutional meanings. It identifies key instances where judges might have acceded to the expectations and demands of the establishment had they not been supported by the masses. The chapter also analyses the objectives, structure, composition and strategies employed by the movement using resource mobilisation as well as framing models and shows how these can be operationalised

to understand social movements. The use of social and electronic media to organise, propagate and solicit broader support as well as mobilising resources required to launch and sustain such a movement are discussed. The chapter analyses the class composition of the movement and highlights the dominant role played by urban, educated middle-class youth. It explains how and why an unlikely alliance of diverse civil society groups, political parties and professional associations emerged to pursue common goals. The role of the Lawyers' Movement in politicising a new generation of Pakistanis is also discussed, along with its implications for politics in the country.

**Chapter 7 – Discussion and Conclusion:** Chapter 7 summarises the key findings of the thesis. It discusses their implications for research on judicial politics in general and in the case of Pakistan specifically. The data collected for this thesis show that judicial independence critically depends on the legitimacy and support judges enjoy among the masses. It shows that the judiciary is a key arena for political contestation and that various political players seek its support to further their interests. At the same time, the judiciary itself can actively cultivate support and build alliances to cement, and at times expand, its sphere of influence. Such politicking must not be seen in isolation at the institutional level, but be understood as part of a wider social contestation. Institutional change in this sense becomes a key symptom of a shift in class structure in a society. The thesis shows how resources mobilisation and framing theories can be used to gauge these tectonic shifts and their link with social behavior and practices. Furthermore, changing class dynamics affect the institution from within by shaping its class coalition and dominant class base. This means deriving new institutional world views and differing culture and practices. Events around the world, particularly the global discourse on the key issues with which an institution has to deal, also shape its outlook

towards these issues – a case in point being a global resurgence in the judicial role and a general consensus in favour of constitutionalism and the rule of law and against military/dictatorial rule.

The thesis concludes that, in the case of Pakistan, mobilisation among the masses culminating in the Lawyers' Movement became the proximate factor for enhanced judicial independence, whereby judges also actively sought to cultivate support. The antecedent factors for this outpouring of support for the judiciary among the masses were the emergence of an urban middle class, improvement in education, the coming of a new generation and the alignment of their interests, including the rule of law, accountable and transparent governance and a greater say in running the affairs of state. The chapter ends by pointing to the need for further research on the changing role of the judiciary using socio-political frameworks, and explains how such frameworks are better able to explain the phenomenon than approaches such as the strategic model and others.

## **CHAPTER 2: THEORETICAL PERSPECTIVES ON JUDICIAL INDEPENDENCE**

### **2.1 Introduction**

This chapter aims to define key terms and review existing literature on judicial independence. The aim here is to review key perspectives on the topic and identify areas that have been generally neglected in mainstream literature. Insights from the wider social sciences, in particular sociology, have been used to inform a debate that has long been dominated by legal and political experts. The chapter, therefore, defines judicial independence as a dependent variable in the context of transitional countries and identifies independent variables that have major impact on the former. It concludes by presenting the key arguments made in this thesis and explaining the causal link between the dependent and independent variables.

There is a long history of the study of the nature, structure and function of law in society. Its importance has been acknowledged as the determinant of the rights and obligations of the citizens in a state. These include key issues of equity and justice, property ownership, freedom of expression and other intellectual, political, economic and judicial rights and obligations. It is the law that establishes the link between the nation and the state within certain geographic confines. It provides the framework through which people organise their affairs in a nation state (Okoro, 2010). Submission of the state authority to a set of laws is seen as critical to its legitimacy. This is true not only of representative regimes; but as Ibidapo-Obe (1992) notes, even 'usurpers to power must resort to some form of law to gain legitimacy and control' (p.1). Thus, the legitimacy and consent required by the state to function requires that its use of

force and violence be (at least seen as) legitimate and within the confines of law. A mechanism is therefore required for the use of force by state to be (or be seen to be) judicious, legitimate and independent of the executing authority. The judiciary provides such mechanism, as a key pillar of the state trusted with responsibilities such as dispensing criminal justice, dispute resolution and interpreting laws and regulations. As the overseer and regulator of law, the function of the judiciary is key to ensuring that the law of the land and its application is perceived as just and impartial by the public. Such a perception helps make governance of the land acceptable and allows the state to maintain a monopoly on violence (Hay, 1898).

Some degree of trust by individuals and community in the ability of judiciary to rule without fear or bias is, therefore, important for a functional state. Also, due to the judiciary's ability to alter rules of political and economic competition, and limit or expand the rights and obligations of various sections of the society, the stakes are always high when a case of significant interest is contested in the court. This makes it a key arena for social contestation and makes judges vulnerable to pressure, as well as other incentives and threats designed to influence their judgement. Understanding judicial independence is, therefore, important not only because of its legal and moral reasoning but also because it represents and affects the structure of the state and its relationship with society. The following section defines judicial independence for the purpose of this thesis, while the following sections review various theoretical perspectives. Finally, we shall come back to the debate on the role of judiciary at the intersection of state, society and power and what changes in judicial behaviour mean for these.

## 2.2 Defining Judicial Independence

Independence is generally defined as being ‘not subject to control by others’ (Merriam Webster, 2013); defining *judicial* independence, however, is not so simple. The concept has drawn much scholarly attention and remains highly debated. It has been conceptualised in a variety of ways, e.g. as a descriptive, normative, absolute or relative term, as an end in itself or as a means to an end, as a matter of social norms or of hard law, and in its own right or in relation to other branches of government and interest groups. Some (e.g. Kornhauser, 2002) argue that such wide use of the term renders it useless and it ends up meaning either everything or nothing at all. Yet from the judgements and remarks of a number of jurists to research papers, and from speeches by world leaders to campaigns by civil society, judicial independence remains a widely-used term. However, use of the term in simplistic, glorified and unqualified manner fails to pass academic thresholds of scrutiny and can be both descriptively inaccurate and normatively indefensible. Its use in absolute sense, for example, has been criticised as implying the ‘unaccountability’ of judicial officialdom, and as a result some (e.g. USAID, 2002) prefer to refer to a ‘fair’ or ‘impartial’ judiciary rather than an ‘independent’ one. Others (e.g. Peretti, 2002) point to the fact that judges cannot literally be independent, because being truly independent implies being free from the constraints of socio-economic constraints as well as from political pressures, or fears of reprisal for their judgements. Hence, some scholars prefer the term ‘judicial power’ or ‘judicial empowerment’ instead of judicial independence.

There is, however, another debate in the literature that questions if it is at all desirable to have a truly independent judiciary, as no part of the government should be independent of the people (Volkanssek and La Fon, 1987). This refers more to the extent of judicial

independence/power and its implications, and has forced some scholars to endorse the idea of independence only in a qualified manner, whereby it is defended with reference to its ends and its sources (Geyh, 2014). Judicial independence in this view, for example, is deemed desirable as long as judges are accountable for using it to achieve certain ends, such as promoting the 'rule of law', providing 'due process', delivering 'justice' and helping create a system of checks and balances by ensuring the 'separation of powers'. The judges must be insulated from external pressures to help them uphold the law impartially and in its letter and spirit. Here, the law itself is seen as a limiting factor that constrains judicial overreach, especially for lower courts (Cross, 2007). The ability of judges to take a non-populist stance is also considered important to ensuring that the majoritarian politics do not infringe upon the rights of individuals or minority groups. Nevertheless, the possibility of using independence to serve interests in addition to (or in lieu of) the abovementioned desirable ends remains, and the independence–accountability balance is ultimately essential to justify the ends that this qualified conceptualisation of judicial independence is expected to achieve (Geyh, 2014).

This thesis, while partially agreeing with the perspectives described above, defines judicial independence as the courts' ability to challenge, and likelihood of challenging, the other branches of government (including the military and other powerful political players). Such a context-specific definition is useful because, given the judiciary's traditional irrelevance and historical rubber-stamping of the executive's demands in Pakistan, any trend epitomising resistance and defiance is credible and important evidence for changing levels of independence. The thesis therefore attempts to explain why courts are now relevant actors in the political process in Pakistan and why it is that they can autonomously influence the outcome of public policies or even the regime type. The courts' emergence as a key arbiter

on such key questions in Pakistan is significant and this makes judicial independence, in this sense of the term, an important tool for empirical analysis.

It is also important to note that an alternative way to view the 'independence' of the judiciary is to understand the nature of its dependence on various structural sources. These include mechanisms that may insulate judges from any undue influence by other actors within or outside the government. Examples of these mechanisms include constitutional protection to judges' tenures, budgetary autonomy and salary and retirement benefits, as well as procedures for appointment, transfer and promotion. These are sometimes called *de jure* measures that can be used as indicators to assess the degree of judicial independence in a country. Mostly, however, these are not enough. Simply having laws and regulations favourable to judges does not mean they will be enforced at critical times and cannot be abrogated or changed by powerful actors. Also, even if judges are able to render decisions independently, their lack of executive authority means implementation of those decisions remains uncertain (Feld and Voigt, 2003). For these reasons, a number of scholars focus on *de facto* sources/measures of judicial independence. These include 'autonomy' (i.e. judges' ability to give judgement in accordance with their free will) and 'influence' (i.e. judges' ability to get judgements implemented and to counter potential threats/changes to their autonomy) (Rosenberg, 1991). Although both concepts are related, there are notable differences; while an influential judge is likely to be autonomous, an autonomous judge may or may not be able to enforce his or her verdict.

Measuring judicial independence, therefore, is even trickier than attempting to define it. The concept cannot be directly observed; only inferences can be made, based on various measures and in a relative sense. The *de jure* sources may appear to be procedural,

observable and easier to measure, but they are not in themselves the sources of judicial independence. Rather, scholars have to measure the incentives that these sources afford judges to behave independently (La Porta et al., 2004). Whether same rules will, in different contexts, provide the same incentives for independent judicial behaviour is debatable and depends on the particular political context. A debate, therefore, continues over the relationship between particular rules and behavior, and to truly understand the value of codified laws one needs to dig deeper, to see what unwritten rules, norms and systems of incentives, as well as repercussions, exist in a society. In the case of *de facto* measures such as autonomy and influence, as well, a number of factors must be considered when making a judgement (Rios-Figueroa and Staton, 2012). Firstly, using *de facto* measures essentially means drawing inferences from behavioural observations. Actions such as remarks and judgements by the judges, and the reaction of various stakeholders to these actions, are critical to ascertaining the degree of autonomy and influence that a judiciary enjoys. Even this can be misleading; if, for example, a judge seemingly producing autonomous judgements, and even getting these implemented (thus scoring high on *de facto* measures), shies away from taking up cases that involve powerful interest groups that (s)he wants to avoid ruling against (Simmons, 2009). Thus, the selection of cases taken up by the judiciary, and its willingness to see them through, is also an indicator of its independence. It is, therefore, important to understand the judicial decision-making process and the various factors that impact the judicial behaviour. The following section attempts to explore various theoretical perspectives on this topic.

## 2.3 Theoretical Perspectives on Judicial Independence

The considerations judges must take into account when making decisions has generated considerable interest among researchers for more than a century. Over this time, a number of competing explanations have emerged from diverse fields of scholarship. Rooted in legal studies, one of the earliest dispositions, known as the 'legal model' (Gillman, 2001), claims that the decisions are derived from the facts of the case and based on the applicable law(s). Scholars of this school focused heavily on the plain meaning of the law, on the intentions with which it was made and on legal precedents to explain how decisions were reached. This approach was, however, criticised for providing an explanation for every possible result and decision, as both sides in a dispute bring evidence from precedents and their own interpretation of the law and the rationale behind its enforcement. This renders the legal model both unfalsifiable and of no value in seeking to predict court verdicts. The critics claim that the court's preferred meaning of law, lawmakers' intent and precedent are intended only to provide legitimacy to judges' decisions and to camouflage the real reasons behind those decisions (Shamir, 1990; Segal and Spaeth, 2002; Murphy et al., 2006).

In response to the 'legal model', a number of scholars developed the 'attitudinal approach', which argues that the ideological preferences and values espoused by individual judges determine the decisions they make and play a central role in shaping their preferences for certain interpretations of law and acceptance of certain precedents (Segal and Spaeth, 2002). This approach points to various institutional devices that insulate judges from outside influence and allow them to adhere to their 'sincere' ideological preferences. Many studies provide evidence that a combination of 'case-facts' and judges' attitudes play a key role in judicial decisions. A study by Segal and Cover (1989), for example, finds an 80 per cent

correlation between their measures of judicial attitudes and voting tendencies in civil liberties cases. In 1995, both authors extended their study to include economic cases with similar results. They conclude that judges' attitudes and preferences are good predictors of judicial decisions in at least two areas that form the bulk of cases decided by the Supreme Court in the United States.

The attitudinal model has been most successfully applied to the US Supreme Court. A number of features, such as lifetime tenure, appointive selection, lack of oversight and high discretion in setting the court's agenda are some of the elements that make it easier for judges in US to pursue policy goals on the basis of their beliefs. Comparative studies in other contexts lend further credence to this model. Smyth (2005) and Wood (2001), for example, in their studies of dissent rates among Australian High Court justices, found that there was a significant relationship between the judge's ideology and his or her dissenting votes. Both these studies stop short of declaring ideology as the only factor that provides a systematic explanation of votes, arguing that it is a significant and important predictor of, among other things, dissent rate (Weinshall-Margel, 2011) but leaving room for other factors. The role of these 'other' considerations makes the attitudinal model useful but inadequate. It was also criticised for its inability to explain judicial decision making in cases where judges voted against their ideological preferences.

The quest for factors other than judges' personal beliefs and values led to the development of the strategic model, which has long since become the mainstream approach to understanding judicial behaviour. The strategic model seeks to analyse the competing interests of key political players and argues that judicial decisions are based on strategic calculations by the judges with regards to the reaction the decisions may elicit from other

players and the decisions' chance of acceptance and implementability (Spiller and Gely, 2007). This approach was pioneered by the likes of Pritchett (1942) and Dahl (1957), who argued that 'the essential nature of the task of a Supreme Court justice.... [is]... not unlike that of a Congressman' (Pritchett, 1942; p. 491). Much like a congressman, judges formulate opinion to decide important public policy issues and use their vote. Thus, much like other political players, judges also, according to Pritchett, act to advance their own particular interests and recognise the interdependence of their actions on others. The underlying premise here is that of 'rational' decision making and 'strategic behaviour'. Marks (1998) further extended these notions by analysing the constraints faced by the courts due to the separation of powers between different state institutions. He concludes that judges seek to maximise their utility within the constraints posed by the perceived preferences of other political actors. A number of scholars have since focused on the politicking between the judiciary and the Congress (legislator) as well as the office of President (executive) in the US context to further develop the model.

Spiller and Tiller (1997) explain the mechanism through which Congress may influence judicial outcomes. It has the power, for example, to change the standard of review that must be applied by the courts when reviewing an (executive) agency's action. It can decide on expansion of judgeships (De Figueiredo and Tiller, 2000) and can use budget appropriations as a tool to show its preferences, in the same way it does with other executive agencies. There seems to be general consensus among the proponents of the strategic approach that, in a strong and unified polity such as a two-party parliamentary system (and certainly by extension in an all-powerful authoritarian regime), judges will refrain from exhibiting judicial independence due to the high chance of retaliation by other players and of ensuing political

conflict, which mean judges will have little to gain. It is only when it is difficult for the polity to overturn the judiciary's verdict that a doctrine of judicial independence may evolve (Spiller and Gely, 2007).

These assertions clearly show that judicial independence cannot be seen as a monolithic concept or as operating in isolation from the wider institutional and contextual dynamics. In particular, it must be situated in the political context of a country and the relative strengths, weaknesses and influence of other stakeholders. There is much debate in the literature over, for example, the role of the judiciary under different types of regimes (Gibler and Randazzo, 2011). Within institutional dynamics, judicial independence is believed to exist when the judiciary, perceived as a neutral third party, acts to resolve conflict (Shapiro, 1981). The assumption of 'neutrality' implies that the judiciary is immune from the influence of other political actors. This, however, is often not the case, whether under autocratic or democratic regimes. Several examples exist wherein formal rules (such as job security, guarantees against salary reduction, lifetime appointments and others) to protect judges from the influence of powerful actors have been ignored or set aside (Epstein, Knight, and Shvetsova 2001). In El Salvador, for example, President Valasco circumvented constitutionally guaranteed tenure for judges by changing their retirement age to force early departure. President Roosevelt persuaded the US Supreme Court to uphold his New Deal Legislation by threatening to 'pack' the courts. In Argentina, there are examples of unfriendly judges being cajoled to take up more lucrative posts, while in Japan review boards were set up for appraisals and rewarded 'friendly' judges with further perks and privileges. The judiciary is already normally at a disadvantage due to low rates of pay that drive many talented lawyers to work in the private sector or in the executive or legislative branches of the state. Also, the judiciary depends on

other state institutions for the implementation of its judgements, making it difficult to give rulings that it believes have no chance of being implemented. The 'stick and carrot' approach has often been used by various powerful actors to undercut judicial independence and obtain favourable judgements (Gibler and Randazzo, 2011).

Along with the impediments to judicial independence mentioned above, procedures to select and promote judges in many countries favour the executive/legislature and limit the ability of the courts to affect the policymaking process, except when various actors take extreme positions in a political conflict. Others argue that courts have a central role to play in establishing and sustaining a stable democratic system. The judiciary's pivotal role as the interpreter and guardian of the constitution, defender of fundamental rights and protector of the rule of law is critical in establishing a consolidated democracy (Linz and Stephen, 1996). The judiciary is therefore a major bulwark against the disregard of statutory and constitutional law by powerful political actors and ensures that there is some mechanism in place to monitor the ruling regime and keep it in check. It is better, therefore, given the range of theoretical positions on judicial independence to conceptualise it as a continuum rather than in black and white. This allows a more pragmatic understanding of the position taken by courts in different circumstances and on various issues. For example, even in established democracies, the judiciary is expected to support the executive in the event of war. This may also help explain instances in which authoritarian regimes tolerate occasional checks by the courts on relatively inconsequential issues. Therefore, the real test of judicial independence pertains to the position the judiciary takes in salient cases against powerful actors after taking into account the exogenous factors. The court's ability to take a strong position on these

occasions, such as in cases related to the legality of a regime change, depends on the degree of legitimacy it enjoys in a society (Epstein et al. 2005).

A number of popular and consistent decisions tolerated by other political actors help build a court's legitimacy (Caldeira, 1987). Many scholars, therefore, believe that the courts are swayed by, and tend to support, public opinion (Mishler and Sheehan, 1993, 1996) and that they strategically choose their cases and desired outcomes (Epstein et al., 2001). The court's ability to get its rulings implemented by other institutions is directly proportional to its legitimacy; the more political support a court has, more difficult it becomes to challenge its decisions (Eskridge, 1991). Over time, the judiciary may build a diffused support base across various organs of state, enabling it to garner support even if it makes unpopular decisions. There is consensus in the literature that judiciaries that succeed in acquiring broad popular support and asserting their independence become a powerful political force in a country. However, in order to preserve the independence of judiciary, courts have to consider a number of factors when giving a judgement: the reaction of the public at large, the prevailing economic conditions, the identity of litigants, the power equation between various political actors, and the legal implications of the judgement. An assertive judiciary, therefore, depends on a court that strategically develops its legitimacy and independence over time. This process cannot be divorced from, and must be studied within the context of, wider and deeper socio-economic shifts that manifest themselves as changes in the power equation between different segments of the society represented by various institutions (Epstein et al., 2001; Gibler and Randazzo, 2011).

The strategic approach to understanding judicial behavior, therefore, focuses on the characteristics of courts as an institution, that institution's relationship with political

institutions and how this relationship shapes judges' policy preferences (Weinshall-Margel, 2011). Chavez (2003) argues that political fragmentation or competition nudges politicians towards accepting a more robust system of checks and balances, whereas in a monolithic polity where the legislature is dominated by the executive, it is easier to curtail judicial independence. Similarly, Gillman (2008) points towards the role partisan politics plays in empowering the judiciary and provides a detailed account of how judges exacerbate cleavages in the polity to pursue their interests and how, in turn, the judiciary itself is shaped by the dynamics of partisan politics.

The strategic model is however criticised for assuming that judges are always able to accurately predict the behaviour and policy choices of other institutions (Baum, 2009). Even if they are able to do so, and to use their perception of other stakeholder's position in their strategic calculations, assuming that other players will retaliate as a given, and that this does not have its own complexities and costs, is simplistic (Segal and Spaeth, 2002). Lastly, the empirical findings have not always supported the theoretical claims of the strategic model, particularly, its ability to explain instances where judges gave decisions against declared positions or interests of other powerful players has been questioned (Pacelle, 2011). The model seems to have a structuralist bias and downplays the agency that judges possess to defy key stakeholders within and outside their institution. This critique is of particular interest to this thesis, as various decisions by the Supreme Court in Pakistan have critically conflicted with the interests of ruling junta since 2005. It was this 'judicial activism' that led to regime retaliating by seeking to remove the Chief Justice. However, what can explain consistent decisions by the judiciary against the interests of powerful political players, including the military, since 2005? This thesis attempts to answer this critical question.

It is also important to note that, in the case of Pakistan, it was not democratisation per se that caused growing judicial assertiveness, but judicial assertiveness that was instrumental in the democratisation process. The Musharraf regime appeared to be fully in control in 2005 when Iftikhar Chaudhry became Chief Justice of Supreme Court. The opposition parties were in disarray and the executive faced little political resistance. A number of decisions by the court between 2005 and 2007 (discussed in detail in following chapters) challenged the dominance of the ruling regime. What explains the judiciary's activism during this time, when there was no precedent and the courts were no match for the military-led ruling oligarchy? The strategic model seems inadequate to explain or predict this kind of assertiveness, where considerable political risks are involved in defying powerful actors and there is no robust tradition of defying the executive. This is not to say that judges do not make strategic calculations or take into account repercussions their judgements may have, but to highlight that there are instances where these do not adequately explain the judicial behavior.

This thesis therefore argues that one has to not only look beyond the courtroom, but also beyond the power equation between various institutions, to understand the factors that influence judicial behavior. It is important to examine the structural factors that affect the role judiciary plays in shaping a particular order of life. Some scholars argue, for example, that the courts almost always reflect elite interests and cannot be considered as a separate veto player in a polity (Tsebelis, 2002). Disproportionate economic power, according to this point of view, leads to disproportionate political power and influence and is manifested through all state institutions including legislature, judiciary, administration and others. This means that the whole process of running for office, organising political parties and campaigns, forming a majority in the legislature and deciding which laws pass and which are not even considered

is, even in liberal democracies, influenced by resourceful and powerful segments of society and that, therefore, the constitutions and laws promulgated through this process will always favour the elite and be inherently unjust. The judiciary's application of law, even if it is impartial, means nothing due to the inherent injustice inscribed in the law itself. Even when it comes to interpreting the law, the judiciary's preference in capitalist societies for preserving property rights rather than redistribution, for example, demonstrates its inability to challenge established order. In this way, the judiciary's role as the final guarantor of justice actually becomes that of a protector of the established socio-political order (Marsh, 2001).

Law, as a key constituent of the politico-social field, therefore plays an essential role in the exercise of power by the state, by organising its repressive and violent arms. It also provides the mechanism through which material organisation of labour as a class relation is maintained by generating consent and the threat (or exercise) of physical violence by the state. Yet, as the preceding paragraphs show, there are limitations to the law's role in regulating the state, whose domain extends far beyond law and judicial regulation. Poulantzas (2000) points to a number of ways in which the state escapes judicial scrutiny. However, the logic under which this works has more to do with the balance of forces in the society than with the judicial order. The state, for example, often disregards its own laws and ensures there are variables embedded in its judicial discourse that allows it to get away with doing so. These actions are at times, for example, presented as necessary in the 'greater national interest' and can be endorsed by judicial officialdom on these grounds. The 'doctrine of state necessity' evolved by the judiciary in Pakistan is a good example of this. Furthermore, the state retains the powers to modify its own laws to large extent. In any case, without an apparatus to enforce obedience, the law remains a mere discourse with limited efficacy or social existence.

Therefore, in a society with class divisions, state takes precedence over law as its sole enforcer and modifier (Poulantzas, 2000).

Yet the existence and application of law cannot be termed exclusively negative and eternally repressive. While it assigns the ruling classes their dominant place in the politico-social system, it also enshrines certain duties and obligations incumbent upon them. In other words, it also establishes certain rights and entitlements for the dominated classes and inscribes within it certain material concessions forced on the dominant classes through popular struggle. This centrality of popular struggle in setting legal limits to the repression and excesses of the dominant classes and the state makes the judiciary an important arena for social contestation (Poulantzas, 2000). This thesis, therefore, goes beyond legal perspectives and theories of political fragmentation to point to the greater social contestation in a society that shapes constitutional meanings and practices. It views the judiciary as a key arbiter of power that limits or expands rights and obligations, the 'rules of the game' and the material concessions that different segments of the society accrue from these. Thus, significant shift in legal norms and practices must be situated within wider social changes. The next section examines more closely the role of political struggle and social movements in deriving constitutional meaning.

## **2.4 Social Movements and Judicial Independence**

Social movements involve collective action by individuals who come together voluntarily around a common cause. Such movements often involve conflict with the accepted norms and ways of doing things and may involve radical action and protest, sometimes leading to transformational change. Social movements have been conceptualised as 'movements of

collective action that provide society with ideas, identities and even ideals' (Eyerman and Jamison, 1991:4), 'contentious politics [that] leads to sustained interaction with opponents' (Tarrow, 1998: 2) and 'informal networks, based on shared beliefs and solidarity, which mobilise about conflictual issues, through the frequent use of various forms of protest' (Della Porta and Diani, 1999:16). However, this thesis shall use the definition provided by Blumer (1969:99) who views social movements as 'collective enterprises seeking to establish a new order of life', because this definition explicitly presents social movements as key agents that attempt to bring about change within societies by challenging established structures (Crossley, 2002).

In recent years, an evolving set of literature has discussed the role of popular mobilisation in bringing about constitutional change. In his seminal book *Constitutional Redemption: Political Faith in an Unjust World*, for example, Professor Jack Balkin (2011) discusses the role of courts in constitutional change through the lens of social movements. He describes the feedback loop between courts and social movements, whereby courts respond to the demands and vision of the movements, and court's decisions in turn shape those demands and visions, significantly altering the political domain in which social movements operate. Balkin (2011) goes on to place social movements, rather than courts, at the centre of his analysis and presents constitutional change as a bottom-up process that requires significant exercise of agency by various segments of the society, rather than something ordained/enforced by the courts. In doing so, Professor Balkin attempts to 'redeem' the courts by pointing to their lively, legitimate and contingent role in affecting social change and challenge the somewhat pessimistic view of courts espoused by mainstream scholarship.

By showing how social movements make use of constitutional principles and court-based tactics, Balkin (2011) encourages scholars to construct a more grounded, context-specific and bottom-up account of constitutional change. He also demonstrates how collaboration between the social action and courts results in broader cultural and political change. He argues: 'when social movement contestation succeeds in delegitimizing a practice sufficiently, it also usually succeeds in getting courts to ratify that conclusion through their interpretation of the constitution' (2011:70). New constitutional interpretation, therefore becomes authoritative, not solely because courts order it as such, but because social movements persuade opinion and political leaders, judges, civil society and public at large to accept the new position as correct. Constitutional change in this way can be seen as a bottom-up process in which courts are not leading but responding to external changes. In return, courts also shape the external environment by influencing other actors in the political system, creating new opportunities for social entrepreneurs in the political terrain.

Epp (1998) argues that courts are partly dependent on the 'support structures' derived from amicable civil society groups. By way of comparison, Epp considered the positions in the United States (US) and India to illustrate the role civil society groups can play by in attempts by the judiciary to create revolutionary rights. Epp found that judicial activism in the United States during the time Justice Earl Warren served as Chief Justice (the 'Warren Court') was largely successful because of the support provided by amicable civil society groups. In contrast, attempts at judicial activism by the Indian Supreme Court on a number of issues were largely unsuccessful because of a lack of support from civil society groups. Epp noted the important role played by US interest groups in bringing cases before the Court, in enforcing decisions, and in disseminating views that judicial decisions handed down by the

Court were important within the broader political and cultural framework of society. Epp's hypothesis, that a court's ability to effect large scale legal and social change is subject to the existence of support from civil society groups, has never been seriously challenged.

Legal scholars are increasingly interested in understanding the role social movements and courts play in constructing constitutional meaning (see for example Balkin and Siegel, 2007; Guinier, 2008; Post and Siegel, 2006; Torres, 2007). A number of these studies explain how social movements, e.g. those for civil, labour and women's rights, have shaped constitutional norms and have in turn been shaped by these themselves. However, seldom have such studies engaged directly with established theoretical frameworks in social sciences to understand the phenomenon. In this regard Balkin's work is no exception, and it is important to further his contribution by incorporating established theories on social change from the realms of sociology and political science to better understand the relationship between social movements and constitutional change (NeJaime, 2013). Drawing on established social movement theories will allow scholars to develop a more nuanced understanding of constitutional change by placing it in a broader context where various conflictual relations shape social reality. Courts, in this view serve an important role as critical sites for mobilisation, contestation and adjudication (*ibid.*). This thesis, in response to calls from the likes of NeJaime (2013) and Rubin (2001), attempts to incorporate two major theoretical frameworks in social movement theory, namely framing/discourse and material conditions/resource mobilisation, to understand changes in constitutional norms and the interplay between judiciary and social movements.

Social scientists have long grappled with the question of why social movements emerge when they do? Early thinking on the topic took emotions and non-rational behaviour as the central

issues in social movement formation. Social movements were portrayed as a reflex response to grievances, deprivations, anomie, structural strains or other forms of hardship (Crossley, 2002). Based on the studies of Fascist movements in Germany, Italy and Japan, this school of thought portrayed social movements as irrational psychological responses and manifestations of 'mob psychology' or collective hysteria (Morris, 2000). During the 1970s and 1980s, however, scholars began to challenge the emotional bias and focused instead on the rational, calculative and opportunistic dimensions of political action. The conventional thinking in this regard has implied that such movements are collective actions by actors aimed at achieving certain vested interests by gaining access to the stable structures of political bargaining (Gamson, 1975; Tilly, 1978; McAdam, 1982). Resource Mobilisation Theory (or Resource-Based Theory, RBT) is one example of such an approach that became extremely popular and continues to inform research on social movements. It focuses on the ability of social activists to garner resources to achieve their objectives (Jenkins, 1983). This may include arranging funding, gathering supporters, propagating their message through media, making alliances with powerful actors and establishing a robust organisational structure. The theory argues that mere dissent and grievances alone are not enough to generate social change and these resources are essential in the success of a social movement (ibid.).

More recently, however, RBT has been criticised for presuming a pre-existing collective actor, able to identify the opening of political opportunities to mobilise indigenous resources for political purposes. Furthermore, the scholars of the 'new social movements', pointing to protests on issues such as peace, homosexuality, feminism and nuclear energy etc. in Western Europe in the 1970s and 1980s (Melucci, 1985; Cohen, 1985; Castells, 2004), argue that participation in such movements cannot be solely predicted by class location, nor were the

participants seeking political or economic gains from institutional actors to pursue their 'interests' in the conventional use of the term. Rather, they sought recognition for new identities and lifestyles. These authors attempt to relocate the understanding of social movements by focusing on the cultural issues and framing processes within a society. In his seminal work, Castells (2004) analyses a number of social movements (e.g. the Zapatista, anti-globalisation and Aum Shinrikyo movements) against the 'new world order' from a politico-cultural point of view. He argues that efforts to define, celebrate, enact and deconstruct identity are more important in recent movements than they have been in the past. Framing theory therefore focuses on social movements' discursive and ideational work and the way its key activists identify grievances, make demands and justify these (Williams, 2003). Movements make 'conscious strategic efforts... to fashion shared understanding of the world and of themselves that legitimate and motivate collective action' (McAdam et al., 1996:27). Frames are therefore used to identify problems, expose those responsible and suggest solutions (Noakes and Johnson, 2005). This process is used not just to mobilise members in a movement but also to persuade bystanders and is related to other aspects of social movements such as tactics, identity and ideology (Williams, 2003). Activists of social movements draw on symbols that people can relate to, and established judicial principles are important examples of such symbols. By employing these symbols and relating these to the specific values and beliefs of individuals, social movements aim to appeal to a broader range of adherents (Williams, 2003).

This thesis follows the likes of Morris (2000), who emphasises that the key lies not in any one factor/approach but in the dynamics and inter-relationships between emotion, structure and culture. It therefore uses both Resource Mobilisation Theory and Framing Theory to

understand the Lawyers' Movement in Pakistan and its effect on significant change in social practice in the country. In doing so, it is important to understand the underlying philosophical assumptions of both these theories. The next section explores in further detail how shifts in distribution of resources and framing processes lead to social change.

## **2.5 Structural Dynamics of Institutional Change**

The importance of 'critical junctures' such as the Lawyers' Movement in social and institutional change is well documented (Mahoney, 2000). It is, however, also important to understand the antecedent factors or conditions that combine during a 'critical juncture' to produce long term divergent outcomes (Slater and Simmons, 2010). The emergent choices and changes during critical junctures are shaped by these critical antecedents in causally significant ways. It is, therefore, important when analyzing the critical junctures to uncover the structural factors that create conditions where social or institutional change becomes possible. Social scientists seeking to explain institutional/social order and change have long argued about the ability of human agents to behave independently, given material and social constraints and structures such as the values, norms and 'accepted ways of doing things' in a society. The agency exercised by human agents is visible only through their defiant actions that challenge the prevalent practices in a society. There does exist, therefore, a relationship between the set of unwritten and invisible (but shared) rules, norms, values and accepted ways of behaviour that govern a society, and the practices that either conform with or defy such norms/structures. Given that, at times, human agents do defy social norms and exhibit the ability to 'do otherwise' (Giddens, 1984), what explains their deviant behaviour? How and why do they choose to challenge the social structures even when there are considerable risks involved in doing so? Although there are numerous examples of defiance at the individual

level, this thesis focuses on changes in group behaviour, in particular social movements, to understand social change. Combining classic literature in sociology, particularly historical materialist and post-modernist approaches to understand social movements, this thesis identifies two sets of factors that encourage or deter maverick behaviour. These are (i) the material conditions and the narratives/discourses in a society that affect the way people understand their environment, and (ii) the opportunities and threats involved in behaving in a particular way. Sustained changes in material conditions and strengthening of counter/alternative narrative encourages new set of practices that, upon becoming prevalent, constitute a new status quo. These are soon taken as granted and acquire the status of unwritten (or written) rules of behaviour that govern the social domain. Figure 2.1 explains key sets of factors involved and their relationship.

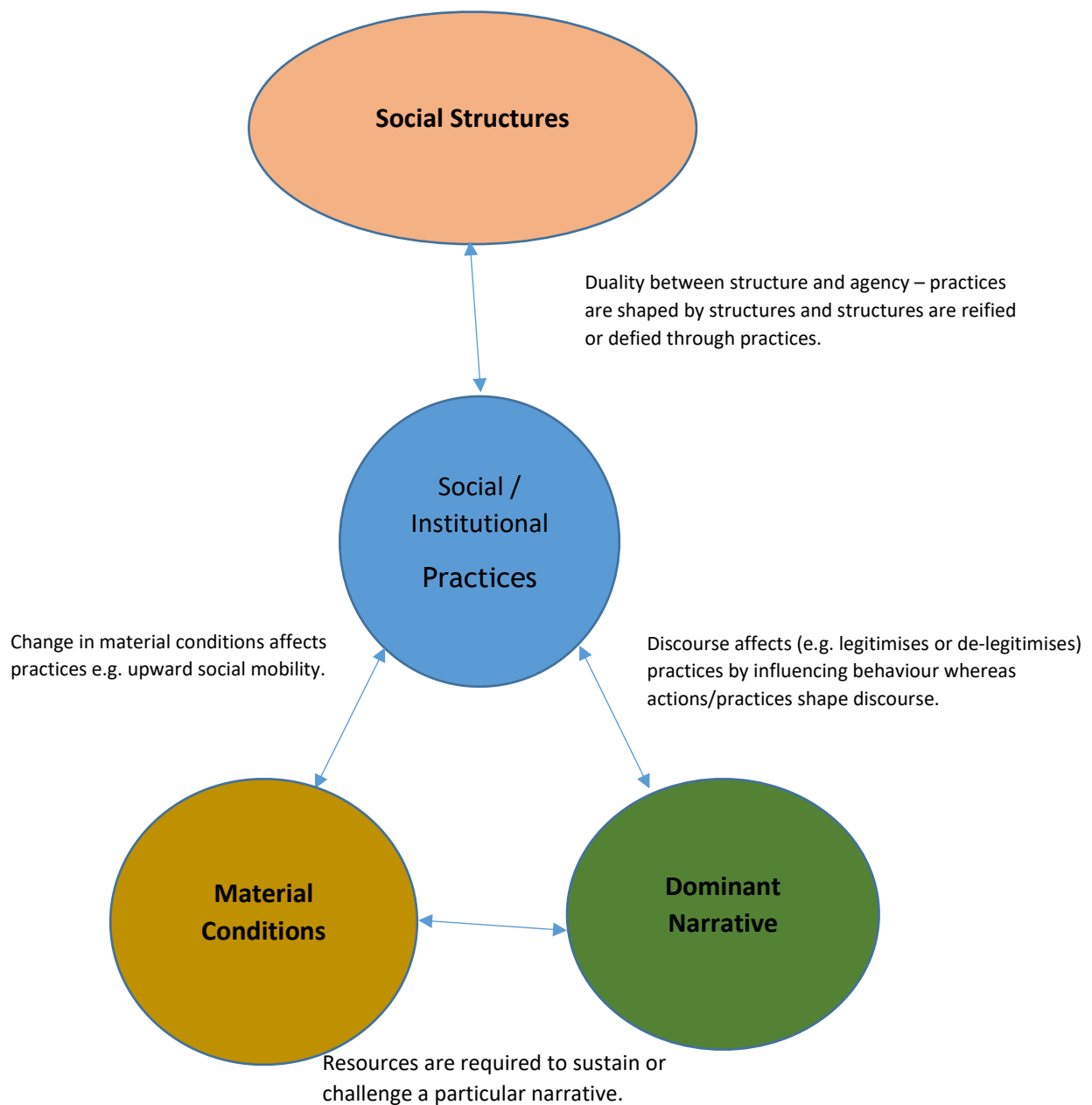


Figure 2.1: Key factors that affect social change

RBT and framing theories both attempt to understand, analyse and at times even predict the trajectory of social change. These models take into account a number of factors at individual, institutional and social levels in their attempt to construct a framework to understand how actions and positions taken by various actors are shaped. Both views, however, believe that the central plank in this debate is the social ‘practices’ prevalent in a society at a particular

point in time. This debate can, therefore, be further enriched by bringing in critical insights from the realm of judicial politics to understand the underlying factors that shape judicial practices and actions. Two sets of structural factors identified from this literature can be analysed to understand the maintenance of or change in social/judicial practices. First are the material conditions, which include the particular distribution of resources among various sections of the society that form the basis for social relations in a given context. Second is the narrative, discourse and the dominant set of ideas that provide the lens through which key actors understand the world around them and their role in it. The dominant discourse also legitimises or delegitimises various practices in a social context. Borrowing from the classic literature in sociology, this thesis links the institutional practices with the unwritten laws, norms, values and accepted ways of doing things (social structures). It argues that any change in 'practice' represents flux in the dominant social structures that, in turn, are shaped by marked changes in the underlying material conditions and/or the shift in the discourse that helps sustain a particular order of life.

Social structures denote a set of unwritten and invisible (but shared) rules, norms, values and accepted ways of behaviour that govern a society. These are enacted through a 'process by which social processes, obligations, or actions come to take on a rule like status in social thought and action' (Meyer and Rowan, 1977) and are thus taken as granted. Social structures are widely agreed upon and any departure from these can have repercussions, sometimes extremely severe. This creates a social order that legitimises one set of practices while disapproving others. Practices are the actions of individuals or a group and include activities that are regular, repeatable and recognisable in a particular cultural context (SE, 2009). These either conform to the embedded social structures or defy them. The study of practice, or

better 'practicing', is expected to yield important insights into how human agents recognise, produce and formulate the regulations of everyday life. It is through practices that the social structures are enacted and reified and it is through accepted and commonly shared changes in practices that these can be altered.

Material conditions refers to the economic base, the collective means of production and the particular distribution of resources among various segments of society. This thesis argues that changes in material conditions are one of the primary drivers behind adoption of new life styles, ideologies and practices. These shape the social relations in a society by altering the particular distribution of power. Resource Mobilisation Theory is among the perspectives that emphasise the resource base of social movement and its effective utilisation to explain social change. It views social movements as rational social institutions, established by social actions with a goal of taking political action to achieve certain ends. It therefore focuses on the ability of social activists to garner resources to achieve their objectives (Jenkins, 1983). The theory argues that mere dissent and grievances alone are not enough to generate social change and these resources are essential in the success of a social movement (ibid.).

The dominant narrative, on the other hand, is the overriding ideology or a set of ideas in a society in which most people believe. It is constructed and sustained in the form of a 'structured collection of meaningful texts', where 'text' includes not only written texts but all forms of expression. The texts must be inscribed (e.g. spoken or written) or depicted in a material form that is accessible to others. These may include pictures, symbols, building, artwork, verbal reports, spoken words, written documents and other artefacts (Phillips et al. 2004). These forms of expression lead to the creation of rules, norms, values and schemas

(social structures) that constitute a social reality within a particular environment and affect the practices by providing or denying them legitimacy.

Scholars have only recently started to acknowledge the power of narrative in shaping judicial behavior. Ocantos (2016), for example, focuses on deep institutional transformations, especially those in the 'culture of legal interpretation', but, more critically, also identifies the penetration of new legal ideas, frameworks and terminologies as a key ingredient required to shape the institutional norms and beliefs. He points to the increasing use of international human rights law in Latin America, particularly in Argentina, to argue that diffusion of legal visions and ideas from around the world alters the judiciary's disposition. These ideas are central to judicial actors' understanding of their role in a political system and colours their legal preferences. They also shape the norms governing professional practices and create 'expectations about acceptable courses of actions' (p.6). He concludes that this shared understanding of the 'right thing to do' as a member of bench has a greater effect on judicial behavior than judges' opportunistic calculations with regards to reaction by various political actors. Other scholars, such as (Levitsky and Way, 2006), have also focused on the transnational civil society relationships that tie these together and help diffuse ideas and practices. These extensive linkages have proved more useful than the democratisation efforts led by governments (through aid, diplomacy or other means) in the West by creating a broad domestic constituency for liberal and democratic ideals.

This thesis will use framing theory and focus on social movements' discursive and ideational work and the way its key activists identify grievances, make demands and justify these (Williams, 2003). Movements make 'conscious strategic efforts... to fashion shared understanding of the world and of themselves that legitimate and motivate collective action'

(McAdam et al., 1996:27). Frames are therefore used to identify problems, expose those responsible and suggest solutions (Noakes and Johnson, 2005). This process is used not just to mobilise members in a movement but also to persuade bystanders and is related to other aspects of social movements such as tactics, identity and ideology (Williams, 2003).

Not much of the literature on judicial politics has applied these concepts to understand judicial behaviour and change; however, as described in the previous section, the emerging institutional approaches have bordered on discussing the role of broader social transformations in institutional change. A notable study in this regard is that by Thelen (2009), which examines how institutions change and evolve as opposed to their rather static conceptualisation in literature. There is, however, considerable literature exploring institutional change in general, and it is important to engage with this literature and incorporate it in developing a better understanding of judicial change, especially where judges deviate from the established practices of the past to create new precedents.

Generally, the theories put forward by scholars to solve the dichotomy between structure and agency reveal a structuralist bias, whereby social action is seen as an outcome of underlying structures leaving little room for agency (e.g. Durkheim's functionalism and Levi Strauss's cultural grammars, described in Ortner, 2008). Thelen (2009) argues that institutions are generally considered to have inertia, stability, path dependency and thus persistence and therefore, unsurprisingly, most of the research has focused on what they do rather than how they change and evolve over time. With such perceptions of institutional behaviour, change is normally presented as disruptive, asymmetrical, discontinuous and almost always as a result of an exogenous shock such as a revolution, defeat in war or regime change at a particular 'juncture' in history. Situations such as these, it is argued, reverse the structure–

agency equation, allowing human agents to make critical choices that set the course toward a new path dependency for the institution until it is again disrupted by another shock (Katznelson, 2003). Conversely, other scholars present humans as the sole creator of social phenomena and believe in the reflexive ability of agents to manipulate the established procedures for social interaction, arguing that humans are able to do 'otherwise' in order to establish their autonomy (read for example Goffman's (1956) social interactionism and Garfinkel's (2002) ethnomethodology).

In contrast to both these dualistic positions, this thesis follows the likes of Giddens (1984) in arguing that neither human agents nor objective social structures alone determine the nature of social phenomena; rather, both are a mutually constitutive duality wherein human agents shape the social structures through their actions (practices), and these actions in turn reify and reproduce the social structure. Similarly, this study follows the likes of Thelen (2009), who emphasises the dual relationship between institutional reproduction and transformation in contrast to the rather structuralist view of the institutional theorists (e.g. Meyer and Rowan, 1991). Thelen (2009) goes on to identify factors that affect institutional change and persistence by conceptualising these as 'political coalitions' of actors, and examines the shifts in these coalitions over time to explain changes in the form and behaviour of the institutions. The factors that may cause a shift in an institution's supporting coalition can be categorised as changes in the material conditions (such as economic changes, technology shift, natural calamity and other factors identified by e.g. Resource Mobilisation Theory) and/or changes in the dominant narrative that legitimises certain practices in an institution (e.g. perceived importance, credibility and effectiveness as described by Framing Theory). Reference to both sets of factors reflects both the classic theory of historic materialism that argues, in the words

of Marx (1979), that ‘...[the] economic structure of society, [is] the real foundation, on which arises a legal and political superstructure’, and the post-modernist notions of the pre-eminence of framing processes in society and the actor’s desire for the recognition of new life styles and identities as a driver for change rather than their material interests alone (see for example Castells, 2004).

Building on these, Hilbank (2007) further dissects structural/social reasons for a particular judicial behaviour. Examining the role of the Chilean judiciary, which remained loyal to the authoritarian regime led by General Augusto Pinochet, she argues that the greater societal struggle in Chile at the time was between the elite and middle class alliance on the one hand and the rising working class on the other. The judiciary was seen by the landed/business elite as an important bulwark against a rising and antagonistic working class. This meant that judges, mostly from the upper- and middle-class sections of society, ‘came to identify their own interests – in job security and social dignity – with those of the institution and its elite’ (p. 92). Angell (2010) also provides a detailed account of how, despite the left-leaning government’s best efforts, the middle classes in general as well as the judiciary supported the elite class, paving the way for the military coup of 1973 that brought Pinochet to power. Studies examining the role of class origin on judicial decision making are scarce. However, it is worth citing Howard (1981), who found in his study of the Courts of Appeal in the district of Columbia (USA) that compared to party affiliation and prior judicial experience, class origin of judges had strongest effect on judges’ preferences in cases involving taxation, prisoner petitions and criminal justice. Ehrmann (1987) also points to the class origins of judiciary in the Weimar Republic (1919– 1933) to explain shifts in judicial paradigms during this period. Before the emergence of the Weimar Republic, judges favored executive decisions under the

authoritarian German Empire to help safeguard the interests of the ruling social groups they identified with. Neumann (1957) posits that:

The judge of this period exhibited all the characteristics of the class of his origin: resentment against the manual worker, reverence toward throne and pulpit, and, at the same time complete indifference toward financial capitalism and monopoly capitalism. The judges represented the alliance between crown, army, bureaucracy, landlord and bourgeoisie (p. 45).

The transition from monarchy to a representative system in 1919 changed little in the structure and composition of the judiciary, ensuring a clash among institutions. The judiciary frequently resisted laws promulgated by the parliament and contributed to the weakness and ultimate demise of the Weimar Republic. Ehrmann (1987) attributes the outright hostility of judges towards the parliament to their inherent disdain for democratic rule, which threatened to undermine the interests of the elite that had entrenched itself during the days of Empire.

This clearly shows the link between the principal social contestation and the institutional behaviour. It also shows how judges attempt to align with social undercurrents to safeguard and promote their interests (job security and social dignity in this case). It also shows how and why institutional behaviour, norms and ways of doing things are shaped by the deeper contestations in the society and how judges identify themselves and their role in this. The class background, makeup and interests of the judiciary, and their alignment with other social classes, can, therefore, be considered one of the major factors that inadvertently shape judicial behaviour.

This thesis aims to understand judicial behaviour by understanding institutional dynamics and their link with the underlying social and economic realities in the society. This therefore builds on the institutional approach that has, in recent years, gained attention in the study of judicial politics and further extends it by attempting to go beyond institutional level to find the roots of changing institutional behaviour in the underlying social structures.

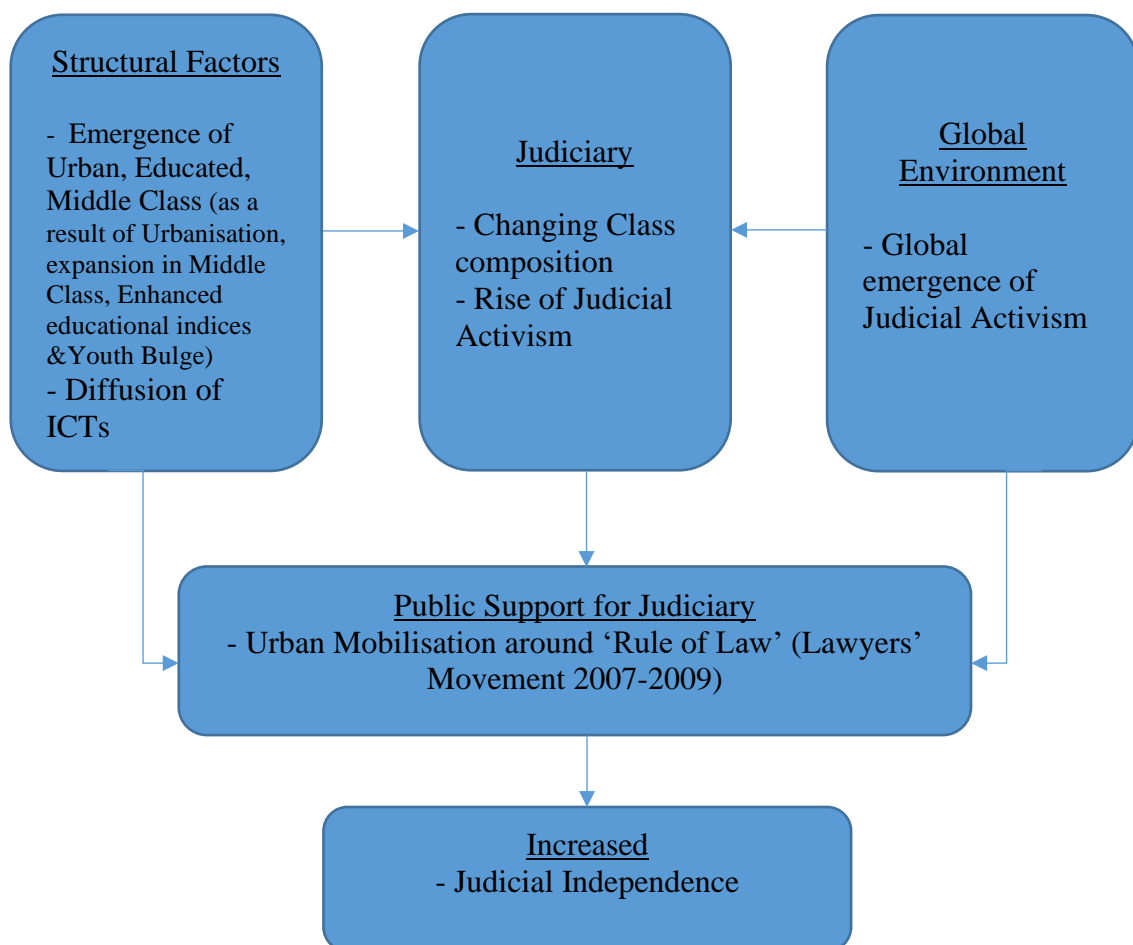
## **2.6 The Argument**

This thesis defines judicial independence as the ability of judges to rule against powerful political players in a country, including the executive. It argues that judicial independence depends critically on support for the judges, constitutionalism and the rule of law among the masses. Judges may have constitutional guarantees such as job security, fixed tenures and financial autonomy to protect them from reprisal from powerful players. However, in the absence of a culture of constitutionalism and active support for the rule of law, these may not be enough to stop powerful political players from intimidating or co-opting judges to rubber-stamp their decisions. Judges, therefore, do at times actively cultivate support among sections of society to help them cement and/or expand their sphere of influence. In countries with weak political parties and representative institutions, they may appeal directly to various social groups for support by taking populist stances on key political, social and economic issues.

The thesis shows that shared class consciousness between judges and their support base is a critical factor that shapes judicial behavior and decisions on key issues. The thesis therefore draws a distinct and causal link between the dominant class base of the judiciary, its rulings on various socio-economic issues and the support it is able to garner among sections of wider

society. Furthermore, it highlights the role of the global legal environment and the diffusion of legal doctrines from across the world in shaping culture, expectations and world views and, thus, the stances of judges on pressing socio-economic issues. However, it argues that the effect of global legal discourse has to be understood in the local context, where local political and social dynamics guide its adaptation and interpretation.

Figure 2.2: My Argument



The centrality of public support for judicial independence is evident from people's mobilisation around the 'rule of law' during the Lawyers' Movement (2007–2009) in Pakistan, which proved a critical juncture that led the judiciary on a divergent trajectory. During this

time, thousands of protestors took to the streets against the sacking of Chief Justice Iftikhar Chaudhry by General Musharraf. The protests, led by various lawyers' associations, garnered considerable support from the wider public across ideological, ethnic, sectarian and demographic divides. The overwhelming support of the civil society, opposition political parties, media and international community culminated in a popular movement that proved to be the turning point in enabling the judiciary to assert its independence in an unprecedented manner. This led to the historic judgement by the full bench of Supreme Court on 20<sup>th</sup> July 2007 that declared government's action unlawful and reinstated Justice Chaudhry as the Chief Justice of Pakistan, instigating a tug-of-war between the regime and the legal fraternity that eventually paved the way for a return to democratic rule. The outpouring of support during the Lawyers' Movement meant that judges were now deriving their legitimacy and power directly from the people and were able to take on executive to consolidate their newfound power. It was, therefore, the support of key sections of society that affected judicial behaviour. It provided the legitimacy that enabled the Court to get its rulings implemented by the executive, even if these were against the executive's key constituents.

The thesis also shows how judges used judicial activism through public interest litigation and the human rights cell at the Supreme Court to actively create a support base for themselves. A number of judgements show that judges borrowed heavily from precedents and legal doctrines originating elsewhere. The increasing number of lawyers obtaining legal qualifications abroad, or through distance learning programmes from institutions based in the West; a newfound focus on postgraduate qualifications and research; interaction on regional and international forums and greater dissemination of global legal norms, opinions, judgements and practices, all contributed towards shaping the culture, practices and world

view of judges in Pakistan. However, this does not, on its own, fully explain the change in judicial behavior, particularly the kinds of cases that were chosen by the judges, their stance on key political and other socio-economic issues and the support they were able to garner among sections of society at this point in time.

In addition to the diffusion of global legal doctrines, therefore, this thesis points to the link between changing demographics, within the judiciary and in the wider society, that created a shared understanding of pressing contemporary issues and helped forge an alliance that enabled a particular kind of judicial activism and saved the courts from reprisal by the executive when needed. It points to the key issues such as accountability of government officials, nepotism, corruption, meritocracy, VIP culture and others where the Court focused its newfound activism. The prioritisation of these concerns emerged from the increasingly middle-class origins of the judges and resonated strongly with that demographic, which has expanded considerably in parts of Pakistan during last two decades. Thus, the thesis argues that shared social consciousness among the judges and their support base is a critical factor that explains the contours, scope and limits of judicial activism in the country.

This means that the actions of the courts and their reception among certain demographics must be understood in the context of a greater social contestation within the society. The analysis of the role the Lawyers' Movement played in deriving new constitutional meanings is critical in this regard. The movement is viewed in this thesis as the proximate driver of judicial independence and as the physical manifestation of alliance between the judiciary and the urban middle class. It is, therefore, important to understand in detail how the Lawyers' Movement itself was made possible. The thesis argues that five key structural socio-economic trends, the antecedent conditions (Slater and Simmons, 2010) – namely urbanisation, the

emergence of a middle class, enhanced education, the diffusion of ICT and a demographic youth bulge – provided the critical mass for the Lawyers’ Movement (and, in turn, judicial assertiveness) to materialise. These changes created a sizable constituency that looked to the judiciary for its own emancipation and rallied behind it under the slogan of ‘rule of law’, resulting in the success of Lawyers’ Movement. The alignment of interests between the judiciary, itself experiencing middle-class resurgence among its ranks, and the emerging educated, urban middle class on issues such as accountability, transparency and a greater share of power and resources, was key in making an alliance that propelled the judiciary to become a key arbiter of power. The shared world view of the judges and this emerging section of society guided their collective stance on actions by the executive and provided the basis for resistance against them.

The thesis therefore explores the link between social and institutional change. It highlights the role class origin plays in shaping institutional outlook and views these as arenas for social contestation to play out. The institutions can, therefore, not only not remain oblivious of the wider social change, but actually represent and embody such transformations. This thesis therefore explains how institutions, such as the judiciary, are affected by wider social changes and extends the understanding of institutional change by using key works in sociology.

## CHAPTER 3: JUDICIAL CHANGE OF COURSE IN PAKISTAN

### 3.1 Introduction

This thesis attempts to understand the change in judicial independence in Pakistan since 2005. It is important therefore to see if there is indeed 'change' in the judicial behavior and independence given the checkered history of the institution in this regard. This chapter therefore uses the *de jure* and *de facto* measures of judicial independence to understand the differences in judicial behavior before and after the events between 2005-2009. The chapter provides a historical perspective, tracing the origin of modern institutions in the areas now included in Pakistan from the colonial period onwards. It then discusses briefly various indicators identified in the literature to measure/analyse judicial independence. The chapter identifies key events in the judicial history of Pakistan, categorising these as either in accordance with the wishes of establishment or against those wishes. It identifies 2005 as a key turning point when the judiciary began to challenge the ruling regime. The ensued confrontation culminated into the Lawyers' Movement (2007-2009) that seems to be another critical juncture that changed the course of judicial history in Pakistan. This is evident from shift in trend of decisions given by higher judiciary in favour of or against the military establishment (as shown in figure 1.1). It also discusses various tactics, ranging from the lure of increased perks and privileges to sheer blackmail, used by the establishment to obtain favourable judgements and the individual and collective resistance by the judges during Pakistan's judicial history. This chapter provides an essential context for further analysis in the rest of the thesis that aims to explain the factors responsible for potential transformation

in the character of judiciary in Pakistan, from its traditional role as a subordinate of the ruling establishment to an independent power broker in the polity of the country, and its implications for democratisation.

### **3.2 Historical Context**

The state structure in Pakistan has its roots in the British colonial period, when institutions such as bureaucracy, judiciary and military were established along modern lines. The British also significantly altered social life in the Indian sub-continent. In pre-British India, the state mattered little in the daily lives of village communities, who were effectively autonomous and regulated their affairs through primeval institutions such as village councils and where caste or position in the tribal hierarchy defined the role of community members (Kaviraj, 2005). It was during British rule that initial attempts were made to increase the role of the state in ordering social life. Dispute resolution and contract enforcement became the responsibility of the state, represented by police, courts and the administrative apparatus. The integration of the Indian sub-continent with the imperial economy significantly altered the role of local actors. The 'landholders', for example, in a short span of time transformed into 'landowners', not through a long-winded organic economic change, but due to the largesse of the state (Saberwal, 1986). In short, despite significant regional variations (as illustrated by Kohli, 2004), the state was responsible for many processes of class formation alien to pre-colonial Indian society. This resulted in what Hamza Alavi (1972) termed an 'over developed state' in an 'under developed society'. His core argument was that the strong military–bureaucratic state apparatus was largely capable of appropriating most of the surplus capital and deploying it in bureaucratically driven 'development' projects, benefiting its key constituents in the

process. Such an oligarchy, he argued, had little dependence on the social classes it was supposed to govern.

The politics and power configuration between various state institutions in post-independence Pakistan and India owes much to the colonial patterns of patronage. At the time of independence, both India and Pakistan inherited similar social and political structures. The bureaucracy and military were British trained and maintained a professional 'Sandhurst' ethos; both countries came into being as a result of popular movements; both had an agrarian economy and faced similar nation-building challenges. Yet their political evolution from that point onwards has been anything but similar. Tudor (2013) argues that the class composition and the respective strength of the pre-independence political parties is primarily responsible for the divergent trajectories of post-independence regimes in India and Pakistan. The distinct social classes that dominated the Congress and All-India Muslim League had considerable bearing on the likelihood of the establishment of representative regimes after independence. A number of factors in 19<sup>th</sup> Century British India, such as the influx of capital, growth in trade and education reforms resulted in the emergence of an urban, educated middle class that transcended the traditional status groupings in the region. This emergent social class desired upward mobility through participation and access to state power and patronage. This led to the formation of the Indian National Congress in 1885 to lobby the colonial government to establish a more representative political regime that could be significantly influenced and controlled by the urban, educated middle class in India (ibid.).

The leaders that formed the core of Pakistan Muslim League, on the other hand, belonged to a landed aristocracy that Tudor (2013) defines as 'geographically concentrated, colonially entrenched and religiously distinct'. They sought to protect their social status and material

interests by lobbying the colonial state against the introduction of political institutions and to achieve extra-proportionate political representation for Muslims on the basis on their shared religious identity. The Muslim League was later able to translate this distinct social identity into a political identity to demand a separate homeland for the Muslims of India. The class interests of the League's leadership in opposing representative political institutions meant that, even before gaining independence, Pakistan was unlikely to develop a stable democratic system. While Congress went on to forge pragmatic alliances with various segments of the society and make compromises to agree on a constitution and create a foundation for representative governance in India, the Muslim League struggled to adopt a clear, programmatic and unifying nationalist ideology once Pakistan was created and the slogan that 'Islam is in danger' no longer applied. Divergent patterns of ideational commitment, as well as the contrasting interests of various social groups in the newly formed country, made compromise harder, resulting in a decade-long wrangling for power that eventually resulted in the emergence of the military as the dominant partner in an elite ruling oligarchy (ibid.). During this time, the failure to forge consensus on the country's constitution epitomises the divided polity that ran affairs of the state. Serious disagreements emerged during the debate on the 'Objectives Resolution' that provided aims and objectives and a framework for the constitution. The religious minorities, who had a more secular vision of Pakistan, had strong reservations. Nevertheless, despite passage of the Objectives Resolution in 1949, it took another seven years to pass the first constitution of Pakistan in 1956. It envisaged Pakistan as a republic with parliamentary form of democracy and a federal structural based on the principle of 'parity' between East and West Pakistan. The political elite, however, had lost much credibility due to continued political instability that saw seven Prime Ministers between

1947 and 1956. The military, led by General Ayub Khan, seized the opportunity to impose the first period of martial law in independent Pakistan in 1968.

The deep-rooted permanence of military in the political sphere of Pakistan since then is largely due to its image as the saviour of the nation and to the colonial Punjab connection. Ayesha Jalal (1990) argues that, right at the time of partition, especially after the brief war fought over Kashmir within months of independence, Pakistan's sovereignty was linked to its ability to develop an adequate defence capability to ward off India, which was perceived as vying to swallow the nascent country. The already-established imperative of national security allowed the military to assume its role as the arbiter of political power, albeit with some opposition from some under-represented ethnonationalist groups such as the Bengalis. Another aspect that legitimised the military's historic dominance in Pakistan (and was much despised by other ethnic groups) was the Punjab connection. Punjab, the province that today forms the heartland of Pakistan, became an interesting case of social re-engineering during British rule. The construction of a perennial irrigation canal system, one of the largest in the world, provided the Punjab with unprecedented power to shape the social order (Habib, 1995). The northwest frontier of the subcontinent was viewed by the colonial state as a crucial buffer meant to save the vast British Indian Empire from aggression from the west. The rank and file of the British Indian Army was therefore largely drawn from the Punjab and the Pashtun areas of the Northwest Frontier. The land grants in the canal colonies were effectively used by the state to buy the loyalty of this volunteer army in these areas (ibid.) resulting in a military-bureaucracy-landed aristocracy nexus that persists today.

The relative power and persistence of this oligarchy in contemporary Pakistan, however, needs to be re-examined in the light of a number of changes mentioned in previous sections, and this is something that this thesis attempts to achieve.

### **3.3 Judicial Subservience: Pre-Lawyers' Movement Era**

The judiciary in Pakistan consists of lower courts and the higher judiciary. Lower (or subordinate) courts include district courts, session courts and civil judge cum judicial magistrate's courts that deal with civil and criminal cases. Numerous special courts specialising in banking, insurance, customs and excise, terrorism, taxation, consumer protection and corruption etc. also exist. Government may also constitute judicial commissions or tribunals from time to time for a particular purpose. The superior courts consist of the Supreme Court of Pakistan, the Federal Shariat (Islamic Law) Court and five High Courts (one each for four provinces and a fifth for federal territory). The Federal Shariat Court was constituted under the military regime of General Zia-ul-Haq as part of his agenda to Islamise the country and has the powers to examine and determine whether the laws of the country comply with sharia law. In practice, however, the High Courts and Supreme Courts are where the real power lies, while the Federal Shariat Court yields little influence. This chapter will mainly focus on the higher judiciary of Pakistan and uses a number of factors identified from the literature to analyse *de jure* and *de facto* measures of judicial independence.

Most measures of judicial independence use the frequency of decisions against the government as a proxy (e.g. Helmke, 2005; Laryczower et al., 2002; Ramseyer & Rasmusen, 2003). However, one must also take into consideration whether courts are taking up cases of

political interest that may involve powerful players; this is important because at times courts may appear to be more autonomous and influential by deciding a number of inconsequential cases against the government while carefully avoiding hearing cases in any area of importance to the government – a case in point being the Chilean superior court during the Pinochet regime (Rosenn, 1987). Also, while most studies focus on either *de jure* or *de facto* indicators of judicial independence, this thesis follows the likes of Feld and Voigt (2002) in combining both sets of indicators to compare the state of judicial independence in Pakistan before and after the Lawyers' Movement. The following section describes some of the indicators that Feld and Voigt (2002) use to assess the judicial independence.

*De jure Measure of Judicial Independence:* The sources for *de jure* indicators are the laws inscribed in the constitution and statutes that define the role and scope of higher judiciary and provide it legal protection and guarantees. A court anchored by a constitution that is difficult to amend provides better job security to judges. Similarly, an appointment procedure that relies on professionals from the legal fraternity, rather than the executive, is deemed important for judicial independence. Tenure of judges also ought to be fixed (appointed for life or up to a mandatory retirement age) and protection provided against arbitrary removal. If the judicial term is subject to renewal, judges may be more amenable to the appointing body, to the detriment of judicial independence. Control over salaries, pensions and other benefits, and their value in comparison with other functionaries of the state – for example bureaucrats and other professionals (e.g. lawyers, doctors, teachers etc.) – also bestows social prestige and economic freedom upon judges. At times, courts are constrained to only taking up cases initiated by certain parties; however, it is considered important for judicial independence that courts are not only accessible to the general public but can themselves

initiate cases when they consider doing so in the public interest. Internal dynamics within the higher judiciary – for example, the predominance of Chief Justice in matters such as allocating cases to various judges, forming the bench to hear a particular case and other administrative powers – increase the potential advantages of ‘buying’ the Chief Justice and are considered detrimental to judicial independence. The authority to interpret the constitution and the power of constitutional review indicate greater independence. Lastly, if courts have to publish their judgements, so that they can be scrutinised and critiqued in public, they can be expected to be more accountable, making it difficult for other players to pressure judges to issue rulings that may be difficult to defend in public domain. Transparency will be even greater if dissenting notes are also published along with the judgement.

In the case of Pakistan, the Objectives Resolution passed in 1949 with the aim of providing a framework for the country’s first constitution (and later included in the (current) 1973 Constitution as an enforceable preamble) promised to fully secure the independence of the judiciary. This was subsequently followed by the 1973 Constitution, which provides a comprehensive set of laws on the composition, jurisdiction, powers and function of the judiciary in the country. It provides for independence of the judiciary, separation from the executive, and entrusts courts with the preservation, protection and defence of the Constitution. It also stipulates the qualifications of judges, appointment procedures, service conditions, salaries and pensions. The remuneration of judges and other administrative expenditures of the superior judiciary are charged on the Federal/Provincial Consolidated Fund; these may be discussed but cannot be voted upon in the parliament. The procedure, grounds and forum for the removal of judges is also provided by the Constitution. This involves a Supreme Judicial Council, presided over by the Chief Justice of Pakistan along with

two senior judges of the Supreme Court and two Chief Justices of High Courts. A reference against a judge can be sent by the President on the grounds of misconduct or physical or mental incapacity. The Constitution provides complete immunity to judges in Pakistan for their actions in exercising their judicial powers (Hussain, 2015).

The periods of military rule under General Ayub Khan and General Zia-ul-Haq were the worst periods for the judiciary. With the Constitution held in abeyance for most of the time, judges were beholden to the whims of ruling regime. Tactics used to intimidate, remove, coerce or co-opt judges will be discussed later in this thesis, but it is important to note here that many changes were made by ruling military regimes to empower the office of the President by vesting in it a number of authorities related to the appointment, transfer and removal of judges. Until 1996, for example, the President of Pakistan had the authority under Article 200(1) of the Constitution to transfer a judge from one High Court to another without consultation with the Chief Justices of the Supreme Court or the affected High Courts, as long as the transfer was for no more than two years. Clause 4 of the same article provided that judges who refuse to accept such a transfer were to be deemed retired. Apparently this clause contradicts Article 209(7), which provides constitutional protection to the services of justices at superior courts in Pakistan. Similarly, Clause 5 of Article 203C provides that a judge who refuses to accept transfer to the Federal Shariat Court (generally considered as a demotion or sidelining), shall be deemed to have retired from the High Court. Furthermore, under Clause 4B of Article 203-C, the President has the power to modify the term of appointment of a judge (including that of the Chief Justice) at the Federal Shariat Court to perform other functions as desired by him. Judges at the Federal Shariat Court normally have a three-year term that can be extended or curtailed by the President at any time. This

therefore remains the most insecure appointment in almost all of the bureaucratic and judicial structures in Pakistan.

Whenever the position of the Chief Justice of Pakistan became vacant, the President was required under Article 180 to appoint the most senior judge of the Supreme Court as the acting Chief Justice; however, the appointment of the permanent Chief Justice of Pakistan, and those of the High Courts, had no seniority condition. It was also a practice, especially during General Zia's regime, to appoint an acting Chief Justice for long periods so as to keep him under the threat of removal at any time. The Constitution (articles 181 and 182) provides for the appointment of acting and ad hoc judges at the Supreme Court (Article 197 makes similar provision for the High Court) for the purpose of meeting the temporary demands of an emergency situation. Such appointments were used by successive executives to appoint favourable judges, at one point even becoming a gateway through which almost every judge had to pass before they were made permanent. In some cases, judges remained on these temporary appointments for years.

Further, the disparity between the retirement ages of the High Court judges (sixty-two years) and Supreme Court Judges (sixty-five years) provided strong incentive for High Court judges to remain in favour with the executive to secure a chance to be appointed to Supreme Court, as such an appointment – along with prestige and perks – also extended their service by three years. Judges can only be removed in Pakistan in accordance with Article 209, which envisages the establishment of a Supreme Judicial Council headed by the Chief Justice of Pakistan. This mechanism, however, does not provide a mechanism for the accountability of the Chief Justice himself.

In 1994, the Supreme Court ruled for enhanced financial autonomy in the case of *Sind v Sharaf Faridi*. It held that elimination of the executive's financial control over the judiciary is a key component of the principle of 'independence of the judiciary' enshrined in the Constitution. The chief justices of Pakistan and the High Courts are therefore authorised to make re-appropriation of funds within the budgetary allocation without the approval of the Finance Ministry. In its ruling, the Court also authorised chief justices to create or abolish posts or upgrade/downgrade them, along with moving funds from one head of expenditure to another. In another landmark ruling, in interpreting Article 175(3) of the Constitution that provides for the separation of judiciary from the executive, the Supreme Court in 1994 split the functions of the magistracy and put judicial magistrates under the administrative control of the High Courts. Later in 1996, in historic judgements in the *Al-Jehad Trust v Federation* and *Asad Ali v Federation* cases, the Supreme Court further elaborated the procedure for the appointment of Supreme Court and High Court judges. The ruling mandated that these judges are appointed by the President from a panel of judges recommended by the chief justices of the Supreme/High Courts. The judgement clarified that the recommendations of the chief justices were binding on the President, except where sound reasoning was provided by the President where a disagreement occurred (Hussain, 2015).

During civilian regimes in the 1990s, judges found some reprieve from these constraints and sought to reverse many legal and procedural changes that military regime had introduced in previous years, using their power to interpret the constitution. Civilian rulers, however, although not as authoritarian as their military counterparts, also did little to help the judiciary take up its due role as an independent pillar of the state. No substantial constitutional

amendment was passed, for example, to completely rid the judiciary of the legacies of the Zia era.

*De facto measures of Judicial Independence:* Moving on to *de facto* measures of judicial independence, the aim of this thesis is to gauge whether rulings given by judges reflect their independent opinion and whether they were able to take up politically contentious cases and get their verdicts implemented even where these went against the wishes of the executive or other powerful players. Other factors, such as judicial infrastructure including court rooms, judges' chambers, the size of the legal library, modern computer equipment etc. also reflect the power and influence enjoyed by the judges. The various tactics used by the executive or other power players to coerce or co-opt the judiciary, to make changes to the constitutional guarantees provided to them or to manipulate and subvert judicial process, and the ability of judges to cope with these, provide another key indication of *de facto* judicial power.

Many of the gains made in elaborating the judicial appointment process and other aspects of *de jure* independence were, however, rendered meaningless when it came to their application at critical junctures of history. On a number of occasions, various tactics were used by military and, at times, even civilian regimes to influence judges. Coercing the judges into writing required judgements, co-opting them into collaborating and forcefully removing them from the post have been key mechanisms to ensure the judiciary's subservience.

This subservience to powerful state actors, initially the bureaucracy and then the military, during most of the country's history started with an infamous judgement by then-Chief Justice Muhammad Munir in 1954 that invoked the 'doctrine of necessity' (Virk, 2012), a maxim based on the writings of medieval jurist Henry de Bracton that states 'that which is otherwise not lawful is made lawful by necessity' (Wolf-Phillips, 1979). In October 1954, Ghulam

Mohammad, the Governor-General of Pakistan, dissolved the Constituent Assembly of Pakistan and reconstituted the Council of Ministers. The President of the Constituent Assembly, Maulvi Tamizuddin, filed a writ petition in the court challenging the power of the Governor-General to dissolve the Assembly and seeking to restrain the Council of Ministers from implementing the dissolution. After much deliberation, the court ruled that the Governor-General, in certain circumstances, had the power to dissolve the Constituent Assembly 'under the common law of civil or state necessity'. This established a precedent in Pakistan for validating unconstitutional acts by declaring them necessary for the survival of the state (Virk, 2012). Justice Munir later admitted that while he felt that the dissolution of the Assembly was unconstitutional, he was 'constrained' to uphold it (Newman, 1962).

The first constitution of Pakistan, adopted on 29 February 1956, provided for a parliamentary form of government wherein the executive authority was vested in a cabinet led by the Prime Minister, while the post of Governor-General was replaced with the largely ceremonial post of President (Newman, 1962). However, on 7 October 1958 President Iskander Mirza abrogated the Constitution and declared martial law. Within a month, Mirza was himself deposed by the Commander-in-Chief of the Pakistan Army, General Ayub Khan, bringing to power Pakistan's first military regime. The *Laws (Continuance in Force) Order 1958* issued by the regime held the Constitution in abeyance while declaring valid all remaining laws in force before the assumption of authority by the regime (Shah et al., 2011). In the *State Vs. Dosso & Others* case that challenged the *Laws (Continuance in Force) Order*, the Supreme Court of Pakistan, under Justice Mohammad Munir, ruled that 'where revolution is successful, it satisfies the test of efficacy and becomes a basic law creating fact' (PLD 1958). It declared the *Laws (Continuance in Force) Order* the basis on which the validity of the laws and the

correctness of judicial decisions had to be determined (ibid.). Justice Munir later revealed that he was called by General Ayub a few hours after the imposition of martial law to scrutinise a draft instrument in a meeting attended by General Ayub himself, a law secretary and a young army officer. Justice Munir suggested some modifications and the law was promulgated as the *Laws (Continuance in Force) Order* the next day. A sitting Chief Justice having contributed to the drafting of the law before presiding over the bench that validated the order was later termed a 'mockery of judicial propriety and judicial independence' (Mehmood, 1992 cited in Shah et al., 2011).

General Ayub Khan remained president until he was replaced in 1969 by General Yahya Khan as a result of popular resentment that threatened to transform into mass movement (Khan, 2009). It was during this time that two judges of the West Pakistan High Court were issued notices for contempt of martial law and summoned by the Sub-Martial Law Administrator General Mitha to reverse a stay order issued by the court against one of his orders. One of the two judges, Justice Nasim Hassan Shah (who later served as Chief Justice of Pakistan), later expressed his helplessness as not even a single person in the civil society stood by them (Shah et al., 2011). Under public pressure, in 1970 Yahya Khan held the first nationwide elections that are widely considered free and fair. However, conflict ensued when Bengali Nationalist party the Awami League, led by Sheikh Mujeeb, won an overall majority (that heavily relied on its support base in East Pakistan), while the centre-left Pakistan Peoples' Party (PPP) won majority of seats in West Pakistan. The Yahya regime, however, delayed the formation of government and launched a military offensive against what he described as separatists in East Pakistan. This made worsened the already precarious situation in East Pakistan virtually to a state of civil war that resulted in military intervention by neighbouring

India. The Pakistan army was defeated and East Pakistan seceded to become the sovereign state of Bangladesh. Yahya Khan was forced to resign and Zulfikar Ali Bhutto, leader of the PPP, assumed the powers of President and Chief Marshal Law Administrator (CMLA) and later, (after the adoption of the 1973 constitution), as the elected Prime Minister of Pakistan (Talbot, 2009; Kazimi, 2012).

After the completion of its term, the PPP government held elections in 1976 that were marred by allegations of rigging that resulted in street protests by the opposition parties. While the government was negotiating with the opposition to find a solution to the conflict, General Zia-ul-Haq, Bhutto's hand-picked Chief of Army Staff (COAS), launched operation 'Fair Play' to seize power (Talbot, 2009). Zia-ul-Haq assumed the power of Chief Martial Law Administrator, and then President, while Bhutto was arrested along with scores of political activists. Begum Nusrat Bhutto, wife of Zulfikar Ali Bhutto, filed a writ petition in the Supreme Court challenging the legitimacy of the regime and seeking the release of her husband. Chief Justice Yaqoob Ali Khan admitted the petition and ordered Mr Bhutto be moved from Lahore to Rawalpindi (Shah et al., 2011). This did was not well received by the military regime and under the *Chief Martial Law Administrator's Order Number 6*, issued on 22 September 1977, an amendment was made to the 1973 Constitution stating that the Chief Justice deemed be retired when retirement age is reached even if his (otherwise guaranteed) five-year tenure has not been completed. This resulted in the removal of Chief Justice Yaqoob Ali Khan (ibid.). The Supreme Court was reconstituted as a result and Justice Anwar-ul-Haq assumed the office of the Chief Justice. By decree of the CMLA, all judges of the Supreme and High Courts were ordered to take a fresh (amended) oath of the office which effectively meant accepting the state of martial law. Chief Justice Anwar-ul-Haq in his judgement invoked the 'doctrine of

necessity' (Virk, 2012) referring to the previous judgements by the Supreme Court and declared that the imposition of martial law was 'undoubtedly an extra-constitutional step' but 'the Armed Forces... intervened to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster'; its actions were therefore 'obviously dictated by the highest consideration of State necessity and welfare of the people' (PLD, 1977; Hussain and Khan, 2012). This judgement further empowered General Zia to amend the constitution. Justice Dorab Patel, one of the Supreme Court judges at the time, later noted in his memoirs that the power to amend the constitution was inserted into the judgement by Chief Justice Anwar-ul-Haq by hand, after the original judgement had been signed by all judges (Patel, 2004). General (retired) K. M. Arif (one of the close confidants of General Zia) in his own book later described a meeting between Sharee-ud-Din Pirzada (Zia's Attorney-General) and Chief Justice Anwar-ul-Haq in which the Chief Justice informed Pirzada that the court had decided to validate the imposition of martial law. The Attorney-General inquired whether the power to amend the Constitution had also been granted, to which the Chief Justice replied in the negative. Pirzada then reportedly told ul-Haq that, in that case, the government would have to bring in a new Chief Justice who would agree to grant this power. This incident took place a day before the judgement was announced (Arif, 2001; Shah et al., 2011).

Emboldened by the decisions of the judiciary, the Zia regime charged Mr Bhutto with orchestrating the killing of a political opponent, Nawab Ahmed Khan Kasuri, who had been murdered in March 1974 (Schofield, 1990; Hassan, 2000). Bhutto was, however, released by Justice K. M. A. Samadani, who declared the evidence against him to be contradictory and incomplete. This resulted in the swift removal of Justice Samadani from the bench while

Bhutto was arrested again on the same charges. The case was arraigned before the Lahore High Court instead of the lower court, denying Mr. Bhutto one level of appeal. On 18 March 1978, a five-member bench of the Lahore High Court, headed by one Maulvi Mushtaq Hussain (a known detractor of Bhutto who made no secret of his dislike), sentenced Mr Bhutto to death in a split decision. The trial proceedings were widely criticised and former US Attorney General Ramsey Clark, who attended the trial, called it a 'mock trial' fought in a 'kangaroo court' (Clark, 1978; The Nation, 2008). An appeal against the decision was launched in the Supreme Court. Most of the judges were unwilling to uphold the High Court's decision, so the court was adjourned until the end of July 1978, when one of the reluctant judges was due to retire. Eventually, on 6 February 1979, the Supreme Court issued a guilty verdict and upheld the sentence by a bare 4-to-3 majority. On 4 April 1979, Bhutto was hanged (Schofield, 1990; Hassan, 2000). During the Zia regime, chief justices of High Courts were regularly appointed as the acting governors of their respective provinces, sometimes for long durations. This not only created a new avenue for distributing patronage but also resulted in the mixing of executive functions with the judiciary (as governors had vast executive powers under martial law regulations in absence of elected chief ministers). As acting governors, judges were allowed to import duty-free luxury cars for their personal use, and it was also during this period that allotment of developed land (such as residential plots) by the state to friendly judges at prime real estate locations started (Shah et al., 2011).

General Zia-ul-Haq died in a suspicious plane crash on 17 August 1988, bringing overt military rule to an end; after an election, Benazir Bhutto, daughter of the late Zulfikar Ali Bhutto, was elected as Prime Minister (Yasmeen, 1994). General Zia had, however, made a number of amendments to the Constitution to make it a semi-presidential system, with the president

holding the power to dismiss the elected government and the assemblies (under the infamous Clause 58/2B introduced in the 8<sup>th</sup> amendment). After Zia's death, Ghulam Ishaq Khan, a senior bureaucrat close to the military, assumed the office of President. Through him, the military kept strong control over the nuclear program and military funding and could veto any legislation that it desired (Talbot, 2009). A power struggle thus followed between the President and the Prime Minister. Eventually, Khan dismissed the government of Benazir Bhutto following charges of corruption, nepotism and despotism in November 1990, less than two years after it came to power. This cycle was repeated when President Ghulam Ishaq Khan moved to dismiss Prime Minister Nawaz Sharif, who led the Islamic Democratic Alliance to victory in the 1990 elections (ibid.). Sharif, however, applied to the Supreme Court which, under Chief Justice Nasim Hassan Shah, ruled in his favour and declared that President could only dissolve the parliament if a constitutional breakdown had occurred and that the incompetence or corruption of the government were not valid reasons for dismissal. The political stand-off between the President and the Prime Minister continued, however, despite the reinstatement of Sharif's government (Yasmeen, 1994). Finally, under pressure from the Armed Forces, Sharif agreed to resign on the condition that Khan must also go. In July 1993, both Sharif and Khan resigned.

Fresh elections in October 1993 brought Benazir Bhutto back to power, and she appointed Mr. Farooq Leghari as President (Talbot, 2009). Ms Bhutto had a strained relationship with the military during her second term and even survived an attempted coup d'état from a group of army officers, including a major-general, in 1995. In November 1996, President Leghari used the infamous Clause 58/2 B again to dismiss the government of his own benefactor on corruption charges. His actions were challenged in the Supreme Court, which validated the

dismissal by a 6-to-1 majority vote (Virk, 2012). Nawaz Sharif won the 1997 elections with a two-thirds majority that gave him the numbers to amend the Constitution. He immediately stripped the office of the President of the power to dismiss an elected government and parliament (in the 13th amendment) and also introduced the 14th amendment compelling members of parliament to always vote in favour of substantial legislative bills introduced into parliament by their respective parties. A conflict soon erupted between Sharif and the Chief Justice of the Supreme Court, Justice Sajjad Ali Shah, who was critical of some of the amendments Sharif was making in the Constitution (Talbot, 2009). Justice Shah initiated contempt of court proceedings against Sharif after the Prime Minister criticised Justice Shah in public. Sharif personally appeared in court, but it failed to resolve the conflict. On 30 November 1997, the conflict took an ugly turn when several Cabinet ministers and a large number of Sharif's supporters stormed the Supreme Court, halting and disrupting proceedings. Justice Shah attempted to strike down the 13<sup>th</sup> amendment and restore the President's right to dismiss the government. He also sought help from the military to remove Sharif and to provide Justice Shah with security. The military, however, refused to back him and Justice Shah and President Leghari were both ousted by Sharif, ending the crisis. President Leghari was replaced by Justice (retired) Rafiq Tarar, a Sharif loyalist.

Sharif's relationship with the military was strained after he sacked the Chief of Army Staff, General Jehangir Karamat, over disagreements regarding the latter's desire to constitute a National Security Council for decisions of critical importance (Talbot, 2009). Sharif appointed General Pervez Musharraf as the new Chief of Army Staff, but Musharraf soon launched incursions into the Kargil sector of Kashmir that resulted in a bitter conflict with India. After the retreat of Pakistani forces from the Kargil sector, the mistrust between Sharif (who

claimed that the Army had not sought his permission for any military action) and General Musharraf reached its peak. While General Musharraf was flying back from Sri Lanka, Sharif sacked him and appointed General Zia-ud-Din as the new Army Chief. However, senior military officers moved to arrest Sharif, Zia-ud-Din and prominent leaders of his party, launching another coup d'état. When General Musharraf landed in Pakistan, he assumed the title of Chief Executive. The Constitution was suspended and a Provisional Constitution Order (PCO) was promulgated, which restricted the writ jurisdiction of Superior Courts against any act or order of the Chief Executive or his representatives (Behuria, 2009). Judges were asked to take a fresh oath under the PCO in an order called *Oath of Office (Judges) Order, 2000*. The then-Chief Justice of Pakistan, Saeeduzzaman Siddiqui, and five other judges of the Supreme Court refused to take the oath and were duly discharged. Those who took the oath were retained and Justice Irshad Hasan Khan, being the most senior among the remaining judges, was appointed the Chief Justice of Pakistan. Seven judges of various High Courts were not offered the new oath and were therefore removed from the bench (Behuria, 2009).

The reconstituted Supreme Court took up the writ petition by Syed Zafar Ali Shah, member of the deposed parliament that challenged the legality of the October 12 actions by General Musharraf and his commanders (Hussain and Khan, 2012). A twelve-judge bench heard the case and ruled that the step taken by General Musharraf was valid because it was motivated by the doctrine of state necessity (PLD, 2000; Virk, 2012). The court allowed General Musharraf to continue as the (self-proclaimed) Chief Executive of Pakistan and noted that 'Since in particular, he is performing the functions of the Prime Minister, he holds the position of Chief Executive in the scheme of the constitution and the criticism on this aspect is uncalled for' (PLD, 1999). The court also conferred upon the Chief Executive powers to amend the

Constitution in line with and in order to achieve his objective declared through his speeches after assuming the office, and granted him three years to take the country back into a democratic process. One of the judges who took the oath under the PCO and was also part of the bench that ruled on the Zafar Ali Shah case was Justice Iftikhar Muhammad Chaudhry.

Up to this time, the judges in the superior courts in Pakistan had been unable to articulate shared institutional interests and act collectively to resist other institutions' incursions into their domain, incursions that undermined their prestige as well as their independence. On a number of occasions, judges known for being upright and incorruptible were removed arbitrarily by the military regimes by simply not inviting them to take a new oath. At times, judges were humiliated and 'arm twisted' to obtain favourable judgements; some preferred to sacrifice their prestigious service on the altar of their conscience, while others complied to protect their perks and privileges.

### **3.4 Judicial Ascent to Power: Post Lawyers' Movement Era**

After the restoration of the judiciary as a result of a successful Lawyers Movement, that judiciary understandably took a harsh stance against the elected PPP government for its reluctance to reinstate the deposed judges and even went on to sack the Prime Minister, Yousuf Raza Gillani, for contempt of court. It also repeatedly, through its judgements and observations, made clear that no extra-constitutional action by the military would be tolerated. In July 2009, a bench comprising fourteen Supreme Court Judges issued a landmark judgement that declared the proclamation of emergency, *Provisional Constitutional Order (PCO)*, laws, constitutional amendments and all other orders and actions issued by Musharraf during the period of emergency unconstitutional and void *ab initio*. It reiterated its order,

issued on the day the state of emergency was proclaimed, restraining government officials from its implementation, and it nullified the validation of emergency by the Dogar Court (headed by Justice Dogar who was appointed Chief Justice of Pakistan after taking oath under the PCO). The court also invalidated all judicial appointments made since the proclamation of emergency, including those by the PPP government. Over 100 judges were affected by this order and those who took oath under PCO, including Justice Dogar, were sent to the Supreme Judicial Council to be tried for contempt of court. However, the elections and the orders of these judges pertaining to non-constitutional affairs were deemed valid. The Supreme Judicial Council also amended the code of conduct for judges to state:

No Judge of the superior judiciary shall render support in any manner whatsoever, including taking or administering oath in violation of the oath, of office prescribed in the Third Schedule to the Constitution, to any authority that acquires power otherwise than through the modes envisaged by the Constitution of Pakistan (SC, 2009).

Since that time the judiciary has continued to take up cases and give decisions that challenge the establishment in the political arena. In an historic judgement in the Asghar Khan case, which had been buried in the long list of cases waiting for 16 years to be heard, the Supreme Court in October 2012 agreed with the petitioner that the 1990 elections were rigged by the intelligence agencies and ordered legal proceedings to be initiated against the former Chief of Army Staff, General Mirza Aslam Beg, and the former Chief of ISI, General Asad Durrani (Dawn, 2012). The court also continued to take up cases of missing people from Baluchistan and succeeded in getting some of these people freed from the custody of intelligence agencies. The majority of these, however, remain missing and many judgements by the court in these case ae yet to be implemented; nonetheless, the Supreme Court has played a key role in keeping the issue of missing people alive in the national discourse (Dawn, 2013). A

number of other provisions added to the constitution by Musharraf, such as the requirement of being a graduate to stand for election and a restriction on third terms for prime ministers, were also done away with by the judiciary, ushering an era where the institution's loyalty cannot be taken for granted by any political actor.

The most telling evidence of increased *de jure* and *de facto* judicial independence comes from the saga of proposed changes by the politicians in the judicial appointments procedure. The ruling in the *Al-Jehad Case* in 1996 had given judges of the higher judiciary complete control over appointment of judges in both the superior and the lower judiciary. Attempts were made by the legislature to reverse this and include parliamentary oversight of the appointment process. A consensus evolved among political parties during deliberations on the 18<sup>th</sup> Amendment Bill, which sought changes in a large number of constitutional provisions ranging from curtailing the powers of the office of President (a legacy of the Musharraf era) to enhanced parliamentary oversight of the process of judicial appointments. The 18<sup>th</sup> Amendment, passed almost unanimously in the parliament, envisaged two forums for the appointment of judges. First was the Judicial Commission, headed by the Chief Justice of Pakistan and comprising two senior judges of the Supreme Court, Chief Justices and two senior judges of the High Courts, the Attorney-General, federal and provincial law ministers and representatives of the federal and provincial bar councils. The Judicial Commission was given the task of nominating judges for each vacancy and forward its recommendations to the second forum, the Parliamentary Committee for confirmation. This committee comprised eight members split equally between Treasury and Opposition benches, with half from the upper and half from lower house. All names confirmed by the Parliamentary Committee were to be forwarded to the President via the Prime Minister for appointment. The Amendment

was challenged before the Supreme Court which, in an unprecedented move, admitted the petition for hearing before the full court. This in itself, along with the remarks of various judges and the prevalent mood in the courtroom, made it clear that judges were intent on keeping absolute control of the process of judicial appointments even if they had to invoke the doctrine of 'basic structure' of the Constitution and strike down a constitutional amendment. Although it remains controversial, the basic structure doctrine has been used in some countries, including India, to prevent the legislature altering basic features of the constitution, thus giving the judiciary power not only of interpreting the constitution, but also of approving or disproving its provisions in accordance with its understand of their conformity with its basic structure. It was obvious during the proceedings that the court considered judicial independence as the central plank of the 'basic structure' and changes in judicial appointments procedure as a violation of this. However, after much posturing the government and the judges reached an understanding and the court refrained from striking down the amendment, instead referring the matter back to parliament with the following opinion (PLD 2010 SC 1165):

We had two options; either to decide all these petitions forthwith or to solicit, in the first instance, the collective wisdom of the chosen representatives of the people by referring the matter for re-consideration. In adopting the latter course, we are persuaded primarily by the fact that institutions may have different roles to play, but they have common goals to pursue in accord with their constitutional mandate.

The statement above is telling because it established, for the first time in the history of Pakistan, that the court had the power to adjudicate on a constitutional amendment and that it would not hesitate in doing so if the parliament did not comply with its directions. Judges suggested two substantial changes to the appointment procedure. First, the number of senior

judges on the Judicial Committee was increased from two to four. Second, if the Parliamentary Committee had objections to the recommendations of the Judicial Committee, it had to provide detailed reasoning and refer the matter back to Judicial Committee which, if it was not satisfied with the objections, could reiterate its original recommendations; moreover, these would now be binding and routed directly to the President, who was bound to make appointments in accordance to them. The parliament duly obliged and passed the 19<sup>th</sup> Amendment incorporating the judges' suggestions.

The Supreme Court went on to further limit the nature of objections that the Parliamentary Committee could raise regarding recommended appointments, ruling in the *Munir Hussain Bhatti* case that 'the technical evaluation of a person's calibre as a judge has to be made by the Judicial Commission' and that the Parliamentary Committee can only 'reject the nomination on the grounds falling within its domain for very strong reason which shall be justiciable'. The requirement that any objections to be 'justiciable' meant that, ultimately, the Supreme Court holds complete control over the process, being the final authority to adjudicate whether an objection is justiciable or not. Furthermore, interpreting the 19<sup>th</sup> Amendment, the Judicial Committee formulated the *Judicial Commission of Pakistan Rules 2010* (JCPR), which gave the power to initiate the nomination process to the Chief Justice of Pakistan alone. This means that only the Chief Justice has the power to nominate judges for appointments while other members of Judicial Committee can only agree or disagree.

The role of the Chief Justice in this increasingly powerful judiciary in the post-Lawyers' Movement era indicates that, rather than being the nominal head of the Supreme Court (a position described in the constitution as the first among many), the role has become that of exclusive and undisputed leader of the judges. The repeated experiences during the (mostly

military but at times civilian) regimes that attempted to undermine the judiciary, in particular the most recent attempts by General Musharraf, have taught judges to stick together and present a united front. Since the reinstatement of higher judiciary, therefore, there have been hardly any dissenting opinion on numerous cases of political significance disposed by the higher judiciary. The sweeping judgement in the PCO Judges case established a strong precedent as a deterrent against future judges validating extra-constitutional measures, but it also created a homogeneous court. The judges have subsequently consolidated their sovereignty over judicial matters, even, at the retirement of Justice Iftikhar Chaudhry, providing a list of successors as future Chief Justices of Pakistan covering the next ten years. Such unprecedented actions from the judges demonstrate that the higher judiciary is fully committed to preserving its newfound judicial independence and is willing to go to any lengths in achieving this.

### **3.5 Conclusion**

In the seven decades since its creation, Pakistan has seen a number of cycles of military rule followed by weak civilian governments described by Hussain Haqqani (2005) as 'military rule by other means'. The judiciary has played a central role in allowing the military and its allies to entrench their power, creating a perpetual institutional imbalance that has undermined Pakistan's nascent representative institutions. On each occasion that the military seized power the judiciary validated its actions, resulting in legal precedents that preserve the military's dominant role in politics. Even during periods of civilian rule, the judiciary has played a role in facilitating continued military influence. There is, however, an emerging divergent trend since 2005, which has seen the judiciary openly challenge the establishment and consistently rule against its wishes. This deviation is not limited to a single charismatic

leader, such as Justice Iftikhar Chaudhry; as the combined behaviour of the judges demonstrates, it has much deeper roots within the institution and among the society at large. Thus, the majority of the judges refused to take oath under the PCO and validate the imposition of emergency rule by General Musharraf in 2007. Lawyers, media and other segments of the society took to the street and succeeded in having the judges reinstated by sheer 'people's power'. For the first time, judges who took oath under the PCO were sacked and some even tried for contempt of court. A number of rulings were given to institutionalise this shift in Pakistan's legal trajectory, including amendments to the judges' code of conduct and the historic judgement in the PCO Judges case that, in Justice Chaudhry's words, 'buried the doctrine of state necessity once and for all' (The Nation, 2009). The superior judiciary seems to have created a state of judicial independence by exhibiting greater autonomy and wielding considerable influence. Also, a number of laws and procedures governing judges' appointment, transfer, removal and privileges were revised through judgements in critical petitions and the use of judges' power of judicial review and their role as interpreter of constitution.

The current transition to civilian rule in Pakistan has involved unprecedented institutional and political transformation, changes that diverge from long-held views about the country's perpetual state of crisis and looming risk of failure. These transformations provide a glimmer of hope that a strong foundation can be laid for democratic rule and constitutionalism. The way forward, however, is not without its risks and fears of a return to authoritarianism will always remain. Achieving the desired outcomes with respect to democracy, fundamental rights, constitutionalism and the rule of law ultimately depends on sustained and effective challenge to the entrenched status quo maintained by a dominant establishment and will

need to be supported by key actors, including the judiciary. Since the judiciary is itself embedded within a particular political, institutional and social context, a deeper and more holistic understanding of the shifting contextual realities is required. There is no doubt, however, that given the historic weakness of Pakistan's representative institutions and their continued vulnerability to the establishment and its antidemocratic narrative, the judiciary will be tested in maintaining the fine balance between judicial activism and judicial restraint needed for the democratic process to continue. In many ways, it has emerged as a crucial power broker and a power centre in its own right in the murky world of Pakistani politics.

It is important to note that, since the events described above, the judiciary has attempted to draw its legitimacy directly from the people, building a pro-people image and constantly taking up issues of public concern (Waseem, 2012; Kalhan, 2013). This has resulted in its meddling in the executive domain as well as considerably increasing its sphere of influence. By successfully keeping mainstream public opinion in its favour, the judiciary has been able to carve out considerable political space for itself. This also means, however, that instead of strictly considering the technical and legal merit of the cases before it, the political fallout of its judgements also became a key consideration, and the court at large has assumed for itself a role in articulating and fulfilling the aspirations of the people. It is important to further scrutinise the issues that the courts have taken up mostly using their *suo motu* powers, and which segments of the society have been the major beneficiaries of this judicial activism. Articulation of some of the issues (and the judiciary's stance on them), such as corruption, accountability, mismanagement, abuse of power and selective application of morality, reveals a middle-class bias. It is, therefore, also important to understand the class basis of the higher judiciary itself, along with that of other institutions such as the media, emerging political

parties and even the military, to better understand the deeper changes at the social level that manifest themselves in a hyper-active judiciary. Lastly, the proximate driver of judicial resurgence appears to be the Lawyers' Movement, which was identified in this chapter as the central event that powered significant changes in judicial behaviour leading to greater independence. It is important, therefore, to explore in greater detail the structure, composition, sources of funding and narrative of the Lawyers' Movement to understand the extent of support for an independent judiciary in Pakistani society.

The next three chapters, draw on empirical data collected for this thesis along with the secondary data to analyse the key socio-economic transformations that created fertile ground for judicial resurgence to take place (Chapter 4), the changing class composition and the outlook, world view and tactics of higher judiciary (Chapter 5) and the culmination of the both into an unprecedented popular movement that provides the most compelling evidence for a paradigm shift in the institution (Chapter 6). Finally, Chapter 7 will summarise the key findings of the thesis, propose direction for future research and conclude the thesis.

## Chapter 4: EFFECTS OF SOCIAL TRANSFORMATIONS

### 4.1 Introduction

Chapter 3 discussed the contrast between a pre-2005 submissive judiciary and the post 2005 assertive judiciary. This chapter builds on this to analyse key underlying structural changes that have created favourable conditions (antecedent factors) for the judiciary to assert during the last decade or so. The chapter argues that the emergence of a sizable urbanised middle class, its penetration in and the alliance with the higher judiciary resulted in the judicial empowerment. The chapter therefore consists of two parts. The first establishes the key socio-economic changes that have taken place in the country and the second explains how these affected the legal fraternity.

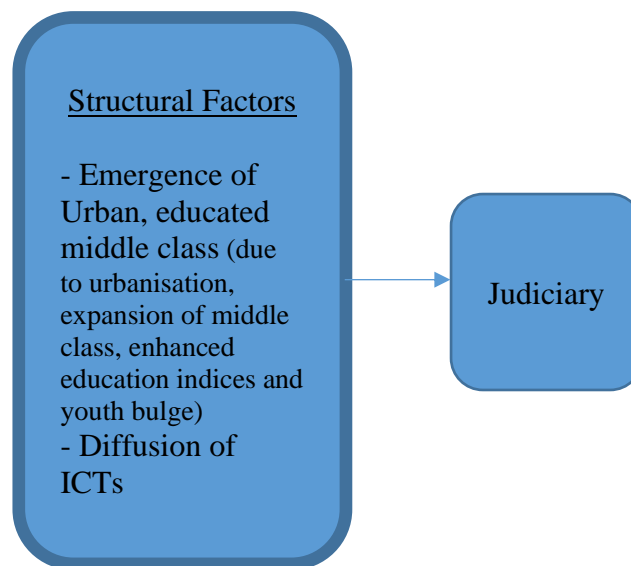


Figure 4.1: Component of the argument (fig. 2.2) discussed in this chapter

This chapter focuses on the 'structural changes' shown in the argument presented in section 2.6 (and highlighted in figure 4.1 above). It is important to explore if indeed there are ongoing

social undercurrents that affect institutions such as the judiciary. This will help expand the current debate on judicial empowerment and add further independent variables that explain it. Next section provides a brief overview of the evolution of political system in Pakistan within which the judiciary operates. This is followed by the analysis of social trends such as rampant urbanisation, middle class expansion, enhanced education levels, youth bulge and the diffusion of ICTs. The final section discusses the affects of these on the legal field as well as their implications for the politics in the country.

## **4.2 Evolution of Political System in Pakistan**

The judiciary in Pakistan operates in a political environment shaped, throughout a history spanning millennia, by the caste, tribe and ethnic identities that played major role in determining an individual's place in the society. The modern state structure in Pakistan, however, has its roots in the colonial period, when institutions such as bureaucracy, the judiciary and the military were established along modern lines. The British also significantly altered social life in the Indian subcontinent. In pre-British India, the state mattered little in the daily lives of village communities, which were effectively autonomous and regulated their affairs through primeval institutions of village councils and where caste or position in the tribal hierarchy defined the role of community members (Kaviraj, 2005). It was during British rule that role of the state in ordering social life in general increased. Dispute resolution and contract enforcement became the responsibility of the state, as represented by police, courts and the administrative apparatus. The integration of the Indian subcontinent into the imperial economy significantly altered the role of local actors. 'Landholders', for example, in a short span of time transformed into 'landowners', not through a slow, organic economic change but due to the largesse of the state (Saberwal, 1986). In short, the state was responsible for

many processes of class formation alien to pre-colonial Indian society and resulted in what is termed as an 'over-developed state' in an 'under-developed society', a legacy that in the view of many scholars remains true of Pakistan even today (Alavi, 1972).

During the British colonial period, private ownership of land and relocation of millions of people to 'canal colonies' led to the emergence of a feudal society wherein land became the primary distinction between various sections of the society (Kaviraj, 2005). Since independence, the landed aristocracy has been a willing partner of the military in sharing power in the country, albeit with the latter being the dominant player. Since the vast majority of the population resided in rural areas and was dependent on agriculture, a patronage-based political system evolved wherein the landed elite provided the masses limited access to the state. The newly independent country had inherited the colonial administration, including a bureaucracy and military that were trained to maintain law and order and to suppress the possibilities of political uprisings rather than to serve the people. The landed elite maintained its dominant presence in the state machinery by ensuring that most of the high state officials including the bureaucrats, military-men, legislators and the judges were recruited from this tiny proportion of the society. The state apparatus was therefore effectively used by the ruling oligarchy to keep politics a domain of the elite. Industrialisation in the 1970s under the military regime of Ayub Khan resulted in high economic growth; however, inequality also rose massively. The emergence of socialism and communism on the global stage inspired many among the lower strata of society, as well as the working class, to launch a movement aimed at removing the Ayub regime from power (Zaidi, 2005). The labourers in the newly emerging industrial sector, as well as the peasants, provided the force that managed to remove Ayub Khan, who handed the reins of the country to his second-in-command, General Yahya Khan

(Khan, 2009). The first elections based on 'one man one vote' were held in 1970 and unexpectedly swept the newly established Pakistan People's Party (PPP) to power in West Pakistan. The PPP was headed by Z. A. Bhutto, a charismatic leader who had served as the foreign minister under the Ayub regime but developed disagreements with and left the government (much to the amusement of the public). Despite being a scion of a landed family, Bhutto's PPP fought the election under the socialist slogan of *roti, kapra aur makan* ('food, clothing and shelter'). Many of the party's leaders were left-leaning intellectuals and student leaders. Surprisingly, the PPP managed to defeat established politicians and went on to form government in the truncated Pakistan, after East Pakistan separated to become independent Bangladesh. The remaining political elite finally succeeded in drafting a constitution for the country, with a consensus that envisaged the country as an 'Islamic Republic' with a federal parliamentary system of governance (Gardezi, 1983). The PPP-led government initiated a process of land reforms and nationalisation of industry; however, its measures were not considered effective enough by its support base. Many of the leaders with a socialist bent left the party after developing differences with Mr. Bhutto, who then reverted to the traditional political elite, transforming the dominant class base of the party leadership. The right-wing parties, especially the religious parties, joined hands to form a formidable opposition and succeeded in achieving considerable concessions, including constitutionally declaring adherents of the Ahmadi/Qadiani sect non-Muslims. In the 1976 elections, the PPP government won a landslide victory, but the opposition cast doubt on the fairness of election and accused the government of massive electoral fraud. It is generally believed that the PPP would have won the election by decisive margin regardless, but there was evidence of electoral malpractice in some constituencies. A massive movement thus emerged against the newly formed government and culminated in another coup that brought General Zia-ul-Haq

to power. By this time, most of the working class that had initially voted the PPP into office had become alienated and the traditional landed elite among the PPP was too divided and fearful of the military to react. Bhutto was thus hanged in what is considered a 'judicial murder' in 1976 (ibid.). The industrial elite and the upper-middle classes despised Bhutto and the PPP and happily aligned themselves with the Zia regime. The new government also found religious parties a willing partner, providing much-needed legitimacy, and went on to successfully break the power of trade unions and peasant associations. Subsequent elections held under the Zia regime on a non-party basis firmly reverted the politics of the caste- and clan-based patronage networks. Patronage-based politics continued throughout the 1990s, culminating in another military coup that installed General Musharraf as the head of the state (Zaidi, 2005).

The limited political process from the late 1980s onwards, however, also resulted in limited competition between the elite, leading to increased demand for 'service delivery' among the electorate. In the absence of local bodies (except for a brief period during the Musharraf regime), development projects in all constituencies remained firmly in the hands of elected members of provincial and national assemblies. Thus, electoral politics is heavily influenced by the perceived ability of the candidates to deliver basic services – for example, the provision of electricity, gas, tapped water, sanitation and communications – along with their ability to provide patronage when it comes to dealing with state institutions such as the police (*thana*), lower courts (*kachehri*) and land registry (*patwari*) as well as public sector employment. This means that a candidate's stance on policy issues and skill in law making have not been important considerations for the electorate. While this empowers the civil and military bureaucracy to maintain its firm grip on policy making and strategic decision making, the

politicians' role remains largely limited to looking after infrastructure in their constituencies and grappling with unending demands from the electorate. Politics today in Pakistan is largely 'post-ideological' and that of 'service delivery', with all political parties vowing to 'serve' the people and compete for better track records in this regard.

### **4.3 Impending Socio-economic Changes**

A number of structural changes are shaping social relations in contemporary Pakistan. The data gathered for this thesis indicate that politics is increasingly becoming urban-centric, as is evident from increasing incidents of urban mobilisation. Although there is a general dearth of literature on these socio-political trends, some recent discussions – such as those initiated by Zaidi (2014) – are beginning to acknowledge them. An academic conference on the changing political economy of Pakistan was organised at Oxford University in 2016 and a volume of these discussions is being edited by McCartney and Zaidi (forthcoming). This follows an earlier conference, in 2014, co-convened by the author and Dr Ishtiaq Ahmad at the same venue. The discussion during this conference has already been published as an edited volume (co-edited by the conveners) titled *Pakistan's Democratic Transition: Change and Persistence* (Ahmed and Rafiq, 2016). There is increasing acknowledgement, therefore, of the impending socio-economic as well as demographic changes and their implications for politics in the country.

The following sections discuss key trends identified from the data on changing social realities in Pakistan, including rampant urbanisation, emergence of a middle class and the youth bulge. They use quantitative data from secondary sources to triangulate the findings of the Focus Group Discussions conducted for this thesis to understand these impending changes. This

allows for the analysis in the rest of the chapter to understand their implications for various institutions including the judiciary and politics in general.

### 4.3.1 Waves of Urbanisation

One of the key trends defining contemporary Pakistan is rampant urbanisation. Pakistan is the sixth-most populous country in the world, with 185 million inhabitants according to the UN Population Division's estimate (Hasan and Raza, 2012). With an annual growth rate of 2.2 per cent, the population is expected to reach 335 million by 2050. The last census held in Pakistan, in 1998, showed that the urban population was around 35 per cent of the total population, with this projected rise to 50 per cent by 2030. Within this urban population, 49.7 per cent is concentrated in six cities of one million-plus people each; in 1951 this was just 17.7 per cent in just one million-plus city (Burki, 2011).

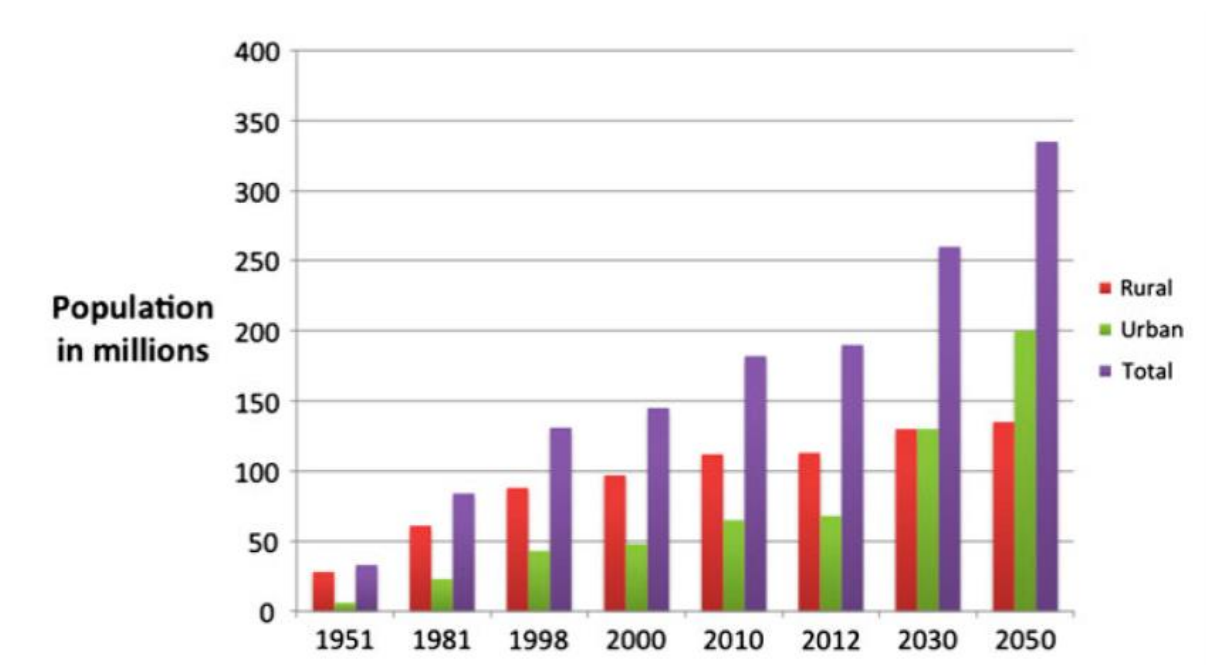


Figure 4.2: Urban, rural and total population in Pakistan

While the largest cities quite clearly continue to grow, another important factor has been the growth of smaller cities and towns of between 500,000 to one million in population. These

towns are expected to more than double in size by 2025, at which point they will account for 11 per cent of the population (Hasan and Raza, 2012). Since 1951, the major urban centres of Karachi and Gujranwala have grown nine-fold, while most of the other cities have grown six-fold. There do exist some regional variations; for example, while nearly half the populations in the most populous Punjab and Sindh provinces are urbanised, the percentage remains lower in Khyber Pakhtunkhwa (16.7 per cent) and Baluchistan (23.89 per cent). Both these provinces are, however, fast catching up with their capital cities of Peshawar and Quetta, expanding almost four-fold between 1981 and 1998.

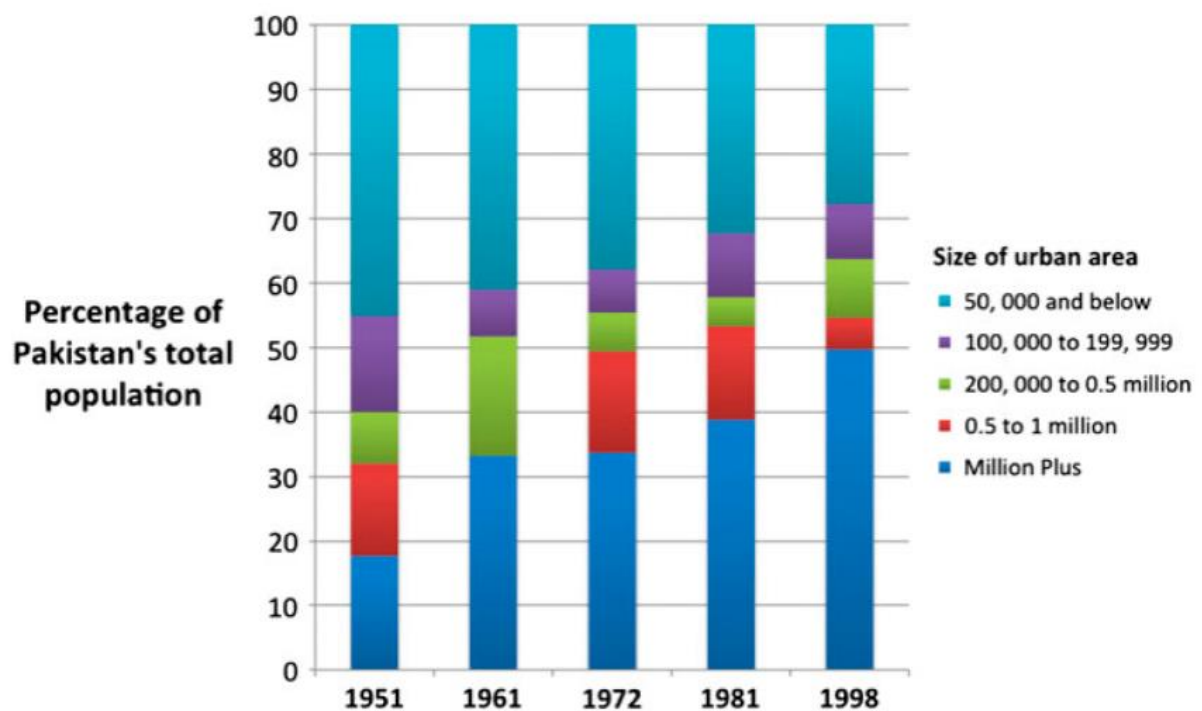


Figure 4.3: Population percentage distribution across urban areas of different sizes

Some scholars have contested these figures (Ali, 2002; Hasan, 2002; Arif, 2003). Based on his pioneering work analyzing census data since 1901 in the areas now included in Pakistan, Reza Ali (2002) identified a major anomaly in these figures. He tracked the definition used for 'urban' areas in censuses held in 1951, 1961 and 1972. On these occasions, urban areas were

defined as those either with a minimum of 5000 inhabitants or having the administrative status of cantonment board, town committee, municipal committee or a municipal corporation. In the 1981 census, however, the definition was changed to only include areas within administrative divisions of municipalities, town and cantonment boards, while the discretion of the census committee to designate areas as 'urban' outside these divisions was removed. This meant that 54 areas defined as urban in 1972 on the basis of population size and other characteristics outside the designated administrative boundaries were, in 1981, re-designated as rural areas. A total of 1,462 areas, each with over 5000 inhabitants, that according to the 1972 definition would have been categorised as urban were designated as rural in 1981. The number of such areas grew to 3961, with a combined population of 31 million, in the 1998 census. The problem with changing definitions is obvious. In most towns and cities, the population has extended far outside administrative boundaries, resulting in gross underestimation of urban population. Based on these statistics, Ali (2002) estimated that the total urban population could be up to 50 per cent in 1999.

The issue of definition, however, is also important because in defining the urban space in Pakistan it assumes all the rest to be rural. In other words, it does not define what is rural in the context of the country. Furthermore, the debate on defining urban space has evolved in last few decades and administrative boundaries and population sizes no longer constitute the only criteria to differentiate the urban from the rural. Lastly, it is questionable whether these categories can be seen as a black-and-white dichotomy. A more nuanced understanding can be gained by conceptualising these as extremes of a gradient, with much falling between the two. Characteristics such as population density, an urban core and proximity are increasingly being used to understand these demographics. Ali (2013) has, therefore, developed new

criteria to define urban and rural areas and goes on to introduce a new category of 'urbanising areas' for those that fall in between. He has defined a settlement of at least 100,000 inhabitants as the urban core. He goes on to suggest that a population density of less than 250 people per square kilometer (/skm), with no town of over 50,000 people and a distance of more than 75 minutes from the urban core, should be considered as rural. Areas within this radius around an urban core, as long as it has a population density of 500 people/skm should be considered as urban. Those falling between he terms 'urbanising' areas. These criteria seem more consistent, and significantly higher, than those used in many countries around the world. Needless to say, this categorisation puts the estimate of urban areas in Pakistan much higher in certain provinces, particularly in Punjab. Combining Ali's criteria with the census categorisation gives the urbanised or urbanising population of Punjab as 73 per cent, Sindh 68 per cent, Khyber Pakhtunkhwa 45 per cent and Baluchistan 24 per cent, as of 1998. In the years since 1998, one can safely assume that the urbanising areas have become vibrant urban spaces and in turn many more urbanising areas have emerged in close proximity to these. Urbanisation has, therefore, meant not only movement from rural to urban areas, but also from the urban areas to rural in the form of changing economic and technological systems that have had an enormous impact on livelihood and behaviour. This has resulted in a substantial increase in mixed rural-urban livelihood systems, where households draw their income not just from rural production but also more distant peri-urban, urban or even international economic systems. This has led to gradual monetisation of the barter-based rural economies and the emergence of consumerism.

Three major factors have influenced the rampant urbanisation in Pakistan since independence. First was the partition of India, leading to the creation of Pakistan. The second

is internal migration and the third the international migration and return of diaspora Pakistanis. Another wave of migration had already occurred in colonial times when peasants from eastern Punjab (now part of India) were relocated to 4.5 million hectares of land that now constitutes Pakistani Punjab (Jan et al., 2008). The partition saw an influx of around 6.5 million Muslims to Pakistan, while 4.5 million Hindus and Sikhs left for India. Most of these immigrants chose to live in the major urban areas, especially those in Punjab and Sindh. Large dwellings had to be divided into multiple smaller houses and informal settlements occupied open spaces. These settlements have expanded over the years and become a regular feature of urban areas in Pakistan. Internal migration from villages to town and cities is another major cause of urbanisation in Pakistan. More than half the rural population in Pakistan is landless and for many migration to the city is the only hedge against wage fluctuations, demand for labour and prices for essential commodities. The improvements in quality of life – due to better health, sanitation and education facilities, social freedoms and job opportunities – also attract citizens to the urban areas (Hasan and Raza, 2012). Lastly, large influx of migrants fuelled by the Soviet invasion of Afghanistan and resulting civil war in that country, along with return of overseas Pakistanis, provide the third major cause of urbanisation. Around 10 million Afghans, mostly Pashtuns (an ethnic group located in both Afghanistan and Pakistan) took refuge in Pakistan. Most of these took up residence in cities due to better work opportunities and the poor living conditions in refugee camps. More than 25 years later, many of these Afghan refugees have settled in Pakistan, despite not being given citizenship, and have generated significant demographic change in the biggest metropolitan city in Pakistan, Karachi, among others.

The 1970s and 1980s saw the migration of over five million labourers, mostly from Kyber Pakhtunkhwa province, to Saudi Arabia (61 per cent), other Gulf states (30 per cent) and the West. This resulted in considerable remittances being received by their families, and gradually many of these families moved to the cities to access better facilities. The Pakistani diaspora has, over time, developed its own understanding of the problems the country faces and have demonstrated on many occasions their willingness to make a contribution. Along with philanthropic aid, the diaspora is also increasingly investing in politics; however, due to its socially and politically conservative character, right-wing parties have been the key beneficiaries. Financial support from the diaspora community, for example, has been a key source of funding for the emerging Pakistan Tehreek-i-Insaf (PTI) headed by cricketer-turned-politician Imran Khan (Mustafa and Sawas, 2013).

A large number of traders' guilds, chambers of commerce and transport unions have emerged at the local level in the urban and peri-urban areas. New forms of patronage networks have been established between the medium-sized enterprises in the manufacturing and service sectors in urban areas that rely on low-wage labour from rural areas. The entrepreneurial class, as well as the salaried middle class comprising professionals with permanent contracts and better work conditions, also emerged and increased in number owing to deregulation and expansion in various industry sectors, particularly service industries such as telecommunications, banking and media. Trader classes in peri-urban areas may have ceded political power to traditional landed or feudal elites in exchange for patronage-based access to state apparatus, this is not on the basis of kinship ties such as caste, tribal affiliations and ethnicity alone (Hasan and Raza, 2010). The ability of the political elite to deliver services has become the primary factor in ensuring them wider public support. Expectations of

infrastructure maintenance (roads, communications, sewerage, water) as well as better health, education and recreational facilities, contract enforcement and conflict resolution, have all become important for the political elite to retain legitimacy and public support.

Concentration of political and economic capital in urban environments is known to expose large sections of the population to mass media, literacy and modern lifestyles (Lipset, 1960; 1981). This leads to the creation of various interest groups as key players in social contestation for political and economic power, which, may at times involve violent or quasi-violent means. This view has led to the development of Political Modernisation Theory (PTM) that attempts to explain interest-group formation. It further claims that as economic complexity increases and interdependencies between these groups grow, violence becomes costly for everyone including the elites, and representative politics emerges as a compromise (Lipset, 1959; Dahl and Tufte, 1973). In a recent study of over 80 developing countries, Anthony and Crenshaw (2014) provide strong evidence that urban concentration and the rise of large cities leads to democratisation. They propose that the distribution of a country's urban population is a key factor that explains why authoritarianism gives way to democracy over time. They therefore attempt to put 'geography' and the country's 'space-economy' at the centre of the theory of democratisation. The authors argue that as cities grow large they provide spaces for concentrating grievances in the form of inequalities and related identities. Furthermore, such spaces provide unique mobilisation resources, such as the presence of national and international media, electronic means of communications and potential allies that are critical for a social movement to emerge. Over time, such a space offers political contenders concentrated and unique sets of resources that help them pose a meaningful challenge to the status quo.

The data gathered for this thesis supports these assertions. The concentration of people and resources in the urban areas played a key role in providing critical mass for Lawyers' Movement to have an impact. Urbanisation was the key process that led to the emergence and politicisation of professional associations, civil society groups and other pressure groups. It allowed for the resources to be pooled together, communications to be streamlined and have significant impact on the public life and working of the government when various forms of public action such as protests were held. Diffusion of technology and media liberalisation brought an information revolution through mobile phones, internet and satellite channels, resulting in quest for completely different lifestyles and aspirations (Rafiq and Gao, 2009). The quest for new life styles, new ideas of citizenship and relationship with the state as well as concentration of grievances when these aspirations were not met provided conducive environment for social movements to emerge. Urbanisation is therefore a key antecedent factor responsible for the emergence and success of Lawyer's Movement in Pakistan.

#### **4.3.2 Emergence of the Middle Class**

The second key demographic shift shaping contemporary Pakistan is the emergence of an expanded middle class. 'Middle class' is one of the most widely used terms in the social sciences, especially in economics, sociology and political science; however, there is no consensus in the literature on its definition. Generally, it is used to describe those in a society who are between, and separate, the rich (upper class) and the poor (lower class). The boundaries between these remain vague, however, and are measured using variety of methods depending on the context in which the terms are used. According to the Marxist tradition, the middle class resides between those who engage in manual labour for survival (the proletariat) and those who own the means of production (the bourgeoisie) and is

sometimes referred to as the petty bourgeoisie. The Weberian tradition, in contrast, locates the middle class at the mid-position on the continuum of wealth, power and prestige.

Recent developments in the world economy, however, have had a far-reaching impact on the classic classification of society into working and capitalist classes. The emergence of the knowledge economy, bolstered by the increasing degree of education, shift to digital communications and improvements in regulatory mechanisms, has resulted in the growth of the service industry, dominated by the white-collar occupations, salaried and self-employed entrepreneurs and professionals. The size, influence and significance of this growing segment of society seems to be increasing. This new professional class is different from the petty bourgeoisie (which comprises shopkeepers and small independent producers) and is increasingly distinguishing itself from other classes due to the skills it possesses and its ability to shape the discourse in public affairs.

It is, therefore, interesting to explore the size and influence of the middle class in Pakistan and the political behaviour it exhibits. This, however, poses the basic question of quantifying this segment of society. Comprehensive studies on the middle class in Pakistan are scarce, so we rely on Dur-e-Nayab's (2011) weighted composite index to estimate the middle class in Pakistan. Generally, the middle class can be measured in relative terms (its position on a scale comprising various indices vis-à-vis other socio-economic groups within same context e.g. a country) or in absolute terms (a strict economic measure based on income, expenditure, assets or a combination of these, normally applied across countries at global level). Dur-e-Nayab, however, uses a combination of relative and absolute approaches to take into consideration economic (e.g. wealth, income and occupation), political (status and power) and sociological (values, beliefs, lifestyle and education) dimensions. The indices used to

segment the population include: Education (to qualify as a member of middle class, at least one individual in the household must have college education), Income (households with an income at least double the poverty line), Housing (ownership of house with availability of electricity, gas and tapped water as well as a reasonable number of persons per room), Lifestyle (ownership of twenty-three consumer items, such as various appliances and a motor vehicle) and Occupation (employment in non-manual occupations).

Table 4.1: Size of different classes through a weighted composite Index in Pakistan (Dur-e-Nayab, 2011:16)

Class	Categorisation for Middle Class <sup>1</sup>	Proportion (%)			Numbers (in Millions) <sup>2</sup>		
		Total	Urban	Rural	Total	Urban	Rural
Lower Lower (LLC)	<i>Vulnerable</i>	41.9	23.6	55.2	83.7	20.1	63.6
Middle Lower (MLC)	<i>Aspirants</i>	23.0	21.8	23.9	41.9	16.4	25.6
Upper Lower (ULC)	<i>Climbers</i>	15.8	20.8	12.3	28.5	15.9	12.6
Lower Middle (LMC)	<i>Fledgling middle class</i>	8.5	12.5	5.7	16.3	9.4	6.8
Middle Middle (MMC)	<i>Hard-core middleclass</i>	4.3	8.1	1.6	6.7	5.2	1.5
Upper Middle (UMC)	<i>Elite middle class</i>	6.0	12.3	1.3	9.5	8.0	1.5
Upper (UC)	<i>Privileged</i>	0.4	0.9	0.1	0.6	0.6	0.0*
Total		100.0	100.0	100.0	187.2	75.6	111.6

The study classified the Pakistani society into Lower Class (with sub-classes including lower-lower (LLC), middle-lower (MLC) and upper lower (ULC)), Middle Class (lower-middle (LMC), middle-middle (MMC) and upper-middle (UMC)) and Upper Class. One can then take either a strict view of the middle class including only the upper, middle and lower middle class, or an expanded view that also includes the upper lower class (ULC) that is normally considered on the verge of entering the middle class with the same/similar life style aspirations and world view. Strict definition of the middle class puts the size of this segment at around 20 per cent of the population (or 32.5 million), while the expanded view increases this to around 35 per cent (or 61 million). Interestingly, in urban areas the middle class ranges between 33 per cent of the population (strict view) and 54 percent (expanded view).

Table 4.2: Percentage and Numbers of Strict and Expanded Middle Class in Pakistan (Dur-e-Nayab, 2011:17)

	Proportion (%)			Numbers (in Millions) <sup>2</sup>		
	Total	Urban	Rural	Total	Urban	Rural
<b>Strict Middle Class</b> (LMC + MMC + UMC)	18.8	32.9	8.6	32.5	22.6	9.8
<b>Expanded Middle Class<sup>1</sup></b> (LMC + MMC+ UMC + ULC)	34.6	53.7	20.9	61.0	38.5	22.4

The Asia Development Bank identifies Pakistan as one of the top five countries in terms of the rate of growth in the middle classes between 1990 and 2008 (Chun 2010). This is supported by the fact that from 2002 to 2011, according to another key study conducted by Ghani (2014), the number of people defined as middle class grew from 38 to 84 million, with a resulting increase of households in this social group from 32 per cent to 52 per cent. During the same period, there was an approximate increase in national consumption in Pakistan of approximately \$60 billion, 90 per cent of which was accounted for by the middle classes (Ghani 2014).

As a foundation for his study into the change in the middle class, Ghani (2014: 4) analysed the information available from the *Pakistan Social and Living Standards Measurement Survey* (PSLM) which is conducted bi-annually by Pakistan's Federal Bureau of Statistics, and focused on the responses from around 16,000 households across the country. According to the World Bank, the living standards measurement (LSM) is a method that has been adopted by over 100 countries globally (Ghani 2014). In analysing the data for households, Ghani (2014: 4) adopted the 'total imputed annual household expenditures' method, a process that had been applied in previous research studies (Bannerjee and Duflo 2008; Ravallion 2009; Chun 2010).

According to Ghani (2014: 4), the main benefit of this methodology, as against using income determinants, is that ‘classifications based on expenditures are considered to provide greater accuracy and allow comparisons across studies’. Furthermore, this methodological approach also took into account non-cash consumption and the variations of expenditures in rural population food expenditures and urban housing rentals.

Although the standard definition of the middle class is based on the PSLM \$2-\$10 per household, in his analysis of the changes in consumption Ghani (2014: 5) sub-divided this further, into lower middle class (LMC = \$2-\$4) and upper middle class (UMC = \$4-\$10%). The results, based on the data analysed, confirmed that in the period reviewed the lower middle class households increased by over 16 per cent and the upper middle class by over 5 per cent.

Figure 1 Pakistan households by class

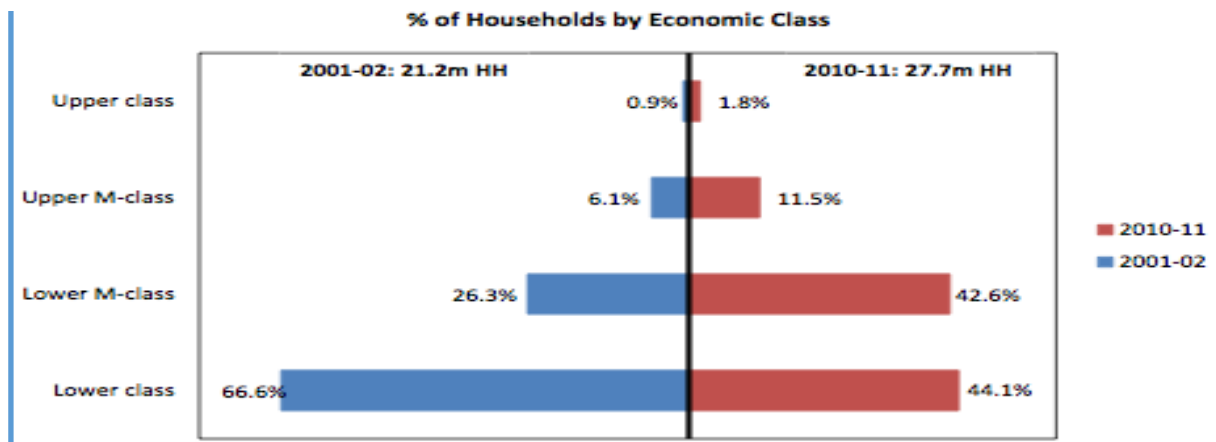


Figure 4.4: Pakistani households by class (Ghani, 2014: 6)

To assess the impact of this change in class structure as it translated into the consumption of durables, Ghani (2014) then measured the change in TV, refrigerator and motorcycle ownership in Pakistan, for which purpose he used the decile approach to analysis. It is clear from the findings presented in the following graphs (see figures 5.3, 5.4 and 5.5, following),

that for each class there has been a marked increase across all of these durables in consumption across the population.

However, it is apparent from the findings that, although the comparative change in terms of TV has remained relatively similar across the deciles, for refrigerators it has widened during the period and for motorcycle ownership there has been a significant increase in the differential between the lower 10 per cent and highest 10 per cent. In this latter case, while the change in this consumption for the two periods for the lowest decile is less than 5 per cent, the change in motorcycle ownership in the highest decile has increased from around 27 per cent to just over 50 per cent. Overall, therefore, these findings serve to confirm that the consumption level gap between the upper and middle classes and the lower class is increasing, particularly in relation to consumption of higher-priced durable products.

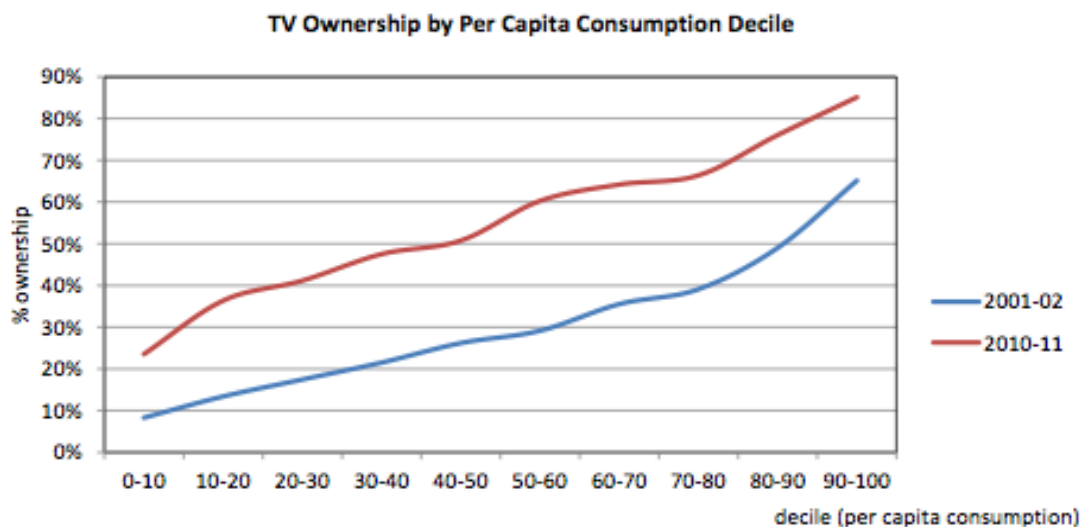


Figure 4.5: TV Ownership by Per Capita Consumption Decile (Ghani, 2014: 7)

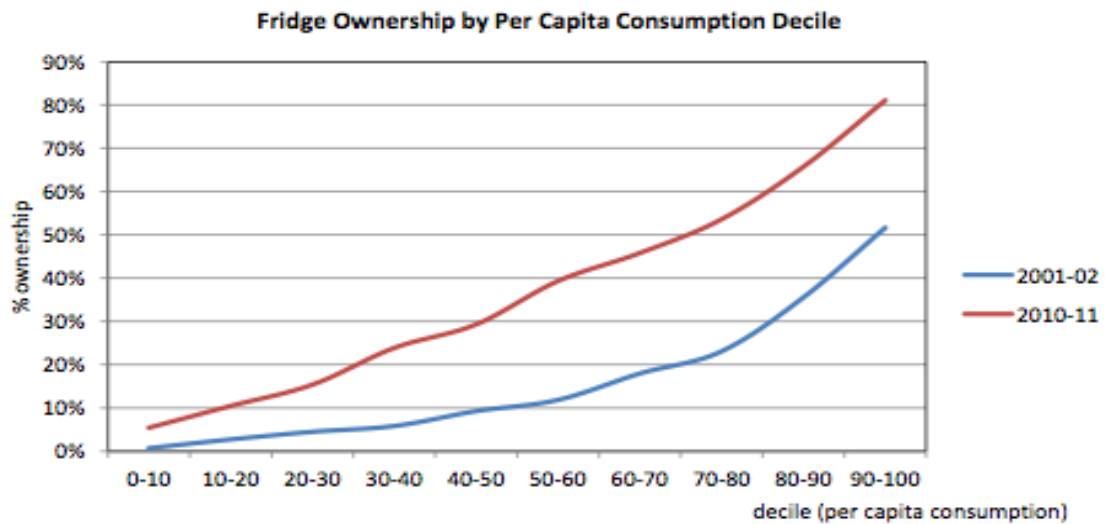


Figure 4.6: Fridge Ownership by Per Capita Consumption Decile (Ghani, 2014: 7)

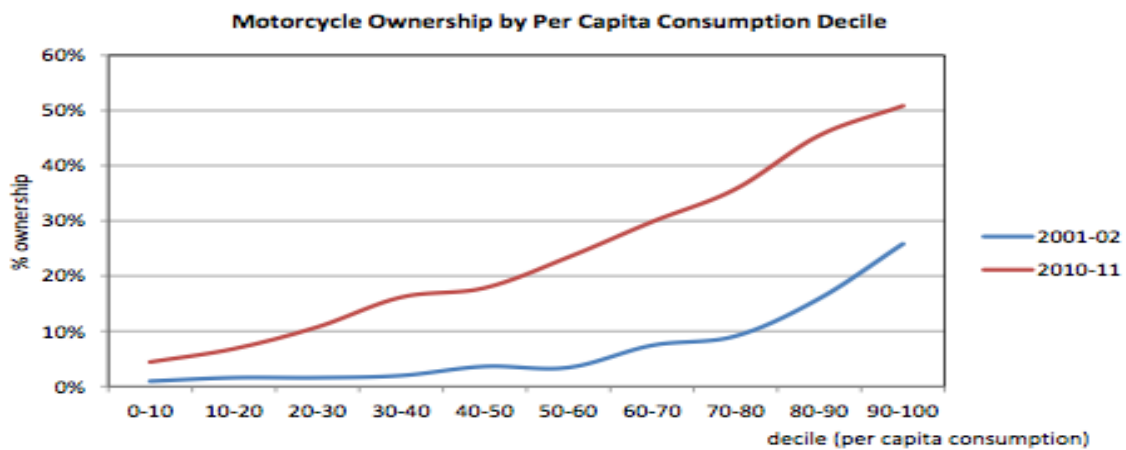


Figure 4.7: Motorcycle Ownership by Per Capita Consumption Decile (Ghani, 2014: 7)

In equating these findings with the national household aggregates (Table 5.3), Ghani’s (2014) analysis confirmed that the middle-class contribution to Pakistan’s total consumption had increased from 44.36 per cent (\$43.3bn) of the total in 2001–2002 to 61.9 per cent (\$98bn) of the total in 2010–2011. There had been similar increases in the middle classes’ contribution to the other economic factors of cash spending, income and assets.

Table 4.3: Household Aggregates (Ghani, 2014: 8)

<b>Table 1:</b>				
<b>National Household Aggregates</b>				
<b>(\$ billions in 2005 \$ PPP)</b>				
	<b>All Pk</b>	<b>All Pk</b>	<b>M-class</b>	<b>M-class</b>
	2001-02	2010-11	2001-02	2010-11
Consumption	97.6	158.3	43.3	98.0
Cash Spending	71.5	120.2	31.9	74.2
Income	85.0	151.6	38.2	96.5
Assets	387.2	772.6	208.1	522.6

However, perhaps the most notable area of change in these findings was in relation to the assets owned by the middle classes. In 2001–2002, the middle classes owned \$208.1bn of the nation’s total assets (53.74 per cent), while in 2010–2011 this had increased to \$522.6bn (71.54 per cent).

In addition to the factors discussed previously, there are, of course, other differentials that exist between the Pakistani middle and lower classes. Not least in this respect is the fact that ‘household expenditures are typically about 60% while income is 80% higher, and wealth is over three times higher’ (Ghani 2014: 9). Furthermore, differences exist in terms of educational levels. According to the research conducted by Ghani (2014), the number of middle class households where at least one person has completed, or is in the process of completing, college education is over five times the number for lower class households. It is apparent that this differential contributes to the higher incomes, as persons within the middle-class households can take advantage of higher paid job opportunities, such as managerial positions. Both Dur-e-Nayab and Ghani, therefore, point to increasing size of the middle class in Pakistan as a key factor shaping the evolving political economy in the country.

As part with the expansion of services sector in general, the practice of law has provided another avenue for social mobility to the middle class. As a result, the judges and lawyers being inducted into legal practice increasingly have middle class origins. The expansion of and access to private education has provided the middle class an opportunity to obtain the qualifications and knowledge required to practice law. This is evident from the expansion in professional legal education (discussed in detail later). Furthermore, the number of middle class students studying law abroad in institutions affiliated with foreign universities has increased. This means that one can expect the middle class to completely dominate the bar and the bench going forward. This transformation in the class origin of the institution is bound to have considerable effects on its behavior. This also creates an intrinsic link between the law practitioners and the wider middle class in the country leading to convergence of views, interests and behavior. This can have profound affect on the legal interpretations, sense of priority and use of legal doctrines by the judiciary.

Classic literature on middle-class development suggests that, because its economic prospects depend more on professional skills and income than on inherited capital, it favours investment in human capital, entrepreneurial activity and democratic development (Moore, 1966; Lipset, 1960; Acemoglu and Zilibotti, 1997; Wietzke and Sumner, 2014). Acemoglu and Robinson (2006) and Boix (2003), for example, draw on the 'median voter model' to suggest that expansion of the middle class increases the chances of political reform, as elites are more likely to share power in the face of a relatively lesser threat (compared to the potential for uprising by the poor masses). This view presents the middle class as a buffer or intermediary between the elites and the poor, resulting in some devolution of power and democratic transition. Evidence of the positive correlation between the emergence of a middle class and

democratisation is, however, sketchy at best. There have been instances where the middle class has sided with the elites, resulting in restricted democracy or dictatorship. Views such as Power-Resource Theory, and those on the history of the rise of the welfare state in the developed world, depict the conflict between capitalist classes and the organised urban working class as the primary driver of social reforms and democratisation (Rueschemeyer et al., 1992; Lindert, 2004). These theories are skeptical about the role of the middle class in political transformation and argue that the middle class essentially seeks its own inclusion in the elite and forms the alliances necessary to achieve this. These views, therefore, emphasise the organisation and unionisation of the working class as the most important developments leading to welfare state models.

This thesis acknowledges the ambivalent behavior of middle class as evident by its pro-military stance during most of the country's history. It does not however rule out divergence of interests between the elite and the middle class and emergence of alliances that lead to political reforms and progress towards liberal democracy at the very least. It further agrees with the likes of Levantoglu (2013) who suggest that if middle class fears uncertain future and potential downward social mobility, it is more willing to demand redistribution through devolution of power and democratisation. Given the security situation in Pakistan, power shortages and political instability, middle class does not trust the ruling elite including the military to steer the course anymore. The focus group discussions clearly showed that the urban middle class is against military rule and wants a seat at the table for itself. Most of the participants were convinced that neither the (corrupt!) elite nor the (illiterate!) poor are suitable for running the business of the state and it must be the prerogative of the (educated!)

middle class to take the reins of the country in its own hands. One of the participants of the FGD argued:

Democracy is a system that *counts* the participants, but does not *weighs* them. How can the vote of an educated person equal to that of an illiterate?

The desire among the middle class for access to power, reshaping distribution of resources and making the ruling elites accountable remains strong. This created the conditions where judicial activism became the symbol of resistance for this segment of the society and led to overwhelming support for judiciary among them. Without this support, judicial activism and Lawyers' Movement did not stand a chance against an all powerful authoritarian regime. Expansion of middle class therefore served as another important antecedent condition that contributed towards increasing judicial independence.

#### **4.3.3 Increase in Education Indices**

Education and the educational system and structure within a country provide the foundation for the development of social class and social changes in any community, as well as influencing its future economic and political direction, and this applies equally to Pakistan. It is, therefore, pertinent here to discuss the rising levels of education among the urbanised middle class and the expansion of the service sector that has created new avenues for upward social mobility over the last couple of decades. The telecommunications, media, banking and finance, insurance, software development, private health and education sectors, as well as the non-governmental development sector, have proliferated, boosting the service industry to the point that it now contributes around 60 per cent of Gross Domestic Product (Ghani, 2014). Agriculture, in contrast, has shrunk considerably, while the manufacturing sector has shown mild growth however both contribute around 20% of the GDP each. Since most of the

service industry is urban-centric and requires a skilled workforce, it is the urban middle class that has been its major beneficiary as well as its driving force. The expansion of private education sector and the class composition of its customer base also provide strong evidence of this phenomenon.

Historically, education in Pakistan was founded on an elitist public school system, which served to maintain the divide that existed between the upper classes and the remaining social groups. Benz (2012: 223) has suggested that one of the adverse impacts of this approach was that, until the late 1990s, 'school education in Pakistan has been in deep crisis ever since Pakistan's independence more than 60 years ago'. Indeed, as the author suggested at the time of his study, from an education aspect, Pakistan was not only one of the weakest countries in relation to educational performance but was also 'characterised by tremendous gender, regional, class-specific and rural-urban disparities in education levels' (ibid). These disparities had increased as a result of the support given to the development of 'a separate sector of elitist English-medium schools that offer top-quality education for high tuition fees' (Benz 2012: 223) by consecutive civilian and military governments.

However, since the latter part of the 1990s, and as a result of increased demands by the lower and middle classes, the educational environment and structure in Pakistan has not only changed significantly, but also become more complex (Ejaza et al., 2012; Shabbir et al., 2015). In addition to the rise in the numbers of religious 'Madrasa' schools (Andrabi et al., 2005), which are attended by a relatively low percentage of Pakistani children, there has been a more dramatic increase in the numbers of non-elitist private schools across the country. For example, in his research into the development of the education sector in Pakistan, Andreas Benz (2008: 335) noted that, in the last two decades of the 20<sup>th</sup> Century, the number of non-

elitist private schools had increased ‘from about 3,300 private schools in 1983 in the four major provinces of the country to more than 32,000 in 2000’. This has led to a situation where ‘the share of private sector enrolments (from primary to the inter-college level) increased from 14% in 1991 to 23% in 1999’ (Bano 2008: 473). More recent research has indicated that the level of private sector enrolments had risen to over a third of all school children towards the end of the first decade in the 21<sup>st</sup> Century (Bano 2008, Ejaza et al., 2012).

Table 4.4: Growth of private and public education institutions in Pakistan

S.No.	Level	Type	1999-2000	2005	2007-08	% of Total in 2007-08	Change since 2000 (%)
1	Primary	Private	14,748	16,911	17,250	11%	17%
		Public	131,779	119,848	139,342	89%	6%
		Total	146,527	136,759	156,592	100%	7%
2	Middle	Private	12,550	24,115	24,847	61%	98%
		Public	12,085	14,334	15,982	39%	32%
		Total	24,635	38,449	40,829	100%	66%
3	High	Private	5,940	13,484	14,053	59%	137%
		Public	8,509	9,471	9,911	41%	17%
		Total	14,449	22,955	23,964	100%	66%
4	Total (1-3)	Private	33,238	54,510	56,150	25%	69%
		Public	152,373	143,653	165,235	75%	8%
		Total	185,611	198,163	221,385	100%	19%
5	Total*	Private	35,889	70,365	73,529	30%	105%
		Public	153,062	147,027	168,659	70%	10%
		Total	188,951	217,392	242,188	100%	28%

The private education sector in Pakistan has continued to expand exponentially over the last decade. This is evident from the number of private schools, which rose by 69 per cent from 1999 to 2008 compared to a mere eight per cent increase in government schools. In 2000, the number of children enrolled in the private schools was around six million; within eight years it had doubled to reach 12 million (equivalent to 34 per cent of total enrolment) and

the trend is expected to have continued beyond 2008. The number of teachers also more than doubled in this period. The expansion of private higher education institutions has been much more remarkable. Between 1999 and 2008, the sector grew by 137 per cent, compared to a paltry 17 per cent in public higher education. Although new private schools in rural areas have outnumbered those in urban areas, much higher enrolment rates in urban areas mean rural schools are smaller in size with limited capacity. Given that the overall household annual expenditure per pupil is higher in the private institutions compared to public sector, it can safely be deduced that the upper lower and middle class segments of society are the main drivers and beneficiaries of the rise in private educational institutions. This means a significant increase in the number of educated middle-class urbanites compared to any other era in the history of Pakistan.

The rise of private educational institutions has been encouraged by the liberalisation of the sector by the Pakistan government, which had neither the will nor sufficient financial resources to satisfy the increasing demands of the middle classes for changes to be made in this sector (Bano, 2008). However, it is doubtful whether, at the time, they had considered, or indeed even envisaged, the impact this policy change was likely to have on the continued expansion of the middle class in Pakistan and, perhaps more importantly, the changes in attitudes and demands of this social class regarding the type of social and political governance they would consider acceptable. As indicated earlier, increased access to knowledge through education can have an impact on the attitudes of the student populace towards social norms and political structures, particularly if they consider current governance not to be attuned to their needs and demands. Access to knowledge and an evolved world view is, therefore, likely to contribute to the type of social class rebellion against the political elite in Pakistan that has

caused so much concern to the US administration in recent years (Dormandy, 2015). Nonetheless, although one could support the fundamental aspects of this argument as it relates to education, it can be argued that it is the process and medium through which this knowledge and information is gained that has provided the inspiration for the recent changes in attitude towards political governance in Pakistan. In this respect, as discussed in the section 4.5, the development of new media channels, as a means of improving the communication of knowledge and data, has played a critical and central role in the driving the demands of the Pakistani middle classes.

#### **4.3.4 Youth Bulge**

The third key demographic change shaping contemporary Pakistan is the Youth Bulge. Unabated population growth rate has resulted in large number of young people in Pakistan. The population doubled between 1975 and 2005, while the median age fell to 21 years, with 60 per cent of the population being under 30 years of age (Farooq et al., 2014). Reading these numbers along with the increasing size of the urban population, as well as that of the middle class, one can safely argue that a large urban, educated middle class has emerged with a significant proportion of second generation and young urbanites. This represents a significant change in the political economy of the country and has far reaching implications in a number of socio-economic fields.

It is clear from the data that the rise in the involvement of the middle classes in the political structure of Pakistan has been further fuelled by changes in youth demographics in Pakistan. Recent studies tend to suggest that it is this segment of the populace that has taken the lead in precipitating the middle classes change in the attitudes towards political involvement (Iqbal, 2012). Education results in the gaining of learning and knowledge, which increases the

ability of students to develop a greater understanding of their social environment. More importantly, education sharpens their ability to question the value and appropriateness of the social norms and political policies that determine their behaviour and position in society (Soomro et al., 2015).

The extent to which change in attitudes occur is affected by the student's access to relevant knowledge and information. In recent decades, the development of the Internet and the expansion of its usage across global borders has served to provide students in developing countries with an increasing understanding of politics and the effect of varied political structures (Soomro et al., 2015). With increased access to modern Internet technology in Pakistan, access to world-view knowledge has become more accessible. The result has been that, according to research conducted by Soomro et al. (2015), currently over half of Pakistani youths use the internet to access political information and data on a regular basis, while many others also use this medium on a more infrequent basis (Soomro et al., 2015).

The participants of the FGDs conducted for this thesis represented the urban educated middle class youth. The data show that the vast majority of these took a keen interest in discussing various socio-political issues and held strong opinions on a range of problems that they thought the country faced. Importantly, they identified lack of political participation as one of the key problems and advocated more youth participation in the political process. Many pinned their hopes on the youth and opined that the country's future hinges on the ability of its youth to overcome these challenges. The participants confirmed that they rely primarily on television, followed by internet/social media, to access news and information about current affairs. Many read newspapers, accessing online editions either regularly or when prompted by a shared linked on their social media profile. Many participants confirmed their

participation in political process either as a voter or supporter of a particular political party and some had even participated in some form of political action. The majority of the participants expressed their frustration with the lack of good governance and opportunities; however most also favoured continuation of existing political processes and incremental change.

These findings can be corroborated from secondary data on the changing political behaviour of Pakistani youth. A recent study by Iqbal (2012) sought to examine recent changes in Pakistani youth attitudes towards politics and political engagement. For the purpose of the study, Iqbal based his population selection on the prevailing Pakistani demographic statistical standards, which indicated that, 'in Pakistan, the people from 15–29 are considered as Pakistani youth' (Iqbal 2012: 375). As of 2009, this segment represented 27 per cent of the total population, of which 63 per cent are considered to be literate and 49 per cent are actively participating in the workforce. Using these demographics as a foundation and guide for his research, Iqbal (2012: 375) conducted a survey of university students, the aim of which was to gain 'understanding of their ideals, interests, and major concerns towards [the] current political situation and future of Pakistan politics' A quantitative methodology approach, using a self-administered survey questionnaire, was adopted for the study. A sample population of 178 students from the University of Sargodha, with 50 per cent selected from the Social Sciences and Natural Sciences departments, was used (Iqbal 2012: 378). Iqbal's (2012) survey comprised a total of 13 questions, which, being posed as statements, required the participants to respond according a choice presented in the five-part Likert scale, the answer to which ranged from 'strongly agree' to 'strongly disagree'.

From a review of the statements presented in the survey questionnaire, it was apparent that these were set to cover a range of political issues and concerns that were deemed to be directly applicable to Pakistani student youth. Most importantly, the findings confirmed that not only did a high percentage of the students signify an interest in politics, but also a significant percentage was 'agreed that their vote could bring a change in political set up' and that 'it is the duty of every citizen to cast his/her vote' (Iqbal 2012: 380).

However, the findings of the Iqbal (2012) study also showed that there was a deep level of youth mistrust regarding their current political leaders. An overwhelming majority of the participants considered that 'politicians are not interested in people's opinions' (Iqbal 2012: 380), which is why eight out of 10 students would not consider joining any of the current political parties. Consequently, it was perhaps not surprising to find that a total of 77 per cent of the participants agreed with the statement that the 'Pakistani nation badly needs a visionary leader who could save the country' (Iqbal 2012: 379).

Iqbal's (2012) study could be questioned in terms of both its reliability and generalisability across the young generation of Pakistan. The small sample and the phrasing of some of the statements in the questionnaire could be seen to support this view. However, the fact that the author confirms that the findings are supported by the outcome of previous and subsequent peer studies conducted by Pakistani and external researchers does add to its credibility. Therefore, it can be argued that it is the lack of engagement with the youth of Pakistan by the ruling elite that is helping to fuel public unrest in the country, and has increased the demand for the creation of a more transparent system of governance. As has proven to be the case in other countries, the youth population are often at the forefront of

political activism, as they are not afraid to voice their opinions and opposition publicly to what they consider to be political injustices.

This thesis therefore agrees with literature (e.g. Courbage and Puschmann, 2016; Weber, 2013; Cincota, 2009) that connects the presence of large proportion of educated youth with higher degree of political upheaval. In an article published one year after the May Revolution of 1968 in France, the British historian Lawrence Stone (1969) drew a link between education, demography and politics. He argued that political trouble becomes inevitable in a country when 50% of the young males become literate. In a number of countries in the Middle East and North Africa, the role of educated youth as the driving force behind the protests and revolutions often termed the 'Arab Spring' has been well documented. The FGDs however show that while urban middle class youth in Pakistan has been at the forefront of recent instances of urban mobilization, it does not want the democratic system to be derailed and desires incremental change and reform. As one of the participants expressed:

I do want change, but I do not want to overthrow the system. The democratic system we have at the moment is better than the other options such as dictatorship. It will improve with the passage of time and as more election cycles pass. When the votes of the people will count, the system will improve. System should evolve.

Another Participant stated:

What I would like to see is another democratic transition of power in 2018. It will bring stability to the system and democratic process. And If we are to get change it should come through the parliament and a strong judiciary. If democratic institutions are not stable, change will destabilise the system more.

In any case, active participation of youth in politics since the Lawyers' Movement has created new dynamics for the political players in the country and is increasingly shaping the political realities in the country.

#### **4.4 Hegemony over Narrative**

The location of state power in Pakistan has long been reflected by control over the media. Centralised media control was institutionalised by General Ayub through the *Press and Publication Ordinance* in 1960, which enabled the state to censor and take over media institutions (Yusuf and Shoemaker, 2013). The ordinance was used to convert Progressive Papers Limited (PPL), which published *Imroze*, the *Pakistan Times* and the weekly *Lailo Nihar*, into the National Press Trust media group. The Ayub regime also established a quota system for government advertisements in privately owned print outlets, and restricted distribution in many cases to keep newspapers in check. The state-owned media were expanded by establishing Pakistan Television in 1964, joining Pakistan Radio in perpetuating the government's authority. General Zia-ul-Haq, during his rule (1977–1988), oversaw the strictest form of media control, as well as using it as a tool for his Islamisation project. During the 1990s, the country saw a 'satellite revolution' that helped broadcast independent news via the BBC World Service and CNN and also made a number of Indian channels available to audiences in Pakistan. Pakistan's modern media sector has been just over a decade in the making. In 2002, the Pakistani government, under General Musharraf, liberalised the broadcast media sector, leading to an explosion of local, privately owned satellite television channels distributed via cable networks. Between 2002 and 2010, 89 television channels were launched and 26 foreign channels granted broadcast rights. On the radio front, 138 FM radio

licences were granted during the same period, of which about 115 had become operational by 2012. The Musharraf government also created the Pakistan Electronic Media Regulatory Authority (PEMRA) to regulate this newly liberalised sector.

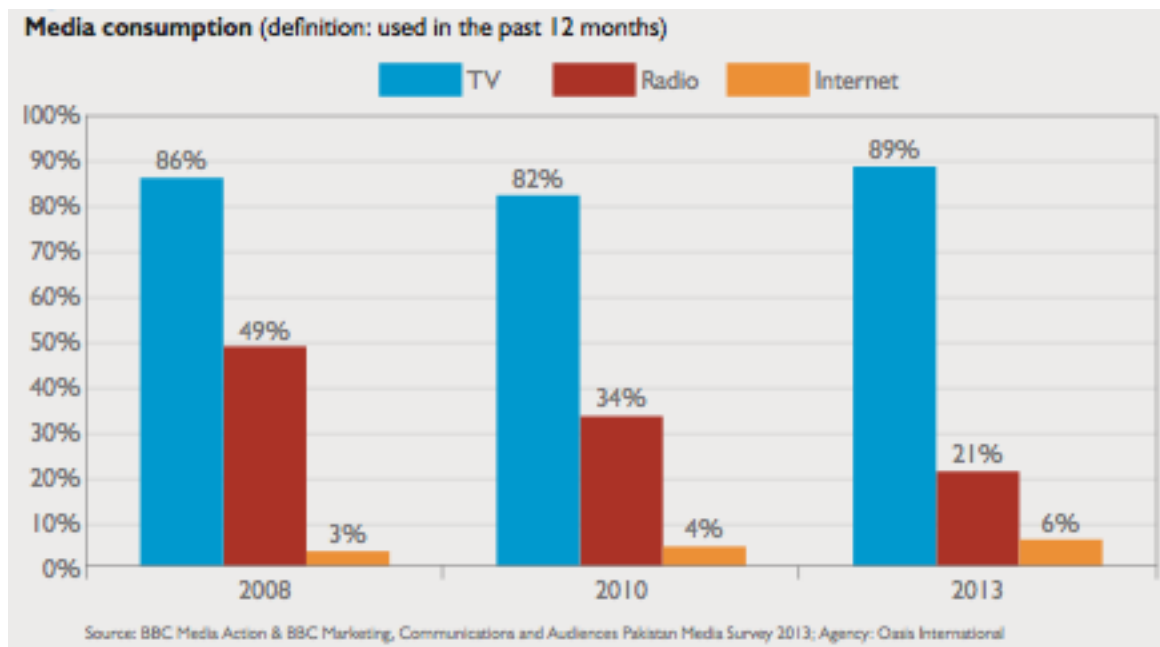


Figure 4.8: Media Consumption 2008-2013

Today, television remains the most popular medium, with PTV being the only terrestrial network along with an expanding cable network. A recent study (Yusuf and Shoemaker, 2013) found access to television to be around the 90 per cent mark. Radio and print media seem to be declining rapidly with the increase in the Internet and mobile subscriber base. While until 2013, only six per cent of the population was estimated to have internet access, this is expected to increase dramatically due to the availability of internet via 3G and 4G mobile networks and wide availability of low-cost smart phones. Most of the mobile users (forming 56 per cent of the country's population) are expected to have access to the Internet through hand-held devices and are expected to consume information through digital networks.

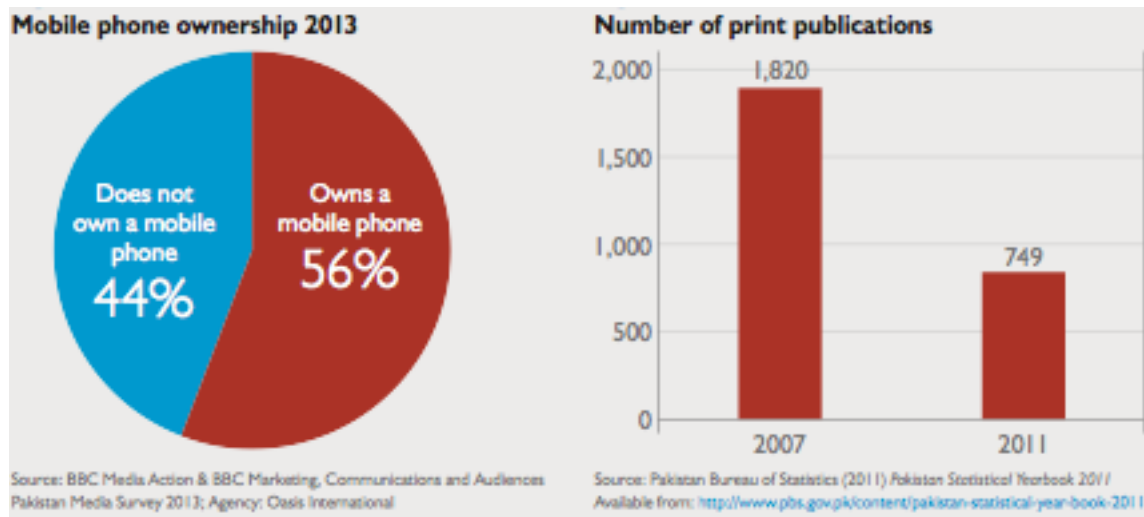


Figure 4.9: Mobile phone ownership and Number of print publications

Scholars have focused on the emergence of a ‘New Media’ that has transformed the communications landscape around the world. There have been various definitions applied to the concept of ‘new media’ as a form of communicating messages (Eijaz 2013), both in relation to the delivery of traditional media news stories and in facilitating discussion regarding these events between members of society. The consensus of opinion is that the term refers to the combination of three important ‘C’ factors: computing and information technology; communications networks; and content on digitised media’ (Eijaz 2013: 114). Flew (2002), in his study of the development of the ‘new media’ suggested an additional ‘C’ be added to this combination, which he defined as ‘convergence’. In support of this extension, Flew argued that the ‘Internet and the World Wide Web is the representative of the convergence of three Cs while cable television and interactive television are related to the convergence of communications network and media content’. In other words, the Internet and modern television media channels serve in combination not only to promote the message related to current news stories and issues of social and political importance to the national and global populace, but at the same time to provide the channels through which these

publics can comment on and discuss the impact of these events on their own attitudes and beliefs (Flew 2002). In the latter context, in relation to the aims and objectives of the current study, it can be posited that the New Media provides public with information and knowledge likely to inspire their demand for social and political change. As Eijaz (2013: 116) observes in referring to previous research in his study, these 'new media tools promote freedom, expedite the process of democratisation and empower activists to fight against despotic regimes', such as those that have historically existed in Pakistan.

Although, the access to, and usage of the new media channels is a relatively new development in Pakistan, it is apparent from the data that its communication benefits have been quickly embraced by the populace (Eijaz 2013). Furthermore, in support of Flew's (2002) communications convergence theory, the public discussion occurring on Internet social media channels are being used by the traditional television and news media as a means of acquiring information and knowledge on which they can base their latest stories. In Pakistan over recent decades, the popularity of involvement in and usage of the Internet social media networks has increased significantly, particularly among the younger generation, predominantly because it provides a freedom of expression previously denied them (Eijaz 2013). Of particular interest to Pakistani youth, in this respect, is that it allows the populace to more openly and rapidly express their views and opinions on political issues and to promote and gain support from the masses for their agenda (ibid).

It is pertinent here to look at some figures of social media usage and user demographics. By the end of 2015, the number of Facebook subscribers in Pakistan had passed 20 million (almost 10 per cent of the population). These include around 15 million male and 4.7 million female subscribers. Around two thirds of these users are under 25 years of age, belong to the

richest 10 per cent of households and are concentrated in urban areas (especially the female users). Thirty per cent of the total online population in Pakistan uses Facebook, including 33 per cent of all mobile users (Qureshi, 2015). Although, as is the case with most social media network users, the majority of subscribers use this medium for personal and recreational purposes, it is also used for discussing social and political issues. This usage is supported by Michael Kugelman (2012) who, in a report prepared for the Norwegian Peacebuilding Resource Centre (NOREF), suggested that social media in this context is used in five different ways, which are equally applicable to its usage by certain factions of the Pakistani middle class. These include communication; 'breaking stories ignored by traditional media; mobilising people for social and other campaigns; promoting and coordinating humanitarian aspects of issues and problems; activism for social causes; and accelerating communication between politicians and their publics' (Eijaz 2013: 117).

In terms of breaking stories ignored by traditional media, in Pakistan social media is increasingly used for the purpose of exposing what are considered to be social injustices, which, due to the dominant influence of the political elite, traditional television media may be reluctant to air and comment on. Similarly, social media has also allowed the Pakistani middle classes, and the youth population, to mobilise support from other members of the populace in a manner that enhances the power of physical and verbal demonstration against what they perceive as political injustices. Indeed, in this respect, along with the Lawyers' Movement, the size of political demonstrations in 2014 against the PML (N) government confirms that social media is being used by Pakistanis as an effective means for engendering support (Eijaz 2013). It is considered that the scale of the disruption caused by these protests, together with the increase in the numbers of protesters attending these demonstrations, adds weight to the

demand for change. Certainly, notwithstanding the isolated cases of violence that have occurred during these events, it is apparent that based on the political move towards democratic elections in recent years, in this respect at least the usage of social media has made a significant contribution.

One must, however, carefully examine the usage of social media and indeed the access to electronic and print media in Pakistan. The figures show that access to information through media has expanded mainly in the middle class and upper lower class, who have become the key consumer market for political content, as is evident from the popularity of political talk shows. Various studies (e.g. Majumdar et al., 2003 and Peshimam, 2013) show that media content, including news, analyses, talk shows and entertainment programmes, has a strong urban bias. In fact, the ratings for these programmes (which are used to attract advertisement revenue) are based on samples drawn heavily from urban centres such as Lahore, Karachi and Islamabad-Rawalpindi. The advertisers are also mostly quick to back content that is more relevant and popular among the urban middle class, which has emerged as the major market for consumer goods and services. It is inevitable, therefore, that the media is largely catering to the urban, middle class sections of the society and is dominated by young, educated professionals who are very much both the products and the beneficiaries of the socio-economic changes discussed in this chapter. It is only natural that the media disproportionately highlights the concerns, predicaments, challenges and issues that affect this section of the society, and thus acts as a powerful platform being used by this section to shape the narrative in Pakistan. Due to its increasing outreach and expansion, the media also serves to portray and disseminate the lifestyle of this segment, which creates a strong demand among the lower strata of Pakistani society for upward mobility and affects the world

view, aspirations and expectations of people still living in rural settings and among the poor sections of society.

Being the active consumers and producers of the content that dominates the print and electronic media, the urban middle class has been able to significantly challenge the traditional political elite, especially the feudal and industrial elite, on a number of critical issues. It has, for example, slowed the process of disintegration of the Federal Higher Education Commission (HEC), which is responsible for awarding the majority of scholarships, including those for higher studies at prominent centres of learning overseas. In debates on the issue, the HEC was defended as a mechanism that provides an important route for upward social mobility and many critics expressed their fears that provincial governments, being more prone to local elite capture, would simply use these scholarships to enhance their existing patronage network with little transparency, accountability or consideration of 'merit' (Bangish, 2011). Another incident that revealed the extent to which the rising middle class has gained the ability to shape narratives and challenge the privileged class is the saga around the murder of Shahzeb Khan in Karachi. Shahzeb had an altercation over his sister's being the subject of 'eve-teasing' (the making of unwanted sexual comments or advances) from one Shahrukh Jatoi, who was accompanied by Siraj Talpur, both scions of two prominent landed aristocrats in Sindh (NR2, 2013). After the incident, Shahrukh and some accomplices traced Shahzeb, the son of a police officer, and murdered him in cold blood. Initially there was an attempt by the local authorities to cover up the incident and the first information report was denied to the victim's family. However, the incident quickly went viral on social media and ignited country-wide outrage against the abuse of power by the wealthy and the impunity that they enjoyed. A legal and political tussle between the two powerful families, attempting

to salvage their own reputation, and a vigorous section of civil society resulted in all four accused being tried and awarded life sentence, and the death penalty for the main accused, after unprecedented events including mass protests and live media coverage of all hearings.

Other incidents have also caused massive uproar through social media and are increasingly helping to limit the power of an elite accustomed to getting its way. These include, for example, an incident in which Rahman Malik, former Interior Minister and prominent leader of the PPP party ruling in Sindh province, was forced to leave a plane after the flight had been delayed for his benefit for around 2 hours (NR, 2014). The video of the incident went viral and the person who raised their voice against the airline, and the exercise of elite privilege, was hailed as a hero. Similarly, Ms Nighat Sheikh, a Member of the National Assembly belonging to the ruling PML (N), slapped a bus hostess for a delay in serving her water. The incident went viral through social and electronic media and the party had to suspend Ms Sheikh's membership (NR3, 2013).

The changing dynamics of Pakistan's film industry are another important indicator of the shifts in production and consumption of media content. A decade ago, the film industry in Pakistan was on the verge of collapsing completely (Paracha, 2013). The decline started in the 1980s with the strict censorship and Islamisation attempts of the Zia regime, which saw various forms of expression, including movies, as potentially dangerous. The exhibition of Indian films (which were extremely popular and provided incentive for Pakistani films to compete for audience share and revenue) had already been banned by General Ayub's regime in 1965. Slowly, with the rise of Video Cassette Players and later DVDs, the middle-class audience switched to indoor forms of entertainment. This key market segment continued to watch Indian and Hollywood movies via pirated CDs and other digital media. Throughout the

1990s, therefore, despite return to democratic rule, the film industry continued to decline and mostly focused on churning out low-budget movies targeted to the working classes with a heavy emphasis on established social stereotypes. Cinemas throughout the country continued to give way to sprawling shopping malls and other commercial buildings now considered more lucrative as the number of films produced dropped dramatically to reach single digits per annum (ibid.).

Starting from 2003, however, with slow progress over the years, young film makers with new set of ideas set about making movies on emerging themes that were relevant to the contemporary realities of the country. Unsurprisingly, the majority of these film makers are themselves from the urban, educated middle class and the content they create is also developed with that market segment in mind. Since the remarkable success of Shoaib Mansoor's *Khuda Ke Liay* ('In the Name of God'), which highlighted creeping religious fundamentalism in Pakistani society, the industry has gone through a revival of sorts. The number of films produced per year has increased, as well as the revenues they are earning. A number of multiplex cinemas have started appearing in all major urban areas in the country, especially in expanding upscale localities such as Defence Housing Societies, Bahria Towns and other similar developments. The ban on Indian movies has also been lifted, pushing Pakistani film makers to compete on the basis of creative ideas and compelling story lines as they still cannot match the financial recourses of Bollywood. The industry has, therefore, in the words of prominent cultural critic Nadeem Paracha, gone through a 'change of guard', with film makers from more modern middle class backgrounds now playing an active role (Paracha, 2013).

The emerging domination of the urban middle class in print and electronic media, including the social media and growing film industry, provides it unprecedented influence over national discourse. It is, therefore, better able than other segments of society to develop a class consciousness, to frame issues in a favourable way and to shape behaviour. The middle class has not only benefitted from the digital divide that deprives the majority of Pakistanis in lower social strata of the benefits of the emerging digital technologies, but has also triumphed over the elite class in the use of these to hold a disproportionate sway over narrative.

#### **4.5 Social Changes and the Legal Fraternity**

The wider social changes analysed in preceding sections have significantly affected the composition, scale, scope and outlook of the legal field. The data collected for this thesis indicate a number of profound changes within the legal fraternity in Pakistan, including the training, practice and status of legal practitioners affecting both the bar (lawyers), and the bench (judges). Research on legal education and practice in Pakistan is extremely scarce and very little quantitative data from secondary sources is available even on the exact numbers of practitioners, graduates and students of law. Therefore, one must rely on the observations, experience and estimates of the interviewees, most of whom have years of experience in teaching and practicing law in the country. Interest in studying and practicing law seems to have grown considerably in Pakistan. The participants of the focus groups (conducted in major urban centres in the country) expressed keen interest in law, even if they were studying other subjects. One of the participants confirmed:

Most of my fellow [undergrad] students at Government College Lahore were interested in Law. Even those who majored in other subjects, chose law as their minor subject.

This is also evident from the increasing numbers of law colleges, a rise in the number of law students and graduates and the growing membership of the bar councils. Mr. Hamid Khan former Supreme Court Bar Association President and prominent lawyer said in his interview for this thesis:

Lawyers' Movement has attracted people to Law profession quite clearly. Number of law colleges and admissions in law degree programmes have increased. Colleges are now over crowded.

The figures available on the Supreme Court website (Khan, 2015) do backup Mr. Khan's statement. There are now 15 government-run institutions of higher education, along with around 70 privately managed affiliate institutions that offer law degrees. A number of other law colleges have also popped up to offer distance-learning degrees from foreign universities, such as the external degree programme of the University of London. Most of the private institutions offering law were established during the last twenty years as a result of the steady rise of private higher education in Pakistan. This is in sharp contrast with the history of neglect of social sciences in the country. Although, government policy continues to prefer the physical sciences (as is evident from the percentage of funds spent on their teaching), the private sector has stepped up to cater to the demand for skills in law, management sciences and the arts and humanities. Despite criticism of the quality of teaching and research in law, and lack of regulatory mechanisms, some efforts have been made by the government since 2005 to better oversee the sector. These culminated in the proposed National University of Law with campuses in all provincial capitals; this was later merged with the proposed upgrade of the National Judicial Academy to the status of university (Siddique, 2014).

Dr Qazilbash, dean of the newly established Law School at Lahore University of Management and Sciences (LUMS), the premier private sector university in the country, stated during his interview for this thesis that job applicants for teaching positions increasingly hold Masters degrees in law. According to him:

A lot of people are being attracted to law studies. People want quality education. More and more people are going for LLM. When we advertise a teaching position, nearly all applicants have an LLM, this was not the case even few years ago.

Moreover, he confirms that a large percentage of applications have obtained their LLM degrees from foreign universities, in particular from the UK and the USA. This is in sharp contrast to the traditional practice, where law was mostly taught by practitioners with multiple years of experience but no post-graduate qualification or expertise in legal theory and research. Also, while there have always been lawyers who were educated at elite foreign institutions, their numbers seem to have increased. Furthermore, while once foreign legal education was limited to the scions of elite families, now students from middle class families are increasingly enrolled at universities abroad. This is especially true for post-graduate courses. The access to foreign legal education through distance-learning programmes has also made such education affordable and accessible to the middle class in Pakistan. This means that more people from diverse backgrounds are entering the legal profession with qualifications from reputable foreign and local universities than ever before. In fact, due to increased rates of return, legal profession has itself become an avenue for upward social mobility for the middle-classes. Even traditional lower paid judicial posts are now attracting more applicants. Dr. Qazilbash notes during his interview for this thesis that:

The salary structure, pensions and perks & privileges of judges increased a lot more than one expected. It now attracts qualified and good lawyers to accept judicial

appointment which is always a good sign.

The total number of lawyers licensed to practice law at all levels is estimated to be around 90,000 (Siddique, 2014). These are associated with hundreds of bar councils and associations spread over all administrative divisions in the country such as tehsils, districts and provinces. Of these, just over 4000 are licensed to practice at the Supreme Court, while around 43,000 each can only practice at high court and district levels (Siddique, 2014). The advocates enrolled at the Pakistan Bar Council, a requirement to practice law at Supreme Court, has seen dramatic increase since 1996 and in particular since 2005. The figures (presented in the graph below) show that compared to the low of 108 advocates enrolled from 1986-1990, there was an almost eight-fold increase in comparable time periods between 2006-2010 and 2011-2015. Given that enrolment as Supreme Court advocate requires a minimum of 10 years' experience of practicing law at High Court level, it can be safely assumed that there has been a proportionate rise in the number of lawyers at all levels of judicial system.

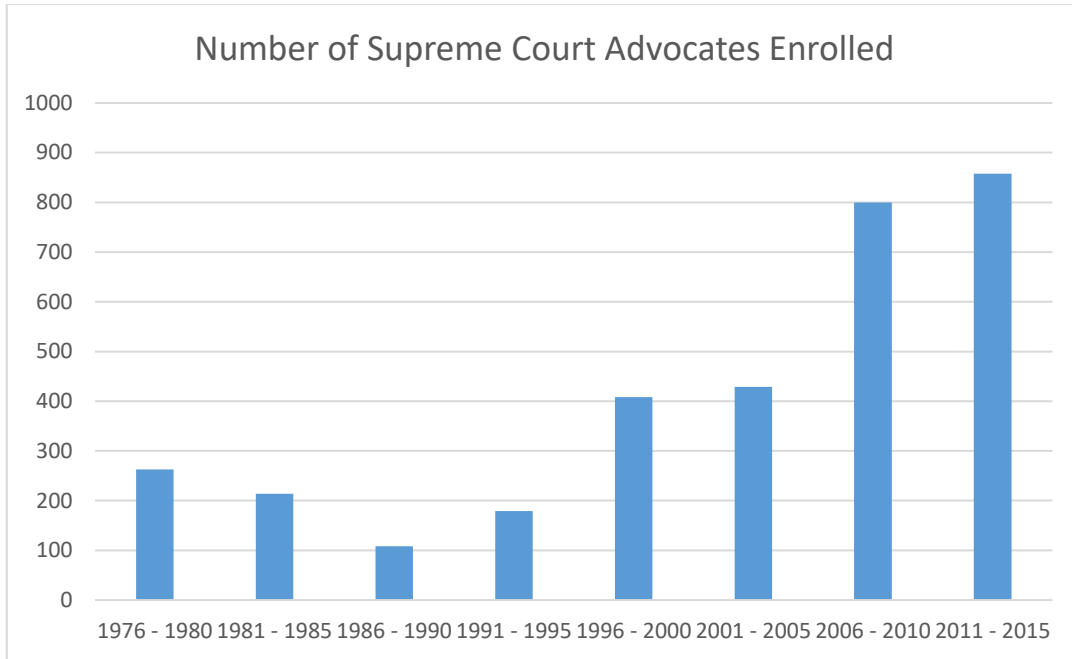
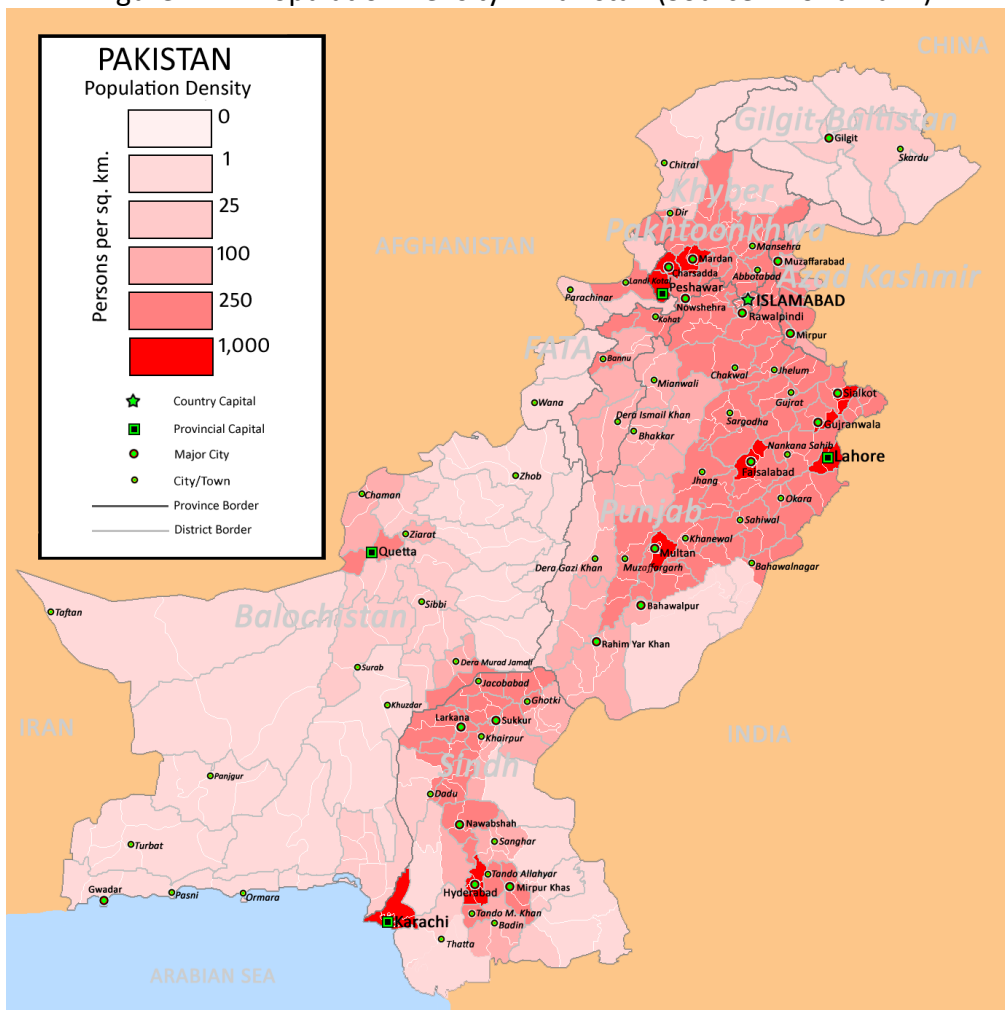


Figure 4.10: Number of Supreme Court Advocates Enrolled with PBC (Source: PBC)

Figure 4.11: Population Density in Pakistan (Source: World Bank)



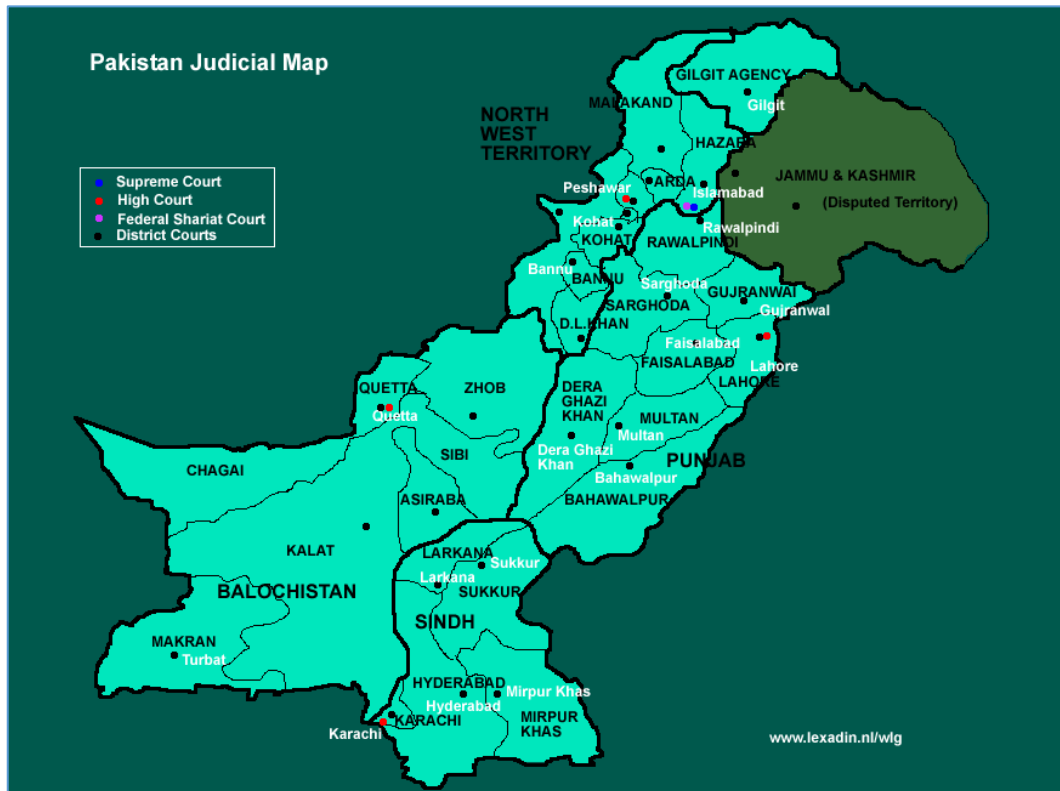


Figure 4.12: Pakistan Judicial Map (Source: PBC)

The vast majority of these lawyers are concentrated in urban and peri-urban areas. The judicial infrastructure is concentrated in the district and tehsil headquarters for the lower judiciary and in provincial and state capitals for the higher judiciary (as shown in the maps of Pakistan depicting major urban centres and the judicial infrastructure). This means that those from rural areas who aspire to become lawyers or judges must work in these swelling towns/cities fueling urbanisation. The same is true for institutions that provide degrees in law. The concentration of the legal fraternity in urban areas has important implications. First, they are better able to mobilise resources as and when needed, as is evident from the Lawyers' Movement. Also, they are better able to evolve a common culture and professional identity that gives them their unique place in the society. Evolution of an identity that depends more on professional stature and status is in sharp contrast to identities based on ethnicity, caste or sect. Of course, in an urban environment traditional markers of identity

operate along with ideological divides; however, evolution of new forms of identity as a result of the growth in professional practice is important. The country has already seen a growing trend of political action and collective bargaining on the basis of these identities as opposed to those based on kinship ties.

The perception of lawyers has also changed during the last couple of decades. Lawyers were once considered to comprise those who failed to get into engineering, medicine or other 'prestigious' career fields such as the civil service and armed forces. Now, however, lawyers are considered the most 'educated' section of the society and the prestige associated with the legal profession has increased. As Dr. Zubair Abbassi, associate professor of Law at LUMS states in his interview for this thesis:

Legal practice is now considered a 'great profession'.

This indicates increasing economic returns to legal education and practice and is expected to attract more people to the profession. Furthermore, the country also seems to be developing a 'litigation culture' where more people are relying on courts for dispute resolution. Prominent lawyer and politician Aitzaz Ahsan states in his interview for this thesis:

From a culture of avoiding courts to settle their disputes and being often dejected and disappointed, people started looking up to courts for justice in all personal matters especially against executive authority.

The statistics from the Law and Justice Commission of Pakistan show a steady increase in new cases every year during last ten years for all courts except the Federal Shariat Court (the number of cases filed in the FSC has seen a sharp decline during last ten years, which makes it an interesting case for further research). Despite structural impediments to swift delivery of justice, issues with prosecution and other aspects of administering justice and an increasing

population that means huge backlogs for courts, especially at the lower tiers, the increasing number of cases cannot be ignored. Although not all the gains in judicial independence have been translated into improvement at lower courts, the newfound connection between the courts and the people is worth exploring. In a nutshell, it can no longer be taken for granted that the judiciary will side with the ruling elite. On numerous occasions, courts have been moved successfully by ordinary people seeking redress to their grievances against powerful and more resourceful opponents. One must remain cautious not to paint too rosy a picture of judicial performance, and much remains to be desired on this front; however, there is clear sense among the majority of interviewees and participants of the FGDs that, despite general pessimism, and strictly compared to the past (rather than against international or even regional standards), the degree of confidence in the judiciary has increased and more people are likely than ever before to trust the institution for dispute resolution. As one of the participants of the FGD argued:

There are many problems at the lower levels of judiciary. The cases linger on for years and sometimes even generations. But higher judiciary has stepped in to provide relief directly to the people. A complaint to HR Cell is decided much quicker and in cost effective manner than making a petition in court.

Another participant narrated an interesting incident:

I was once supplied with low quality steel by my suppliers who were giants as compared to my small business. They refused to accept responsibility despite my many complaints – finally I threatened to make a complaint to the Chief Justice. Within 24 hours they replaced the steel bars and even paid the transportation cost. This time it was the best quality product.

The increased confidence on judiciary is also true for high profile political conflicts, where the judiciary has emerged as the key arbiter of power and has been able to successfully resolve confrontations that threatened the continuation of democracy in the country. Notable examples are the Memogate case and the judicial commission on rigging allegations in the 2013 elections.

This thesis argues that these changes in the numbers, status, behaviour and importance of the legal fraternity are part of wider social changes taking place in the country. Structural changes in the political economy of Pakistan are increasingly shaping the class structure and social relations between various segments of the society. Some of the key trends identified from the data collected for this thesis include urbanisation, the emergence of a sizable middle class, a 'youth bulge', increased education and diffusion of information and communications technology. Structural and demographic shifts are considered primary drivers for change in social relations. Pakistan, for example, is one of the fastest urbanising country in the world and its rate of urbanisation remains the highest among the South Asian countries. This has a profound impact on all aspects of society including environment, culture, infrastructure and politics. This coincides with other trends that are increasingly shaping the socio-political realities of the country. A high population growth rate and relatively shorter life spans mean that the country has a huge youth bulge, with over 60% of the population under 25 years of age (Burki, 2011). Also, economic growth (at an average of around 6%) during the 2000s has given rise to a sizable middle class, mostly based in urban areas and with markedly different aspirations compared to their rural counterparts. Lastly, the young, educated middle class urbanites are increasingly interested in politics and changing the status quo that has prevailed since Pakistan's independence in 1947. These changes are creating new pressure groups, new

elites and new electoral behaviours, which are generally under-studied in the literature. This chapter attempts to bridge this gap in knowledge by analysing these contemporary trends and their institutional and political implications for Pakistan.

The following section provides an overview of the evolution of political system in Pakistan. The remainder of the chapter will then discuss key demographic trends shaping the country, starting with the history, context and causes of urbanisation in Pakistan. It will then provide a measure of the size of the middle class and its various socio-economic characteristics. The chapter will then analyse the changes this demographic shift is bringing to the political structure in the country, in particular the judiciary, and conclude by pointing to the trajectory of current and future political trends based on the rapidly changing socio-economic conditions.

#### **4.6 Political Implications of Structural Changes**

It is evident from the discussion above that a host of socio-economic changes are shaping society in Pakistan. The impact of these on the legal fraternity is obvious from the analysis presented at the start of this chapter. Rampant urbanisation has brought more litigants, as well as more practitioners of law, to the swelling cities and towns where the judicial infrastructure is concentrated. The institution itself now largely draws its personnel from the urban centres, while the remaining sections of society have to move or commute to the cities for work. The social status of the legal profession has improved greatly, and this has created a sense of camaraderie and belonging to the institution irrespective of caste, sect or ethnicity. The lawyers associate themselves with Bar Associations and, despite ideological and other divisions, have developed a strong sense of community.

The structural changes mentioned above, however, are not only shaping the judiciary but also have a profound impact on the traditional political structures and patronage mechanisms in Pakistan. Politics in Pakistan remains based at the local constituency level, where significant networks based on kinship ties (caste, clan and ethnicity) exist as a means for collective bargaining. However, the nature of that bargaining has changed from the traditionally desired patronage to facilitate job opportunities, conflict resolution and contract enforcement through state machinery (police and courts), to a demand for better service delivery. In many areas, especially in large cities (as well as increasingly in peri-urban areas), new forms of identity are taking shape. This movement away from reliance on kinship ties is triggered by the rise of professional associations, such as those of lawyers, journalists, teachers, doctors, transporters, merchants and other bodies that have increasingly started to play a key role in politics. The demise of the Musharraf regime, for example, was a direct consequence of a movement spearheaded by lawyers, organised all over the country as 'bar associations', in reaction to the sacking of the senior judges of the higher judiciary. Similarly, doctors and teachers have also shown signs of political action, demanding better work conditions, job security and rates of pay (Haider and Haider, 2010).

Another factor further changing the political realities in Pakistan is the young, second generation urbanites who are increasingly educated, middle class, tech savvy and have shown an appetite to challenge the traditional patronage-based political system. Brought up in an urban environment, where the basis of prestige and privilege lies not in caste or position in tribal hierarchy, but in professional status and social and economic capital, these young urbanities are all but cut off from their kinship ties. This gives rise to a search for new forms of identity and new bases for collective bargaining, and ferments an ensuing conflict with the

traditional political elite that relies on decades-old patronage networks for power and legitimacy.

Due to the transient nature of society, both the established channels of accessing state resources and the resistance to these are being played out simultaneously, as is evident from the rise of Pakistan Tehreek-i-Insaf and the anti-government demonstrations in 2014. The conflict stems from the need for the traditional political class to provide patronage to key loyalists, who must be accommodated when making key appointments, starting from the family and including other political allies. Similarly, state resources through government procurement, contracts to deliver service/development (*thaikey*) and other means must be used to provide financial incentive/monetary benefits to a loyal network of allies. This inherently means favouring lack of transparency, promoting nepotism, putting 'merit' on the backburner and ignoring 'corruption'.

The emergent urban middle class youth, however, is not part of and does not benefit from these vertical patronage networks (still largely based on kinship ties). At the same time, this segment of society demands its due (and at times even disproportionate) share of key government appointments, representation in parliament, say in decision making, access to leadership positions and state resources. To complicate the situation further, it believes that it is the primary engine of economic growth and is bearing the burden of paying taxes (either indirect taxes through GST or income tax levied on salaried class), while the elite and those benefiting from the patronage-based political system evade taxes altogether. Thus, it wishes to limit the ability of the elite to disburse patronage by demanding more transparency, accountability, an end to corruption and tax reforms (generally labelled as 'good governance'). It also wants greater representation, not just in the media, judiciary, military

and bureaucracy but also in the parliament and within political parties. It has a strong resentment of 'dynastic' politics and hatred of 'VIP' culture. The urban middle class is also conscious of retaining (and expanding) its access to state-sponsored education, e.g. through scholarship schemes at HEC, and therefore bitterly opposed devolution of higher education to the provinces after the 18th Amendment.

Three key trends can be noticed in the urban Pakistan which challenge the traditional political structure in the country.

*New Forms of Identity:* The reliance of an urban, better-educated middle class – especially its second/third generation – on affiliations based on kinship ties (such as caste and tribe) is significantly reduced and new forms of identities are emerging. This is represented by the emergence of new forms of associations for group bargaining based along professional lines: for example, bar associations, doctors' associations, teachers' associations, trader unions, chambers of commerce, and transport unions etc. Still, many educated urbanites in other industry sectors remain without adequate representation in a social network and look for representation through (newly emerging) political platforms such as the PTI. Lifestyle changes also mean that, while remaining socially and politically conservative, the urban, educated middle class seeks more freedom, liberty and, more importantly, economic and political empowerment leading to greater share in resources and decision making.

*Changing Nature of State Institutions:* Much has changed in the education system, which traditionally demarcated elite and commoners' job destinations. The urban middle class in Pakistan, utilising better-quality private educational institutions, has been able to significantly infiltrate the state institutions that were, until recently, largely occupied by the landed and industrial elite. It is important to note here that all organisations and institutions, including

political parties, are multi-class coalitions, but that a particular class, ethnicity, ideology or segment of society will dominate at a particular point in time. One can, therefore, note significant change in the class composition of institutions such as the media, judiciary, bureaucracy and military. These institutions are now largely dominated by an upwardly mobile urban middle class. This has a significant effect on politics as these institutions yield greater influence and play a key role in shaping politics.

*Changing Modes of Communication:* Forms of political communication have changed significantly as the emerging urban middle class (especially the youth) prefers communicating through electronic means. The middle class has triumphed over not just the working class but also the elite class in utilising electronic forms of communication (e.g. social media). This means they have achieved an ability to ‘amplify’ their voice through a resonating electronic media far more than their numbers would suggest. Research shows that users are now increasingly relying on social media for accessing information that is critical in making up their minds and shaping their political behaviour. The political economy of the corporate media dictates that, since the urban middle class is the most important consumer base for the manufacturing and service sectors in Pakistan, the electronic media’s content (including that of the news channels) is heavily geared towards this market segment. As advertising revenue depends on ‘ratings’ that exclusively represent urban Pakistan, the media is bound to project and further amplify the political aspirations and expectations of this segment. The judiciary’s populism since Iftikhar Chaudhry’s ascent to power has largely been a matter of playing to this gallery through the media. New political players such as the PTI have been able to rely on these new modes of communications to become the second largest political party in terms of number of votes.

These impending structural changes continue to shape Pakistan even while it remains a post-colonial bureaucratic state that focuses on ruling and maintaining law and order rather than public service delivery and governance. Intermediaries – including the bureaucracy, political parties (increasingly divided along ethnic lines), religious/sectarian groups and the military – link the state with the society by dispensing patronage and influencing their set of supporters. The emerging young urban educated middle class, however, will not be beholden to these vertical networks of patronage for long. Already there is a behavioural shift in the new generation of urbanites, who are far less connected to kinship-based patronage networks compared to the generation that migrated to the urban areas. This new generation of urbanites is far more likely to adopt new forms of identity (for example professional identities) and use these as means for collective bargaining to achieve good governance, social mobility, improved service delivery and a greater share in decision making. It is evident that, being part of these social transformations, the judiciary finds a natural convergence of interests and a shared world view with the expanding urban middle class. This has resulted in a shared class consciousness and practical alliances that have saved the judiciary from the court-packing attempts of the executive and provided a hedge against attempts to curtail its independence.

#### **4.7 Conclusion**

The analysis confirms that Pakistan is going through an unprecedented wave of socio-economic transformations that have affected judiciary along with other parts of society. The change within the institution is, therefore, a result of these wider social upheavals and has brought it increasingly in line with the interests and aspirations of the rising urban middle class. The analysis shows that over the last two decades or so a new middle class has emerged

as a result of various factors, which include immense expansion in private services sector, especially in banking and finance, telecommunications, legal, health and educational services, media, non-governmental organisations and related services along with the traditional trading class, public sector employees and those who benefit from the informal economy. What makes the middle class even stronger is the number of people who may not yet be categorised as middle-class on the basis of income or assets, but have middle class aspirations. This may be a result of exposure to middle-class lifestyle and values through discourse (e.g. cable TV and internet), formal education or migration from rural to urban areas. The majority of the population now resides in urban centres. The improved per capita income, consumption behaviour and anecdotal evidence confirm that the resulting urban, educated middle class has disposable income and resources that it can invest, and has invested, in political action to affect/shape the redistributive mechanisms of the state (in its favour) in order to get its piece of the cake from the state and gain political empowerment and social status.

The increased political power of this class is manifested in the (changing nature of) institutions such as the media and judiciary, who both largely represent and respond to the needs of this class. NGOs, trader associations and professional associations (e.g. doctors' associations) also represent this class. Furthermore, it is interesting to note that, in contrast to the past, this segment of society is now increasingly interested in politics. This is evident from campaigns on social and electronic media, the popularity of political talk shows (and their rating mechanisms being heavily based on urban, educated households), increased turn-out during the 2013 elections, and the rise to prominence of new political players, e.g. Imran Khan's Pakistan Tehreek-i-Insaf, that largely represent this segment of the society (along with the

ruling PML (N), which has consciously tried to woo this section of the society in the run up to elections with some degree of success).

The urban middle class has been further strengthened by rising literacy rates and the electronic platforms now available to access information almost in real time. Underlying some of these changes is the shift in technology, especially the diffusion of the internet, mobile telephony and cable TV, that has given this class further leverage and means to construct and sustain a narrative. It can be argued that this class has been the biggest beneficiary of the digital divide in Pakistan and has even triumphed over the traditional feudal/tribal aristocracy (along with, of course, those at the bottom of the pyramid) in the use of electronic and social media. These tools have also helped members of this class better organise themselves and forge extensive networks that can be mobilised more quickly and effectively for political action.

Both sets of factors (changes in the socio-economic conditions and enhanced ability to frame the issues in a favourable way) have given the middle class disproportionate power vis-à-vis other segments of the society. This has important implications for regime type. Some literature exists on the link between the middle class and the nature of government a country enjoys. Moore (1966) associates the emergence of the middle class with the consolidation of democracy. This is backed by Collier (1999), who noted that in a number of democracies the middle class aligned with the lower classes to demand an inclusive political system. However, elsewhere (e.g. Leventoglu, 2003), the middle class has also been seen as siding with the upper class, resulting in a restricted democracy or dictatorship. This ambivalent behaviour puts the middle class in the pivotal position of being the 'decisive' class that holds the key to a particular system of governance (Acemoglu and Robinson, 2003: p. 8). Thus, in many

countries, the emergence of the middle class has led to democratisation, while in others, where the middle class has been well served under authoritarian regimes, it has stayed indifferent (e.g. Malaysia, Singapore and South Korea). The current consensus among middle class Pakistanis is in favour of democratisation and will remain so as long as democracy is perceived as being able to serve the interests of the middle class. This does not rule out the chances of another military coup in the country, but it certainly means that the emerging middle class would need to be co-opted in order to launch and sustain such a coup. This, together with increasing demands among the middle class for political power and access to economic resources (which it will not be willing to forego or sacrifice), means that a coup may not have become impossible, but has certainly become very expensive. The growing appetite of the middle class for political and economic empowerment is antithetical to the closed, authoritarian and centralised nature of a dictatorship. Certainly the middle class in Pakistan is not a homogeneous group. There are sectarian, ethnic, urban/rural and other divides. However, the resonance of their shared concerns and issues in the print, electronic and social media, as well as their social networks, has given them greater awareness of their class interests and has served to provide greater cohesion to their narrative and internal alliances.

The next chapter traces the origins of transformed judicial behavior to the changing nature of judiciary's class composition. It compares the class origins of the judges at the time of country's independence and following two decades with those in the last couple of decades. It also explains how changing class composition affected world view, outlook and practices in the judiciary as a direct consequence of wider socio-economic changes discussed in this chapter.

## CHAPTER 5: GENESIS OF JUDICIAL ACTIVISM (2005–2007)

### 5.1 Introduction

Chapter 4 discussed a number of structural changes that affected the legal field in the country during last two decades. Chapter 3 had already established the change in the degree of judicial independence before and after the Lawyers' Movement using a number of *de jure* and *de facto* measures. It discussed in detail a number of judgements where judges took on powerful political players, safeguarded their own autonomy, reversed anti-democratic precedents of the past and made administrative changes to institutionalise these changes. While the chapter looked at the long history of judicial subservience and compared it to the judicial resurgence post-Lawyers' Movement, it was evident that the appointment of Justice Iftikhar Chaudhry as Chief Justice of Pakistan in 2005 marked the turning point for the change of course in judicial doctrine. The period 2005–2007 is, therefore, extremely important to understanding the events that led to the executive's court-packing actions and the unprecedented widespread support garnered by the court that ensured its ultimate survival. This chapter attempts to understand how the court built the support base that eventually proved critical in saving it from the wrath of the executive. It analyses the jurisprudence of the Supreme Court since 2005 to understand how the judicial activism of the court aligned with the interests of emerging sections of society to create greater political space for itself. It argues that the court was able to manufacture legitimacy primarily because its actions resonated with the sentiments of the urban educated middle class. Furthermore, it shows that the judiciary is going through a substantial change in its dominant class base. A new cohort of judges from the middle class origins finds its world view, understanding of issues

and set of priorities increasingly aligned with those of the wider middle class. It is important to understand changing class composition of the judiciary and its link with the wider social changes because the resultant shared class consciousness has resulted in a natural alliance between the judiciary and this emerging constituency. The court thus sought reforms in the governance structures that favoured the emerging middle class and represented their needs and aspirations. As a result, it became the vehicle for advancing the interests of this section of the society and rose to unprecedented levels of public approval. The chapter identifies the key tools used by the court to build legitimacy among these sections of society and analyses why it was so successful in inspiring large numbers of people to join its bandwagon. The key shift in the court's legal doctrine was its proactive role in holding government officials accountable. Whether it was financial corruption or abuse of state power, the court showed rare ability to take a stand for the rights of ordinary people and, in the process, seems to have hit a raw nerve in the psyche of the nation.

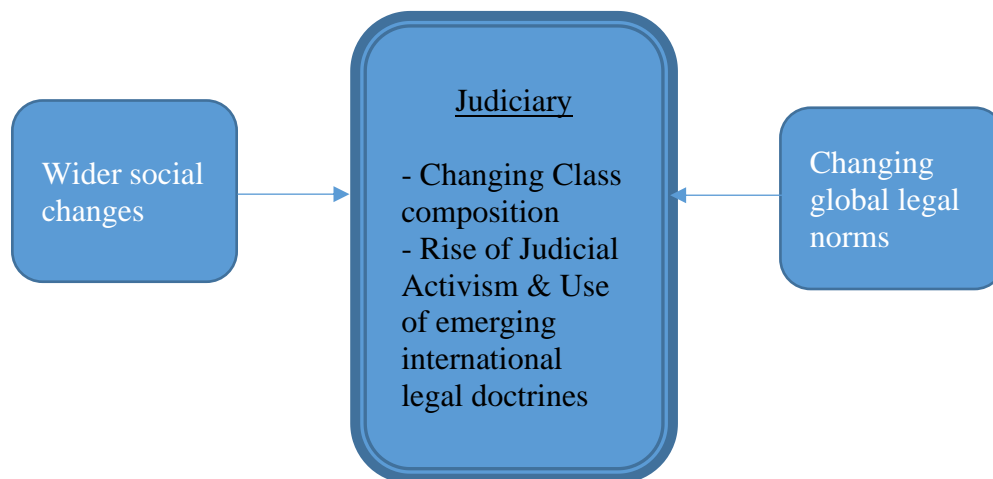


Figure 5.1: Component of the argument (fig. 2.2) discussed in this chapter

This chapter therefore focuses on the institution of judiciary, its class composition, its doctrinal choices and their link with the changing global legal norms and the wider social

changes in the country. The chapter argues that two sets of factors are responsible for judiciary's change of course. First, the judiciary has itself gone through a change in its dominant class base. Secondly, greater diffusion of ideas about the rule of law, constitutionalism, the use of public interest litigation and the judiciary's role in the polity influenced the outlook and world view of the judges. These findings are compared with mainstream models that explain judicial behaviour in terms of strategic calculations made by the judges in a fragmented polity to reach their decisions. As already discussed, these do not explain instances where the judiciary itself takes the lead in propping up certain pressure groups that provide a hedge against potential court-curbing or court-packing actions by the executive. Secondly, while acknowledging the role of established political players such as political parties and military, these models tend to overlook the underlying social structures, class interests and economic changes that shape the preferences of these institutions, parties and social groups. Finally, these models also tend to ignore the diffusion of ideas from mainstream global legal views about questions at hand, ideas that empower the judiciary to make bold decisions if it so desires while making it difficult for judges to deviate from those world views. It is argued that judiciary, in Pakistan in particular, but also in other countries discussed elsewhere in this thesis, carved out political space for itself and successfully challenged the executive by proactively and directly communicating, serving and mobilising influential social groups to promote their institutional objectives.

Next section analyses key sources of agency exhibited by the judges since 2005 followed by the discussion on the alliance between the judiciary and the emerging middle class in Pakistan. The last two sections discuss implications of judicial activism and conclude the chapter.

## 5.2 Sources of Judicial Agency

The exercise of agency by the judges at a time when the country was governed by military-backed authoritarian regime facing little political resistance poses serious questions. Some scholars claim that democratisation must precede judicial empowerment (Seibert-Fohr, 2012); the case of Pakistan, therefore, provides an important counterfactual that needs to be explained. There have always been instances of defiance by individual judges. The examples of Justice Saeeduz Zaman Siddiqui and others have been mentioned previously. Even the use of Public Interest Litigation (PIL) in Pakistan started in the late 1980s and early 1990s, albeit sporadically. Therefore, it appears that from 2005 to 2007 it was more a case of Justice Chaudhry, along with handful of judges, leading the charge against the ruling elite. Many of their brother judges only swung into action after people poured into the streets in support of Justice Chaudhry and after sustained pressure by a coalition of civil society groups and opposition parties propelled them decisively to stay on the right side of history. Even so, the show of defiance by Justice Chaudhry and a few others that eventually inspired the whole judicial institution, and indeed the nation, is noteworthy and demands an explanation. From 2009 onwards, the institutionalisation of the Human Rights Cell (discussed in detail later) and consolidation of judicial empowerment made the new paradigm of judicial activism the dominant doctrine within the judiciary.

It is important, here, to look at the causes of judicial activism at the start of this most important phase in the judicial history of Pakistan. The data collected for this thesis shows that two factors, more than any others, played a key role in the initialisation and evolution of this doctrine. During the interviews, most of the interviewees talked about the 'changed character of a Pakistani judge'. The judiciary was one of those institutions in Pakistan (along

with the military and the bureaucracy) that took pride in its colonial legacy, which included high officials trained in the Westminster ethos and comprised an English-speaking elite. The demeanour and behaviour of the judges was as elitist as that of their counterparts in the bureaucracy and military. The requirement of having a command of the English language, taught at only a handful of schools modelled on British public schools, confined entry to these institutions to the elite sections of society (Martin, 2016). Access to these institutions was also important for the elite class to maintain close connections with the colonial administration in order to preserve its power and privileges, as well as preferential access to economic opportunities. It was typical of the members of affluent, well-connected families to join various branches of government. The judiciary was also seen as a powerful institution and, although judges earned considerably lower wages than successful lawyers, many opted for judicial careers for the power, privilege and family legacy (ibid.). There was also greater movement of personnel between various state institutions. One third of judges, for example, were inducted from Indian Civil Service (ICS) to specialise in the 'judicial side' of the civil service (Gadbois, 1968). While the character of the judiciary may still be elitist in some ways, it can be noted that pride in the colonial legacy and association with an English-speaking elite remains no more. Today, judges take pride in being rooted in Pakistani society, champion the cause of national language, Urdu, and look for inspiration as much from indigenous thought and wisdom as from Western jurisprudence. This rise of the 'indigenous judge' that sees himself or herself closely related to and embedded in the wider society, instead of the distant, elitist judge of yesteryear, is one of the most profound changes to have taken place in the judiciary. Mr. Nadir Cheema, an academic and activist who participated in the Lawyer's Movement as the assistant of its key leader Aitzaz Ahsan and spent considerable time with the key leaders, commented in his interview for this thesis:

Musharraf didn't know what hit him - up against him was not an Anglicised 'brown saab' (a term that means a local who imitates colonial masters, generally used to refer to local elites) but a 'desi' (localised/indigenous) man who came from a culture of resistance and had seen it all. Musharraf had no idea how to deal with these desi band of brothers, rooted in the local values, customs and traditions that means they were much closer to the public than he was.

Similarly, Dr. Tahir Wasti a lawyer and academic currently practicing law in London, UK but with close relationship to a number Supreme Court judges describes Justice Jawad S. Khwaja as:

An ascetic in the form of a Judge. He hardly has any furniture at his home and prefers to sit at traditional seating arrangements at the floor. There are books everywhere, mostly those of Saadi, Rumi and others. He is completely immersed in the eastern scholarship tradition and regularly uses these in his judgements.

Underlying this indigenisation is the changed class origins of the judges that make up the Supreme Court today. Born and raised in middle-class households, these judges see themselves as closer to the 'common man', are more moved by the concerns and apprehensions of the wider populace and are affected more by the middle-class discourse (represented by Urdu language media) than that of the elite English-speaking bubble. This new class consciousness of the judges has enabled them to relate to key segments of the society and build strong alliances with them.

Take the example of Iftikhar Chaudhry himself. He was son of a police constable who was posted to Quetta from Jalandhar (now in India) before independence and settled there for the rest of his life. He went to a government school (that used Urdu as the language of instruction) and completed his Bachelor of Arts and Bachelor of Law at the University of Sindh (Jamshoro), which is not among the elite colleges from which most premier state institutions

drew their officials. Similarly, Justice Ejaz Afzal Khan, former Chief Justice of Peshawar High Court and the only other serving judge of Supreme Court who was reinstated with Justice Chaudhry after the 'long march', having refused even to take a fresh oath offered by the People's Party government, introduces himself on the Supreme Court website in the following words:

Born to a middle-class family of Mansehra on 8th of May, 1953, Mr. Justice Ejaz Afzal Khan, received his primary education from Government Primary School, Mansehra, did matriculation from Government High School Mansehra and FA from the Government College, Mansehra. He joined the Government College, Abbottabad and did Graduation in 1974. Subsequently, he graduated in Law in 1977 from the Khyber Law College and joined the profession of Law the same year.

It is telling that Justice Khan not only emerged from the second tier of the education system (comprising 'Urdu medium' government schools and colleges not originally designed to produce high state officials), but takes pride in this fact. This is in sharp contrast with the culture among the political elites in Pakistan, which emphasise their lineage and inherited riches as a distinguishing factor. Justice Khan's introduction goes on to state:

His elevation to the Bench as Additional Judge in September, 2000 was an acknowledgment of his professional capabilities.

This emphasis on 'professional capabilities' is very much in line with the ethos of a middle class seeking upward social mobility on the basis of their newly acquired skills and knowledge, rather than their lineage and inherited socio-economic capital. So powerful is this change in culture within the judiciary that Justice Jawad S. Khawaja, one of the few judges who hails from an affluent family and studied at the elite Aitchison College, Lahore, and University of California, Berkeley, became a champion of Urdu as official language and frequently used

sayings, poetry and anecdotes from the works of local Sufi (mystic) saints and thought leaders from the wider South and Central Asian region in his judgements. During his brief stint as Chief Justice of Pakistan, he gave a landmark decision directing government to make all information (including rules and regulations, policies, decisions and details of official proceedings including minutes of meetings) available in both Urdu and English. He went on to ensure that all decisions of Supreme Court are also published in Urdu language (PLD 2015 SC 401). The judgement states:

In the governance of the federation and the provinces there is hardly any necessity for the use of the colonial language which cannot be understood by the public at large.

It also made provision for provincial governments to adopt a number of local languages as official languages in addition to the national language. The ruling thus states:

Without prejudice to the status of the national language, a provincial assembly may by law prescribe measures for the teaching, promotion and use of a provincial language in addition to the national language.

The interviews with a number of judges conducted for this thesis revealed a newfound emphasis on indigenisation of legal doctrines and precedents from other contexts. As CJ Iftikhar Chaudhry himself puts it in his interview for this thesis:

We have a number of examples in Islamic history where even Caliphs had to appear in courts and accept even if the judgement was against them. Accountability is not therefore an alien or a western notion but is equally embedded in the ethos of our own society.

Much of this is a result of the changing dominant class base of the institution. There is no systematic academic study analysing the class origins of Supreme Court judges in Pakistan. It is, therefore, very difficult to obtain data on judges' family backgrounds, especially for those

who held this position during the first few decades of the creation of the country. Due to the unavailability of data on the class origins of all judges appointed to the Supreme court in Pakistan, I shall limit the analysis to the Chief Justices, for whom slightly better biographical data are available. Also, it is difficult to use a multidimensional framework to understand the class to which they belonged; therefore, this thesis primarily relies on the institutions from which they graduated, along with any descriptions of their family backgrounds where available from credible sources. As described in Table 5.1, the limited available data shows that while many Chief Justices in the first two decades post independence belonged to landed families or those with strong connections with colonial administration, those in recent years mostly belonged to mercantile and trading classes.

Table: 5.1: Educational and family background of Chief Justices of Pakistan (sources: public information)

No.	Name	Tenure	Education	Family Background
1	Sir Mian Abdul Rashid	27/06/1949 – 29/06/1954	Christ’s College, Cambridge – called to the Bar at Inner Temple, London	Prominent Arain (landed) family in Lahore.
2	Muhammad Munir	29/06/1954 – 2/05/1960	Government College Lahore	Landed Punjabi family. His Grandfather was commissioned officer in British Indian Army while father was a doctor (Qasmi, 2015).
3	Muhammad Shahbuddin	3/05/1960 – 12/05/1960	University of Oxford, Indian Civil Service	-
4	Alvin R. Cornelius	13/05/1960 – 29/02/1968	Selwyn College, Cambridge	Born in a well established family of Anglo-Indian ancestry. His father Mr. I. J. Cornelius was British and taught mathematics.
5	Fazal-e-Akbar	4/06/1968 – 17/11/1968	Lincoln’s Inn, London	-
6	Dr Sheikh Abdur Rehman	1/03/1968 – 3/06/1968	University of Oxford and Indian Civil Service	-
7	Hamoodur Rahman	18/11/1968 – 31/10/1975	St. Xavier’s College, Calcutta; University of London; Gray’s Inn, London	Belonged to a prominent Bengali Muslim family. His father was an advocate and politician who was elected member and later deputy speaker of East Bengal Legislative Assembly.

8	Muhammad Yaqub Ali	1/11/1975 – 22/09/1977	University of Punjab	-
9	Sheikh Anwarul Haq	23/09/1977 – 25/03/1981	University of Oxford and Indian Civil Service	-
10	Muhammad Haleem	23/03/1981 – 31/12/1989	-	-
11	Muhammed Afzal Zullah	1/01/1990 – 18/04/1993	University of Punjab	-
12	Nasim Hasan Shah	17/04/1993 – 14/04/1994	University of Paris	Born in Lahore to a prominent advocate and political activist.
13	Syed Sajjad Ali Shah	5/06/1994 – 2/12/1997	Inns of Court School of Law	-
14	Ajmal Mian	27/12/1997 – 30/06/1999	University of Karachi	Born in a Business family. His father owned a shoes store in Karachi.
15	Saeeduzzaman Siddiqui	1/07/1999 – 26/01/2000	University of Karachi	Born in a middle-class, educated middle class family.
16	Irshad Hasan Khan	26/01/2000 – 6/01/2002	University of Punjab	-
17	Bashir Jehangiri	7/01/2002 – 31/01/2002	University of Peshawar	Born in a middle class trading family in Peshawar.
18	Sheikh Riaz Ahmad Sheikh	1/02/2002 – 31/12/2003	Government Islamia College, Lahore	-
19	Nazim Hussain Siddiqui	31/12/2003 – 29/06/2005	University of Hyderabad	-
20	Iftikhar Muhammad Chaudhry	29/06/2005 – 9/03/2007 & 20/07/2007 – 3/11/2007 & 21/03/2009 – 11/12/2013	University of Sindh (Jamshoro)	Born in a Punjabi immigrant family. His father was a police constable.
21	Abdul Hameed Dogar	3/11/2007 – 21/03/2009	University of Punjab	-
22	Tassaduq Hussain Jillani	12/12/2013 – 6/07/2014	University of Punjab	-
23	Nasir ul Mulk	7/07/2014 – 16/08/2015	Inner Temple, London	Belongs to wealthy Paracha (trading) family in Swat.
24	Jawwad S. Khawaja	17/08/2015 – 9/09/2015	Aitchison College, University of California, Berkeley	Belongs to a family that runs a small/medium size business enterprise.
25	Anwar Zaheer Jamali	10/09/2015 – 30/12/2016	University of Sindh	Belongs to an educated family that migrated from Indian. His father was a lawyer.

School education is considered a credible indicator of social and economic background (Griffith, 1977) and a detailed look at the educational backgrounds of the judges who served on the Supreme Court from 1999 to 2013 makes an interesting comparison with their predecessors (table 5.1). Nine Chief Justices have presided over the Supreme Court in

Pakistan during this time. None received any formal education outside Pakistan, or in an English-language elite institution within the country. Instead, all were graduates of local, public sector universities. Three graduated from University of Punjab, two from Karachi University and one each from the universities of Sindh, Hyderabad, Peshawar and Islamia College, Lahore. Compared to these, seven of the first nine Chief Justices of Pakistan were educated at the elite universities in the UK. Five graduated from Oxford or Cambridge and one each from Lincoln’s Inn and Gray’s Inn, London. As comparison of the tuition fee at Universities of Sindh, Peshawar, Punjab and Karachi with an elite local university (LUMS) and Oxford/Cambridge Universities shows, there is ought to be a massive gulf between the class composition of their student bodies. The annual tuition fee of Bachelors of Law (LLB) course at LUMS is around 8 times more than the universities mentioned above while that at Cambridge is 62 times and that at Oxford is 78 times more expensive. Notwithstanding the closer ties to British Empire during the first half of the 20<sup>th</sup> Century, or perhaps because of them, access to education at the most exclusive of the British universities was a prerogative of the highest of the Indian elite. The appointment of one of the remaining two judges, Justice Muhammad Munir is also a very revealing tale of elite capture of judiciary right at the inception of the country.

Table 5.2: Annual Tuition fee for LLB programme in US \$

<b>No.</b>	<b>Name of University</b>	<b>Fee US \$ (Per Annum)</b>
1	University of Punjab	390
2	University of Peshawar	375
3	University of Sindh	390
4	University of Karachi	540
5	LUMS	2830
6	University of Cambridge	24,300
7	University of Oxford	29,300

Noted lawyer Hamid Khan, in his *A History of the Judiciary in Pakistan* (2016), provides a detailed account of Justice Munir's ascent to the top job in Judiciary. Prior to his appointment as the Chief Justice of Pakistan, Justice Muhammad Munir was not only not the most senior judge, but was also not a judge of the then-Federal Court (later renamed the Supreme Court). At the time of the retirement of the first Chief Justice of Pakistan, Sir Abdul Rashid, the remaining judges of the Federal Court included, in order of seniority, Justices A. S. Akram, M. Shahabuddin, A. R. Cornelius, and Muhammad Sharif. Justice Akram, a Bengali, had remained a judge of the Federal Court since its inception and had also served as acting Chief Justice of the Federal Court as well as Chief Justice of the High Court of East Bengal. However, Governor-General Ghulam Muhammad, scion of a notable family in central Punjab, who had also served in the coveted positions of Auditor-General and Finance Minister, had other plans. He moved to elevate Justice Munir, who was Chief Justice of the Lahore High Court at the time and thus junior to all four judges of the Federal Court, as the Chief Justice. It was not a coincidence that Justice Munir belonged to the same 'Kakazai' clan (*biradari*) as Ghulam Muhammad. The chieftains of the clan were well connected and many of their family members were serving in important positions in the executive, judiciary and legislative assembly. Another study by Qasmi (2015; p.25) describes Justice Munir as 'born in an affluent family with strong connections to the colonial administration'. Justice Akram was successfully pressured into resigning and relinquishing his claim to the top job, and Justice Munir was appointed Chief Justice of the Federal Court on 29 June 1954. He soon repaid his benefactor(s) by indemnifying the dissolution of legislative assembly by Ghulam Muhammad, citing the 'doctrine of state necessity' for the first time in Pakistan in the *Maulvi Tamizuddin* case. He later went on to validate the first military coup by General Ayub Khan using same precedent, thus firmly establishing a tradition of judicial subservience that continued for decades.

As saga around appointment of Justice Munir shows how shared class origins, interests and consciousness among the judicial, military, bureaucratic and political elite therefore plays a key role in the creation, interpretation and application of codified law and its interpretation by the legislature, executive and judiciary. The class origin of the judges, as well as convergences of and divergences in interests between the dominant classes within various state institutions, therefore needs to be taken into consideration in understanding judicial subservience and activism. There are, however, only a handful of studies that attempt to understand the effect of class origin, and of shared consciousness between the judges and various segments of the society, on judicial decision making. An important contribution in this regard is Griffith (1977), who analysed the class origins of the British judiciary from 1820 to 1968 and found an overwhelming dominance by the upper echelons of society. One of the key indicators of social class he used was the law school from which judges had graduated, with British public school and Oxbridge graduates classified as Upper or Upper Middle Class. He found that four out of five full-time professional judges during this period were the products of public school, and of Oxford or Cambridge. He therefore estimated that 76.8 per cent of judges who served in the British judiciary from 1820 to 1968 belonged to the Upper or Upper Middle Class and went on to associate their conservative judgements and lack of deviance from established policy with their class origins. He concludes that '[j]udges are the product of a class and have the characteristics of that class' (p. 208). In another key study, Gadbois (1968; 1969) notes that during the first decade after independence, 93 per cent of decisions handed down by the Indian Supreme Court were unanimous. He attributes this to the common background and similar socialisation experiences of the judges, whom he described as overwhelmingly Hindu, upper class, high caste and educated at elite institutions in India and England.

In the case of Pakistan, the data collected for this thesis from the interviews with retired and serving judges and the FGDs with the urban middle class youth show not only strong support for an independent and strong judiciary but also striking similarity in world views. Both the judges and this emerging constituency saw fledgling rule of law, corruption, lack of accountability, nepotism, lack of meritocracy and abuse of power by state officials as most pressing problems, along with poverty, religious extremism and terrorism. Both groups presented similar views on the 'corrupt elite' that, in their view, is holding the country back despite its great potential. They lamented the lack of 'honest' and 'sincere' leadership and the inefficiency, heavy handedness and politicisation of public officials. In a sharp contrast with the views this constituency is known to have held in the past, there was unprecedented consensus on the need for continuation of democratic system despite its flaws, for the military to stay within its constitutional limits, for the rule of law and supremacy of constitution and for evolutionary/incremental change/improvement in the system. Unlike the past, very few saw the military as the 'saviour' and, instead, put their trust in the continuation of political process and gradual refinement leading to improvement in governance.

While both sets of participants mentioned poverty, lack of education and health facilities and political violence as key problems, there was very little cognisance of the plight of the working classes, rising inequality, social security, redistribution or the repressive nature of feudal and capitalist economy. It is important to note here that the judges' opposition to the privatisation of Pakistan Steel Mill (as discussed in next section), which became a major bone of contention between the judiciary and the Musharraf regime, was not based on a progressive stance against privatisation in principle, but on technicalities. The judges were more interested in irregularities and alleged corruption in the bidding process than in the fate of workers or the

need to safeguard them from degraded working conditions resulting from the privatisation process. This shows that middle class is evolving an understanding of its own peculiar interests and sees itself as distinct from both the working and elite classes. These findings are corroborated by other observers, who draw a distinct link between change in judicial class origin and its approval among middle class in the country. As one blogger puts it:

The middle classes dominate both the judiciary and the media; together, they amplify their class's concerns (The English-language papers, by contrast, are read by so few that they are effectively internal memos to the country's upper middle classes and elite). So, when judges take notice of rising petrol prices, the media echoes their outrage. The economic concerns of the car-less poor find little resonance, by contrast. The publication of malnutrition or infant mortality statistics attract no attention in courts or newsrooms (Webnise, 2013).

Noted author Raza Rumi observes:

...the judiciary now treats itself as a representative of people's will due to the support it garnered during the lawyers' movement.... The growth of the middle class is another factor, which emboldens this new consciousness among the judges and lawyers.

Chairman of the PPP, Bilawal Bhutto-Zardari, whose party mostly depends on the vote of rural peasantry through traditional patronage networks, opined:

One of the primary demographic support bases of the dictator was a portion of the conservative, urban middle class, who benefited from the dictator's patronage. This support base began to erode when the dictator fell out with the Chief Justice (Bilawal-Zardari, 2014; n.p).

The shared class consciousness of the judges and the urbanising middle class, amplified via electronic and social media, shaped much of their world view. This allowed the judiciary to directly build alliances with the wider public and use the media effectively to pander to the

concerns and aspirations of the middle class. The resultant legitimacy, public approval and good will allowed them to give bold judgements against the ruling elite during 2005–2007. The events between 2007 and 2009 tested this alliance and resulted in a further strengthening of it, leading to the consolidation of judicial empowerment.

The second factor that enabled judges to exhibit agency against the established order was the wave of ‘judicialisation’ of politics around the world, including in neighbouring India. The diffusion of ideas, legal doctrines and examples of changed judicial behaviour elsewhere is known to affect judges in a country (Ocantos, 2016). The last two decades in particular have seen judges expanding jurisdiction to areas traditionally considered to be the executive’s domain. The most vivid example of this in Pakistan is the sharp spike in Public Interest Litigation (PIL) from 2005 onwards, particularly after the restoration of the judiciary in 2009. Most of the interviewees termed PIL an ‘international movement’ that originated in the US and UK and was then adapted in a number of legal systems. The judges interviewed for this thesis particularly mentioned the example of the Indian judiciary, which used it extensively following the emergency rule of former Prime Minister Indira Gandhi. They, justified the use of PIL as a legal recourse for underprivileged and marginalised sections of the society and argued that it reflects the needs of the society. Justice Ramdey, who headed the full bench of the Supreme Court that reinstated Justice Chaudhry as Chief Justice stated in his interview for this thesis:

In a dysfunctional system where there are hardly any credible avenues for the general public to seek redress of their grievances, especially against the powerful, it becomes the duty of Supreme Court, despite being an appellant court to provide relief.

Justice Iftikhar Chaudhry stated in his interview for this thesis:

We took notice of issues on the basis of news paper reports and complaints received by post in envelopes that did not even bear stamps. We gave many important judgements on issues of public interest. We made Supreme Court accessible to each and every person in Pakistan.

They agreed that PIL has strengthened the judiciary by enhancing public trust and confidence in the institution. This, in turn, has empowered judges to take up cases concerning violation of human rights, forced disappearances, targeted killings, terrorism, corruption and the excesses of state officials without fear of reprisal from powerful players. Despite some concerns about the lack of improvement in the lower judiciary, there seems to be consensus on the usefulness of PIL as an effective alternative recourse to justice.

Emerging scholarship on the issue views the Pakistani example as part of the global 'judicialisation' trend. As Khan (2015) notes:

The Pakistani Supreme Court's meddling in pure politics under Chief Justice Chaudhry's headship is part of this global expansion of judicial power.

In particular, judges in Pakistan closely watched progress on what Buxi (1979) calls 'Social Action Litigation' in India. Khan (2015) goes on to confirm that

The manner in which judges likened their ideas, and at times explicitly referred to Indian judicial pronouncements, gave PIL a much-borrowed flavor. Simultaneously, however, they took pains to define PIL in indigenous terms as an ideological rights-based device to —achieve democracy, tolerance, equality and social justice according to Islam.

A 'string' of Indian precedents, for example, were used by Chief Justice Muhammad Haleem in the Benazir Bhutto and Darshan Masih cases, considered pioneering cases of PIL in Pakistan. The emphasis on the issue of bonded labor in early PIL cases in Pakistan seems also to be inspired by Indian judgements. Similarly, the extensive use of *suo motu* doctrine by the

Chaudhry court and successive courts in Pakistan also appears to have been influenced by the Indian example.

The judges also clearly took a leaf out of the 'basic structure doctrine' adopted by the Indian judiciary, which restricts the legislature from changing what the court considered the fundamental tenets of the Constitution. This doctrine implies that not even through a constitutional amendment (which requires two-third majority in India) can a legislative assembly promulgate a law that the judiciary deems a violation of the basic structure of the constitution. In adopting this doctrine, therefore, the judiciary reserves a right for itself to 'strike down' such constitutional amendments. Although the judiciary in Pakistan has never invoked the 'basic structure' doctrine in any of its formal rulings, it did threaten to use it in a case against clauses of 18<sup>th</sup> Amendment that changed the judicial appointment procedure. The government took the judiciary's cue and brought forward the 19<sup>th</sup> Amendment, which made changes to the procedure of judicial appointments in line with the wishes of the judiciary. On many occasions since, judges have made it clear that they consider Islam, the federal structure of the state, democracy and the independence of the judiciary as the key tenets of the Constitution, thus practically declaring it the basic structure. Some justify this by pointing to the 'preamble' of the Constitution as the very basis of the social contract between the people and the state and arguing that, if summarised, this preamble states almost the same principles as mentioned above.

The changing class origin of judges and well as the diffusion of ideas from parts of the world where the judiciary has become a key political player have resulted in the rise of judicial activism in Pakistan. Judges have been keen to take populist stances on issues such as corruption, violation of human rights and abuse of power by state officials. By doing so, they

have been able to build strong alliances directly with key segments of the population. The world view of and stands taken by judges, however, seem limited to the concerns and aspirations of the emerging middle class in Pakistan, as opposed to those in abject poverty. A number of other factors, most importantly the rise of electronic and social media, has provided a perfect echo-chamber for these voices. As a result, the judiciary has embarked on a journey toward its own redemption as a key pillar of the state and has used a number of legal tools to actively build and sustain its alliances with the middle class. The following section identifies from the interview data key issues on which judges took a strong stand. It also identifies key legal tools used by the judiciary on its course to judicial activism.

### **5.3 Judiciary – Middle Class Alliance**

As a post-colonial state, Pakistan has long suffered from structural and systemic loopholes that render the ruling elite unaccountable for its actions despite its ruthlessly exploitative practices. There has been little oversight on the deals that various members of the elite make using their position in the upper echelons of government or under the auspices of government officials. The shift from a traditional agrarian society with feudal character to industrialisation was marked by peculiar forms of crony capitalism, where political patronage and access to political power became central for social mobility. This has created resentment among the salaried classes, which have steadily increased in size as a result of the emergence of the tertiary education sector in last two decades. Accountability became a popular slogan among the professional middle class in the 1990s, especially in Punjab. Key political leaders were dubbed as corrupt and ‘mega-corruption’ scandals became a norm. Various political parties took turns to prove their opponent more corrupt and, in the process, created a conducive environment for the military (which enjoyed a relatively clean reputation) to step

in on the pretext of ridding the country of corrupt political elites. The coup by General Musharraf in 1999 was cheered by the middle class, who hoped that it signalled a new era of accountability. However, subsequent manoeuvring by the Musharraf regime to gain political legitimacy put such hopes to rest. Firstly, the regime entered into political alliances with a number of politicians with questionable credentials. It used the much-hyped National Accountability Bureau to arm-twist the politicians until they relented and supported the regime, while others were hounded and put behind bars. A number of members of parliament who won election on PPP tickets in 2003 were allowed to switch sides after a restriction on floor-crossing was suspended for just one day. This was done to ensure that PML (Q), the party allied with military regime, could form government with a majority of one vote. Later, most of those who crossed the floor were given key portfolios and other perks in return for their 'loyalty'. Soon tales of graft, abuse of power, misuse of rules and corruption started to emerge. It was in this environment that the Supreme Court, under the leadership of Justice Iftikhar Chaudhry, started taking notice of these reports and stepped in to make officials accountable. The following sections identify (from data gathered for this thesis) the key issues on which judges took a stand against the executive, along with the legal tools they used to do so.

### **5.3.1 Stance on Accountability**

The judges made it a point to hold public servants accountable for their actions and decisions. This was seen favourably by the merging middle class and it elevated judiciary as a key institution capable of scrutinising key members of elite perceived as corrupt by them. One of the participant of the FGD stated:

We need to set an example that a powerful person is in the jail. This will spread justice in the society which will have trickledown effect. So we need to have accountability and the judiciary needs to play a role.

The court took stern action against powerful stakeholders on counts of corruption, misuse of resources, abuse of power, human rights violations and a number of issues concerned with the public. It went on to use legal tools such as *suo motu* powers and the Human Rights Cell to extend its reach into domains traditionally not thought to be within its purview.

**Abuse of Power:** The interviewees confirmed that some judges, particularly Justice Chaudhry, became quite reviled figures among government functionaries due to the treatment meted out to them by the court. Dr. Khalid Ranjha, the Law minister during Musharraf regime stated during his interview for this thesis:

Justice Chaudhry was never liked by the bureaucracy and the government officials due to his constant interference and insulting demeanour. Particularly after his (first) reinstatement as Chief Justice he would summon high level government officials and make them wait for hours or threaten to punish them for contempt of court. His attitude and actions necessitated imposition of emergency that was enforced by General Musharraf in November 2007.

The court initiated or took up a number of cases aimed at holding the political elite accountable. The interviewees identified a number of cases as evidence in this regard; these have been corroborated from secondary sources as well. Within one week of the appointment of Justice Chaudhry as Chief Justice in 2005, for example, the court imposed a fine of Rs. 12.8 million or a term in jail on a former minister under the accountability laws (Dawn, 2005a). In another case, the court ordered the district administration of Faisalabad to present a report about the properties owned by the Vice-President of the ruling PML (Q) party, who was contesting elections for seats reserved for 'peasant' members in the 2005

local body elections, and subsequently disqualified him from contesting under this category. In February 2006, the Court decided against the conversion of a public park into a mini golf course (PLD, 2006a). It maintained the petition on *pro bono publico* basis, i.e. to protect public property that was situated in one of the most expensive areas of Islamabad. The Capital Development Authority (CDA) had leased the park to a private developer for the construction of a golf course for a paltry rent of Rs. 2.55 million per annum. In its decision, the Supreme Court declared the agreement unlawful and instructed the CDA to initiate disciplinary action against the officers responsible for executing the lease. Similarly, on 5 April 2005, the Court took *suo motu* notice of the cutting down of trees in another public park in Karachi for the purpose of building a multi-storey car park (PLD, 2006b). The district administration had to abandon the construction project as a result.

In one of the most significant decisions, one that irked a number of prominent members of the ruling elite including politicians, military figures and business people, on 31 March 2006 the Supreme Court declared sale of a state-owned steel mill null and void (PLD, 2006c). The court order pointed to a number of irregularities and violations of the Privatisation Commission's mandatory provisions. Furthermore, the petition against the sale was brought by the little-known Watan Party – which had no electoral representation – against the Federation of Pakistan. The acceptance of the petitioner's right as a registered political party to be an aggrieved party with direct interest in national assets, such as the steel mill, stretched the court's jurisdiction in this case under the Article 184 (3) of the Constitution.

In another case, the Supreme Court directed the Punjab Archaeology Director-General to take action against encroachments on historical sites in Lahore (Dawn, 2007b). It took a *suo motu* action against the construction of a commercial building near one of the historic gates of the

walled city of Lahore (Dawn, 2007c). It also took up a petition against the conversion of farmland in the suburbs of Islamabad into palatial farmhouses. This included the houses of a number of senior military officers, including General Musharraf himself (Dawn, 2007d). The court also took up cases related to fake academic degrees and false declarations of members of parliament concerning their dual nationalities. At the time, being a graduate was one of the eligibility criteria for standing for election (a provision later struck down by the court). Dual citizens (i.e. those holding citizenship of another country along with that of Pakistan) were also not allowed to contest elections. The Court decided a number of cases suspending members of provincial and national assemblies on these accounts (PLD, 2010; PLD, 2012a).

A number of high-profile appointments to executive agencies were struck down by the court, citing procedural irregularities. These included, for example, the appointment of Mr Tauqir Sadiq as Chairman of the Oil and Gas Regulatory Authority (PLD, 2012b), of Chaudhry Muhammad Ali as Chairman of the Securities and Exchange Commission and of Admiral (retired) Fasih Bukhari as Chairman of the National Accountability Bureau, among others. The court went much further than ad hoc oversight of executive appointments by initiating structural reforms in at least three key areas to limit the discretion and power of the executive. First, the court directed that appointments in statutory, autonomous, semi-autonomous and regulatory bodies, as well as all government-controlled corporations, must be made by a Commission headed by two other competent and independent members having impeccable integrity and selected through an open, merit-based process with a fixed tenure of four years. After the 2013 elections, the Nawaz government formed a three-member centralised commission in accordance with court's instructions that made around 126 executive appointments to various public sector organisations (Shaheen, 2013). Yet the court

continued its oversight, as is evident from the recommendation to remove Ms Maryum Nawaz (daughter of the Prime Minister Nawaz Sharif) as the head of Prime Minister Youth Loan Scheme (ET, 2014).

Secondly, in May 2013 the Supreme Court ordered that various 'secret' funds maintained by various ministries were not exempt from audit (SC, 2012). These funds had to be simply abolished, enhancing transparency of public expenditure. This measure has reportedly saved or brought into the ambit of the public audit around Rs. 16 billion annually that had previously been spent in secret. In a separate case, *Hamid Mir and another vs Federation of Pakistan*, the court ordered the audit of intelligence agencies' funds, declaring that the Auditor-General has a constitutional obligation to scrutinise each and every rupee spent from the public exchequer without exception. The Federation lodged a review petition against this judgement, which remains pending; however, in a country where intelligence agencies are considered to be a state within the state, this was an unprecedented move towards making them accountable. The court also took up the matter of large-scale allotments of land to ministers, politicians and bureaucrats in the developing port city of Gwadar (Dawn, 2013d).

Thirdly, the Supreme Court consistently declared the consent of the Senate (the upper house of parliament) a necessary condition for Finance Bills, ending the past practice of ignoring the Senate and passing Money Bills exclusively through the National Assembly (lower house) (PLD, 2009).

**Corruption:** Concerns with regard to corruption of government officials and various state owned enterprises constitute a persistent theme of this era. Since 2005, the court has relentlessly pursued cases involving graft and financial corruption within both military and civilian governments. A number of high profile corruption scandals were unearthed, ruled

upon and at times even investigated by the Supreme Court. In 2011, for example, the court took notice of a letter written by Transparency International about the National Insurance Corporation Limited (NICL) scam. The case involved a key leader of the ruling party and the son of the former Chief Minister of Punjab, who were accused of selling their land to the (government-owned) NICL at highly inflated prices. Rs. 83 million was recovered from the accused, although the amount involved in the scam was reported to be over Rs. 5 billion (The Nation, 2012). The court also took notice of the Hajj scam, which involved embezzlement of millions of rupees during accommodation arrangements made for pilgrims to Makkah. The court indicted the Federal Minister for Religious Affairs, Mr Hamid Saeed Kazmi, of the ruling party, who had to be sacked and helped recover Rs. 5.4 million of an estimated Rs. 36.5 million of embezzled funds (The News, 2011). The court also took notice of allegations of corruption in the Rental Power Projects deals (initiated in collaboration with private sector to reduce power shortage in short term) and ordered the National Accountability Bureau (NAB) to prosecute all government functionaries involved. These included the then-Minister for Water and Power Raja Pervaiz Ashraf, who also happened to be the Prime Minister (SCMR, 2012). In the National Police Foundation Land Case, the Supreme Court took notice of a news report and deemed the allotment of land to the foundation illegal. It ordered the NAB to institute cases against several government officials, including a sitting member of the National Assembly.

The court also pursued the Ephedrine case, which involved the son of the then-Prime Minister Yousuf Raza Gillani, sitting National Assembly member Ali Musa Gillani, as well as former Federal Minister for Health Makhdoom Shahbuddin and PML (N) National Assembly member Hanif Abbassi. All were accused of allocating licenses to certain pharmaceutical companies to

import excessive quantities of ephedrine, a controlled substance (Bukhari and Haq, 2012). The case cost Makhdoom Shahabuddin the premiership when, despite being front runner, he was ignored for the position by the ruling PPP for fear of another confrontation with the judiciary after the court had ousted Prime Minister Gillani in a contempt of court case. In the Bank of Punjab case, the court helped recover around Rs. 1.5 billion that had been lent to the Haris Group of companies against the rules and regulations for such lending. The president of the bank, Hamesh Khan, was arrested and convicted in the case (64). In another property scandal, the court went as far as freezing all accounts of the Defence Housing Authority for selling various properties to the Employees Old-age Benefits Institution (EOBI) at highly inflated prices. EOBI officials involved in the sale were investigated and brought to justice (The Nation, 2013).

**Human Rights:** Human rights also remain a key theme in the data, with members of the legal fraternity claiming to champion the cause. The interviewees described how the Supreme Court extended its remit by taking up cases that touched upon a number of social issues that affected both individuals and communities. It used and extended the scope of the basic human rights guaranteed in the Constitution to cement its role as guarantor of human rights for the masses. In 2005, Justice Chaudhry accepted the petition of the residents of Margalla Towers, a ten-storey residential building that collapsed in the earthquake of October 2008 (SCMR, 2005). The petition blamed the Capital Development Authority, the builders and contractors for violating construction regulations and for sub-standard construction putting the lives and property of residents in danger. The petition was filed for the enforcement of petitioners' fundamental right to life, liberty and property as guaranteed in the Constitution. In the same month, the court, inquiring into the disappearance of a girl, ordered the Chief

Secretary of Punjab to immediately transfer the Superintendent of Police in Rawalpindi and depute another officer in his place due to his failure to comply with the court's instructions (Dawn, 2005b).

The Supreme Court also took up cases of 'missing people' that involved powerful military intelligence agencies. It was the first time in the country's history that the intelligence agencies had been held accountable by a civilian authority. The court also took notice and directed strict actions against the police officers who stopped and baton-charged family members and relatives of missing people when they marched to General Headquarters of the Pakistan Army to present a memorandum to the Vice Chief of the Army Staff.

The court took notice of the illegal trade of human kidneys in February 2007 and asked the government to regulate organ transplantations (Dawn, 2007a). On 24 August 2007, the Supreme Court took *suo motu* notice of the military operation in Balochistan and killing of Nawab Akbar Bugti, a veteran Baloch tribal chief (Dawn, 2007e). A day earlier, the court ruled in favour of Nawaz and Shahbaz Sharif and upheld their right to return to Pakistan and participate in the upcoming general elections (Dawn, 2007f). In a case concerning the service of ninety-six ad hoc lecturers, the court ordered the Punjab government to regularise them (i.e. offer them permanent positions) within three days (Dawn, 2009a). The court also took up a petition against the government's oil-pricing mechanism (Dawn, 2009b) and ordered regulatory authorities to pass declining oil prices on to consumers. In a recent ruling, the court decided that only the court, not the Federal government, could freeze the bank account(s) of an individual even if the government suspected links with separatist or terrorist organisations (Dawn, 2013a). The court took notice of bonded labour in Sindh province and ordered Sindh police to arrest the perpetrators in a particular case where members of a family were

kidnapped and forcibly made to work (Dawn, 2013b). On 23 January 2007, the court ordered action against all industrial units that were polluting the Federal capital's environment by violating relevant rules (Dawn, 2013c).

### **5.3.2 Tools of Judicial Activism**

Many of the interviewees discussed in detail the use of various legal tools as innovations in the history of jurisprudence in Pakistan. There seems to be a consensus that the Supreme Court was able to push through its agenda of championing accountability and to carve out for itself a role as the guardian of human rights envisaged in the constitution by using legal instruments scarcely used in the country previously. First was the Human Rights Cell at the Supreme Court, which had remained dormant for years. Not only did the Supreme Court, after 2005, revive this cell, it made it a central plank in providing quick, cheap and effective access to justice. Second was the extensive use of *suo motu* powers that allowed the court to take notice of any issue, at times simply based on a news report or a complaint made to the Human Rights Cell, and initiate court proceedings. This was also a novel use of its jurisdiction which allowed the court to strategically choose its cases and take up any issue it wanted to become involved in. Furthermore, adept media handling and use of contempt of court powers ensured the emergence of the Supreme Court as a feared centre of power that demanded to be heard and obeyed. It is worth understanding in greater depth how the court deployed these tools to achieve its strategic goals.

**Human Rights Cell:** Although the Human Rights Cell at the Supreme Court was established in 1992, the number of cases taken up by the court through this avenue to 2004 remained limited (Siddiqi, 2015). The cell was revived with extraordinary vigour in 2005, after the ascent of Justice Chaudhry to the position of Chief Justice; he turned this into a major tool that has

made the Supreme Court accessible to anyone who can write a letter, even without the assistance of a lawyer. Any Pakistani citizen can, by simply writing an application on plain paper, bring his or her plight to the Supreme Court's notice. The court also made the Human Rights Cell independent, in that it was able to receive complaints and dispose of them through administrative orders to provide relief without them ever becoming court cases. This allowed the court to provide expedited resolution of large number of cases. No less than 201,456 complaints were received between 2009 and 2013, of which 180,765 were duly disposed.

This was not only the most convenient but also the most inexpensive way to access the court and was seemingly aimed at bypassing the formal legalities of normal court procedures. The Cell became extremely popular among the middle and lower middle classes and the deprived sections of society and was, at times, receiving 500 to 600 applications a day. The statistics show an exponential increase in the applications received and decided by the Cell since 2005. The court's acceptance of a number of these complaints considerably expanded the scope of human rights litigation in the country. Issues such as lack of essential amenities (including electricity, water and gas), traffic congestion, lack of roads, social taboos such as *vani* (marrying off girls to settle disputes), under-age marriage, treatment of the transgender community and other human rights issues such as missing people, service-related matters and personal issues were taken up. Most of the complaints were against the heavy handedness or complicity of state authorities such as the police, land registry or even the lower courts and often involved local notables and politicians.

The number of cases instituted by the Human Rights Cell is many times the number initiated under similar provisions in the preceding history of Pakistan. Such a dramatic rise in itself represents radical shift in the court's approach to public interest legislation. This was made

possible by redefining the scope of various constitutional provisions, particularly those under Article 184(3). Firstly, the Supreme Court held that the existence of a petitioner is not compulsory for exercise of jurisdiction by the court (SCMR, 2013). Thus, the court shifted its focus from the petitioner to the issue before it and has taken the initiative of pursuing issues with or without a petitioner or aggrieved party. Secondly, it significantly reduced the requirement of legal remedies first being exhausted under various statutes in normal civil or criminal courts or under Article 199 of the Constitution. It has, therefore, taken up cases directly instead of acting solely as an appellant body. Third, the Supreme Court also took up the same, or similar, cases that were pending before the High Courts or that had been decided by a High Court even if no appeal was made to the Supreme Court. Finally, the Supreme Court has vastly extended the justiciability bar for adjudicating cases in spheres not traditionally viewed as within its purview. These include all sorts of policy issues, administrative issues, questions concerning with politics, economics, large scale law and order and the environment as well as a range of socio-cultural issues. In the words of Siddiqi (2015: p.87): 'It seems that there is no issue which does not have a legal and judicial solution'. He terms it 'radical judicialisation of state and societal issues' (ibid, p87).

Since the retirement of Justice Chaudhry, the Human Rights Cell has continued to operate and has even expanded its scope to make its services available to Pakistanis overseas. This was one of the first initiatives taken by Chief Justice Tassadaq Hussain Jilani, who took over from Chaudhry (Khawaja, 2015). This makes access to justice easier for those who have left Pakistan in search of better work opportunities but continue to face problems with respect to their unattended property. Furthermore, it also recognises the critical role overseas

Pakistanis played in the movement for the restoration of judges and their rising importance in the political milieu of Pakistan.

Table 5.3: Public Interest Litigation cases instituted at Supreme Court of Pakistan (Siddiqi, 2015:84)

Year	<i>Suo Motu</i> Cases	Human Rights Cases	Constitutional Petitions	HR Cell Applications
1988-1999	3	13	23	-
2000	2	3	33	-
2001	2	2	11	-
2002	2	2	42	-
2003	4	2	58	-
2004	4	0	43	-
2005	15	12	41	-
2006	15	80	34	-
2007	27	77	90	-
2008	2	4	18	81
2009	28	97	68	9,879
2010	27	135	81	59,878
2011	20	42	92	48,388
2012	11	69	132	42,999

***Suo Motu Powers:*** The use of *suo motu* powers has been limited to highly exceptional cases throughout the history of Pakistan; from 1988 to 1998, only three *suo motu* cases were taken up by the Supreme Court. However, initiating cases using these powers has become a regular occurrence since 2005. Its impact on the masses was such that to take *suo motu* action became a popular demand from the Chief Justice during protests or lobbying efforts on various issues. The powers operate under Article 183(3), which allows the Supreme Court to initiate cases that would otherwise remain unresolved. This provided relief to thousands of people who would have otherwise remained helpless and effectively established the Supreme Court as platform that was accessible to masses and that responded to their plight. This helped the court achieve and sustain its popular appeal.

Exercise of *suo motu* powers allowed the Supreme Court to step into any domain and take up any issue with any petitioner, or even in the absence of an aggrieved party. It helped the court to choose its cases strategically, remain in the public limelight, build the kind of image it wanted to portray and ensure that people looked to it for intervention in cases where no-one was willing to bring a legal question as a formal petition. However, excessive use of *suo motu* powers has also been criticised on two counts. First, these cases reduced the ability of the court to perform its designated duties, i.e. to deal with regular petitions and appeals. Second, the arbitrary nature of these actions and the absence of formal rules means that these are dependent on issues that the court or individual judges may wish to undertake at their sole discretion (Khawaja, 2015).

***Communications Strategy:*** The Supreme Court improved its ability to use media effectively to communicate directly with the people. It became the norm for remarks by judges during hearings of various cases to appear on the front pages of print media as well as key news

items on electronic media. Talk shows and other current affairs programmes regularly discussed the political and other implications of these remarks and of verdicts given by the court. The court also shifted its *lingua franca* to Urdu, with many of the remarks made and proceedings conducted in that language. The court also issued a number of important judgements in Urdu to ensure its verdicts and views were directly accessible to the masses. The registrar's office effectively became the spokesperson for the court and media started to look to the court for creating news items with large viewer- or readership. This helped the court remain visible and even, at times, to dominate the national discourse. The approval ratings of Supreme Court as a result of these factors increased and have remained higher since 2005 than in any other period in the history of the country.

#### **5.4 Implications of Judicial Activism**

Since the restoration, the Supreme Court has placed a heavy emphasis on Public Interest Legislation cases. These have taken various procedural forms including human rights cases, *suo motu* cases, complaints by individuals/organisations converted into petitions, and constitutional petitions filed by individuals or various entities. Siddiqi (2015) notes the way the Supreme Court has used public interest litigation as a tool to establish itself as the 'central focus of public discourse' (p. 88). He argues that this was possible through 'landmark judgements' that the court delivered on a number of issues being debated at the time. A critical shift towards for corruption and graft issues is visible in the court's selection of cases. Siddiqi notes that although corruption cases had been taken up in the past, and even that dismissals of elected governments had been justified on the grounds of alleged corruption, it was only after 2009 that aggressively pursuing corruption cases became the central focus of the Supreme Court. This established the court as the primary mechanism for the recovery of

public money expropriated through corrupt or illegal practices. Secondly, the court has actively pursued the implementation of its orders and directives. On a number of occasions it has called on the officials of executive authority concerned to ensure implementation, even threatening, and at times actually initiating, contempt of court proceedings against them for non-conformity with court orders. Third, careful observers have noted that the presence of petitioners and members of the general public has increased greatly at the hearings. This represents increasing confidence in the judiciary's ability to give bold judgements and to get them implemented. Petitioners are also given more prominence inside, and even outside, the court, as epitomised by the International Judicial Conference held at the Supreme Court in 2013 that invited three petitioners (including the president of the Transgender Foundation, Ms Almas Bobby) as prominent speakers. This reflects efforts by the court to reach out to the general public and establish lasting trust in its ability to provide relief on a range of issues related to the populace.

The courts' actions and the public mobilisation that led to the restoration of the judiciary effectively transformed the basis of judicial power, from constitutional guarantees of secure tenure and moral legitimacy to a basis in public legitimacy. This thesis points to the conscious strategy, tactics and framing used by the court to achieve and sustain public legitimacy. This included building key alliances with actors where interests converged and various political tools, including mass mobilisation, boycott and negotiations, to achieve judicial empowerment. Furthermore, in building these alliances the court had also to respond to demands from various sections of society. This has serious consequences for the judicial interpretation of the Constitution and law. On a number of occasions, Chief Justice Chaudhry and subsequent chief justices have referred to 'people' in their judgements, remarks and

speeches. This 'people-oriented' interpretation seems designed to extend the public legitimacy enjoyed by the court and makes the constitutional legitimacy of an interpretation dependent on whether it furthers public interest or welfare. As prominent lawyer and former President of Supreme Court Bar Association Mr. Hamid Khan put it in his interview for this thesis:

Justice Iftikhar Chaudhry wanted to make judiciary an 'awami (people oriented) institution' instead of 'elitist institution' - at times he is criticised for going overboard but still it was pro-people. His effort to go outside rigid structure of courts to provide relief established credibility and legitimacy.

How the court decides what the 'public interest' is, or even what is 'public' however, requires further analysis. This thesis argues that it is the emerging urban middle class that court has largely attempted to partner with, and that this is the constituency that has been the most vocal supporter of the court's redefined role. The court's focus on curbing corruption and abuse of power and promoting meritocracy and the rule of law shows how it caters to increasing demand from this section of society.

The court also consolidated its doctrinal shift by purging the judiciary of elements that supported the 3 November 2007 imposition of emergency rule. This led to the sacking of 60 judges appointed in the two years before the court was reinstated. Such decisive action sent a clear message to the legal fraternity that the court was in no mood to accept dissent and expected conformity to its evolving doctrine of institutional independence. It also served to strengthen the court's alliance with a large section of lawyers who had a history of advocating for the independence of judiciary, as well as with civil society and the wider populace. Sacking these judges established a strong deterrent against acceptance of unconstitutional actions by the executive and rewarded judges who stood their ground.

This cemented the court's position as the arbiter of power in the country and allowed it to take up key cases in which government locked horns with the military establishment. While these incidents would, in another era, have most likely resulted in the overthrow of the government, the court's deftness in resolving disputes and its firm stance in favour of the continuation of democracy prevented crises from becoming disasters. Memo Gate, the SHCBA case and the Tahirul Qadri case are important examples of the role played by the court as a political umpire. In the Memogate scandal (Crilly, 2012), the Federal government was accused of writing a memorandum to Mike Mullen, then Chairman of the US Joint Chiefs of Staff, seeking US 'intervention' to dissuade the Pakistan military from ousting the democratically elected government. It also allegedly sought support for the ISI to be disbanded, evoking a furious reaction from the military establishment. At the height of the confrontation, the Supreme Court stepped in and appointed a three-member judicial commission, comprising the Chief Justices of Balochistan, Islamabad and Sindh High Courts, to investigate the matter. In its final report the Commission put the blame entirely on the then-ambassador of Pakistan to the United States, Hussain Haqqani, for writing the memo, absolving the government from official involvement. Ambassador Haqqani was duly sacked and the court thus defused the crisis by taking up the politically charged case and diverting the entire burden or responsibility onto a dispensable individual. Similarly, in the Tahirul Qadri case (PLD, 2013), where an otherwise political nonentity, Dr Tahirul Qadri, widely believed to be backed by the military, attempted to destabilise the government through a sit-in in the Federal capital, the court helped keep the democratic project afloat. While it took its time to gauge Dr Qadri's intentions, it eventually dismissed his petition, citing his dual nationality (Dr Qadri was also Canadian national) and arguing that this disqualified him from contesting elections and thus that his fundamental rights were not violated by the particular set of

electoral laws from which he was seeking relief. Effectively, the court refused to accept him as an aggrieved party. This defused another crisis that had the potential to derail the system. The court's assumption of such a role has important implications for the sustenance of some form of democratic rule in the country. First, the court's establishment of itself as the ultimate ombudsman of the elected government meant that it encroached upon the position historically held by the military. It also transferred people's expectations for dynamic accountability of the government from the military to itself, thus depriving the military of its main excuse to play an overt role in politics.

The judiciary in Pakistan is not, however, unique in proactively expanding its sphere of influence by reaching out to key segments of the society, making alliances and challenging the executive. An emerging set of literature reports a number of cases or instances where judiciaries are increasingly playing a key role in politics and using a variety of legal tools to establish and sustain their popularity, and thus influence, among the masses. The following section looks at the cases of Colombia and Spain and compares these with that of Pakistan to further enhance our understanding of changing judicial behaviour.

## **5.5 Conclusion**

The cases of the Pakistani judiciary discussed above yield key insights into judicial behaviour and support the argument that judges seek alliances with key sections of the society to achieve individual or institutional goals. This is in line with seminal work by the likes of Charles Epp (1998), who views courts as partly dependent on the 'support structures' derived from amicable civil society groups. The Constitutional Courts, therefore, seem largely dependent on both social and political support and have sufficient degree of discretion to decide cases

to enhance or reduce the remit of the power of those groups. In a dualist legal system, international law is regarded as separate from the national laws of a country. To give effect to international law, the country must introduce legislation through the domestic process. In such a dualist legal system, the courts have sufficient discretion and power to create and strengthen the structures that afford them support. This power and discretion is not unfettered, because the courts are constrained by the political and social contexts in which they exist, but they do nevertheless possess a sufficient degree of discretion and power to strengthen those groups, which can in turn increase the courts' power. This needs to be seen in the context of a rich body of literature on how social movements influence the courts. One of the main hypotheses advanced in this work is that bringing proceedings before the courts, and decisions handed down by the courts, can assist civil society movements and groups to become more organised. For example, bringing an action before the courts can create a symbolic power that may help to galvanise support from other interested parties irrespective of the merits of the claim. However, the courts can consciously select/design strategies that recruit agreeable civil society groups to provide support for their decision making. That is to say, it is not solely about how social movements can use or influence the courts but the other way round as well. In the case of Pakistan, it is evident that the court fostered relationships with various interested parties who then helped protect the court at vital moments. These parties include members of the academic community, civil society and the general public, amongst others. The court's willingness to intervene in questions concerning the legality of decisions made by public officials has been welcomed by community actors. This has emboldened the court to maintain continuity in its decision making in judicial review proceedings and has afforded the court a degree of protection against political consequences.

These cases also show that it is not always political fragmentation or a democratic dispensation that encourages or empowers judges to challenge the executive. On the contrary, political fragmentation/competition is neither necessary nor sufficient to activate positive judicial independence. Judges do not operate in a vacuum and can, and obviously do, assess the likely responses of other actors holding positions of authority before asserting their authority to challenge such actors. However, the multiplicity of cases in which judges either ignore the high risks of asserting their authority, or decline to take an opportunity to assert their authority, suggests there are other compelling variables which facilitate a climate of positive judicial independence. It is therefore argued that political fragmentation theories fail to recognise the important way in which judicial attitudes, and the social and institutional processes that constitute them, affect judges' responsiveness to opportunities and constraints in society. It is also clear that it is not always democratisation that creates an environment in which judiciaries can assert themselves, but that, as is evident from the case of Pakistan, the judiciary can play a key role in catalysing the process of democratisation.

Also, the importance of the dominant legal doctrine accepted internationally or in the region at a particular point in time cannot be ignored. The diffusion of ideas from global legal discourse also shapes opinions and, thus, behaviour. Since 1991, the instance of successful coups has decreased significantly and global legal discourse is extremely averse to providing judicial legitimacy to unconstitutional action by powerful actors. The case of Spain (discussed in detail in Chapter 7), is a fascinating example of a period, even before the latest wave of democratisation, when judges were affected by the emerging legal discourse against authoritarian and totalitarian regimes. These judges mounted considerable resistance to the Franco regime and played a key role in the democratic struggle in the country. Bilbink (2012)

discusses in detail the ideological shift, or 'cultural reframing', that provided judges and prosecutors in Spain a sense that they had a professional duty to defend legal principles, in order to 'push' for independence. The judges also cultivated ties with clandestine political parties, progressive clergy, sympathetic media outlets and the Council of Europe, which protected them and enhanced the efficacy of their efforts. Lastly, the class origin of the judges considerably affects their outlook and world view. The shared class interest and its effect on framing issues in a particular way shapes judicial interpretations and judgements reached by the judges. In turn, these interpretations resonate with related sections of the society to affect the approval ratings enjoyed by the judges. In Pakistan, the judiciary seems to have gained considerable legitimacy, public approval and thus power as a result of its sustained rulings on issues that the middle class holds dear. This also explains the link between institutional change and underlying socio-economic shifts. The next chapter analyses the Lawyers' Movement that provided the most important instances when the wider urban middle class and a transformed judiciary came together to protect shared interests.

## CHAPTER 6: PUTTING IT ALL TOGETHER: THE LAWYERS' MOVEMENT (2007-2009)

### 6.1 Introduction

This chapter analyses how the Lawyers' Movement affected judicial behavior in Pakistan. It builds on the discussion in chapters 3 that identified the change in the state of judicial independence in Pakistan and chapters 4 and 5 that substantiated the wider social changes in the society and their affects on legal field. It was however the Lawyers' Movement during which all the changing demographics, changing class origins of judges, effects of emerging global legal discourse and a host of other social, political and economic issues culminated to substantially alter the power structure in Pakistan. This chapter therefore focuses on the Lawyers' Movement as the manifestation of public support for judiciary (as shown in figure 6.1 that reproduces the relevant part of the argument made in section 2.6) and its implications for judicial independence and politics in the country.

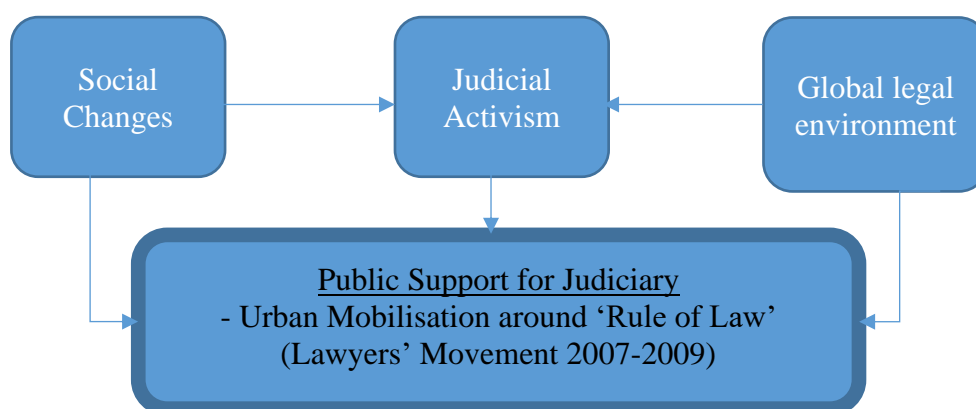


Figure 6.1: Component of the argument (fig. 2.2) discussed in this chapter

As the data show, the turning point in the trajectory of judicial decision making seems to have been the judicial activism that started in 2005. The rise of this new judicial doctrine, however, was institutionalised and consolidated by the Lawyers' Movement (2007–2009) that emerged to save the Supreme Court from the executive's court-packing plans. Although there had been occasional dissent against authoritarian rule within the judicial fraternity throughout Pakistan's history, and a number of judges preferred losing their job to being co-opted or intimidated by the establishment, it was the Lawyers' Movement that provided the real impetus for maverick behaviour. Courts in Pakistan have, since then, taken up cases and given decisions against intelligence agencies' involvement in politics and extrajudicial abductions and killings, initiated the trial of General Musharraf, sacked an elected Prime Minister for contempt of court and taken numerous *suo moto* cases to intervene in processes from ensuring stable commodity prices to scrutinising privatisation contracts. This chapter aims to understand how the Lawyers' Movement helped bring such drastic changes to established legal practices in Pakistan.

Chapter 2 has already discussed the critical role that social movements and popular mobilisation play in constitutional change. The demands and vision of the movement, backed by the masses, influence the court's decisions and interpretation of law and these in return affect the demands and visions of the movement. This duality allows agency to be exercised by both the social activists and the judges to create new legal meanings and establish a new order of life. Putting social movement at the centre of analysis, therefore, allows the process of constitutional change to be studied bottom-up. This also helps place constitutional change in the broader context, where a number of conflicting relations shape social reality. One can thus examine the link between the institutional change and that in the social structures.

Chapter 2 also discussed Resource Mobilisation Theory and Discourse Theory, which help in understanding the consciousness and emergence of social movements. RBT argues that mere dissent and grievances alone are not enough to generate social change and that resource mobilisation is key to a movement's success. It therefore looks at funding arrangements, alliance making, establishing a robust structure and gathering supporters as key aspects of a social movement. Framing theory, on the other hand, focuses on social movements' discursive and ideational work and the way their key activists identify grievances, make demands and justify these. This process is used not just to mobilise members in a movement but also to persuade bystanders, and is related to other aspects of social movements such as tactics, identity and ideology. The following sections use both theories to analyse the Lawyers' Movement using the data gathered during interviews and focus group discussions for this thesis. The data are also corroborated with secondary data, and multiple sources have been used where possible to authenticate the findings. Key themes have been identified from the data to understand the structure, key alliances, sources of funding and key tactics of the movement. Recurring themes are also identified and analysed to understand the way issue was framed to garner support and challenge the status quo.

## **6.2 Understanding the Lawyers' Movement**

On 30 June 2005, Justice Iftikhar Chaudhry became the Chief Justice of Pakistan. Up to that time, he had nothing on his record that could have alarmed the Musharraf regime. He had taken oath under the PCO, was part of the bench that validated the coup d'état, and was also part of the bench that threw out all legal challenges to constitutional amendments made by Musharraf (Ahmed and Stephen, 2010). However, after assuming the office of Chief Justice, he became increasingly assertive, taking *suo motu* notices of a number of matters that irked

the regime. Such cases included suspending the privatisation of Pakistan Steel Mills, shelving the 'New Murree' housing project (in which a number of generals and pro-military politicians had stakes) and the case of missing people from Baluchistan province, where the military was fighting a separatist insurgency (Faqir et al., 2013). Frustrated by the court's activism, Musharraf summoned Chaudhry on 9 April 2007 to the Army House (the official residence of the Chief of Army Staff, which Musharraf also used as his Camp Office), and in the presence of five Army Generals, including the heads of intelligence services, asked him to resign. Chaudhry surprised everyone by refusing, upon which he was immediately placed under house arrest. A case was filed by the government in the Supreme Judicial Council (comprising senior Supreme Court judges) against Justice Chaudhry alleging corruption, nepotism and abuse of power (Ahmed and Stephen, 2010).

There was great unrest in the country at the treatment meted out to Justice Chaudhry and large numbers of people poured out onto roads to greet him when he decided to walk to the Supreme Court for the hearing of his case. Manhandling by the police during this walk further aggravated public anger and enhanced his image as a pro-people judge opposing tyrannical rule (Ahmed and Stephen, 2010). One of the participant of the FGD described her feelings in these words:

Their (Executive's) actions made us realise that if there is no justice for the Chief Justice of Pakistan than there will be no justice for anyone in the country.

A 13-member full bench was constituted by his fellow Supreme Court Judges who, in a unique show of defiance on 20 July 2007, rubbished the Presidential reference and ordered Chief Justice Iftikhar Chaudhry to be reinstated. This was viewed as an historic judgement that redefined the power equation between the judiciary and the military-backed president. Later

in October, Musharraf's five-year term as President was coming to an end and he sought re-election from the lame-duck parliament, which was already in its last month and had already elected him once before. Questions arose about his eligibility for the office of the President, given that he was also Chief of Army Staff, and Chief Justice Chaudhry constituted a bench to decide on these issues. This alarmed Musharraf greatly and, fearing an imminent judgement against him, on 3 November 2007 he declared a state of emergency, suspending the Constitution yet again, along with the parliament and basic human rights. This order was issued by General Musharraf in his capacity as the Chief of Army Staff, rather than President (Ahmed and Stephen, 2010; Faqir et al., 2013).

As the news about the declaration of emergency spread, a number of judges, including Justice Chaudhry, gathered in the Supreme Court and, in a short order, declared the imposition of emergency rule as illegal and restrained authorities from implementing the orders of Musharraf. They were, however, immediately arrested and placed under house arrest along with their family members. Judges of the Supreme Court and the High Courts (except Justice Chaudhry) were asked to take fresh oaths under the Provisional Constitution Order promulgated by the regime. Again in solidarity with the Chief Justice, around 60 top judges refused to take the oath. Lawyers from across the country protested against the state of emergency and the suspension of the higher judiciary. In a major incident and a precursor of things to come, police raided the protesting lawyers at the Lahore High Court Bar Association and, after baton charging and using tear gas, arrested over 800 lawyers (Faqir et al., 2013).

Musharraf, under pressure from the political parties, appointed General Ashfaq Kayani as Army Chief and became a civilian President. Nawaz Sharif and Benazir Bhutto had returned from exile and were leading campaigns for the elections scheduled to be held in February

2008. During campaigning Benazir Bhutto was assassinated in the garrison city of Rawalpindi; despite great grief, mourning and protests, her party, now led by her widower Asif Zardari, decided to contest the elections in accordance with the schedule. The PPP won the most seats and was in a position to form a government with its allies and independents, but opted to form a coalition government with the PML (N) which had come second. Leaders of both parties had earlier signed a 'Charter of Democracy' promising to end the military's frequent interventions in politics. It also demanded the restoration of judges; however, newly elected Prime Minister Yousuf Raza Gillani and Asif Zardari feared reprisals from the military. The Supreme Court was now headed by Justice Dogar, who opted to take oath under the PCO. On his first day in office, Prime Minister Gillani ordered the release of all detained judges, but stopped short of reinstating them. Amid disagreement on the reinstatement of judges, the PML (N) soon opted to sit on the opposition benches and left the government. Frustrated by the failure of the government to restore judges, lawyers organised a long march on 14 June 2008 that was attended by thousands of activists. Led by prominent lawyers such as Aitzaz Ahsan, Hamid Khan, Munir A. Malik and Ali Ahmed Kurd, and supported by lawyers' associations and major political parties as well as the civil society, a number of protests were held along with strikes and a boycott of the courts (Ahmed, 2012; Faqir et al., 2013).

The media – especially the electronic media that had considerably expanded during the Musharraf regime and now had over twenty 24-hour news channels with extremely popular political talk shows airing in prime time – gave unprecedented coverage to the whole judge's saga from the start. This had resulted in Musharraf banning certain TV channels and talk show hosts after the imposition of emergency in late 2008. These were, however, restored after the elections and, along with the social media and electronic platforms such as YouTube, were

key source of information for the public at large. A narrative started to emerge favouring the restoration of judges to uphold the rule of law and defend the independence of judiciary (Ahmed, 2012).

PPP leader Zardari and PML (N) leader Nawaz Sharif joined hands in August 2008 to force Musharraf to resign and Asif Zardari was elected as the new President of Pakistan. However, he continued to refuse to reinstate judges, citing various legal issues. His relationship with Nawaz Sharif, an ardent supporter of reinstatement, deteriorated to an extent that he imposed Governor Rule in the Punjab province, deposing the provincial government headed by the PML (N). Another long march was therefore organised by the combined opposition as well as the lawyers and civil society, supported by the media, on 16 March 2009, when activists in large numbers (estimated in the hundreds of thousands) marched towards Islamabad despite government barricades and other hurdles. The government relented before the participants had reached the capital and in a televised speech the Prime Minister announced the reinstatement of the deposed Judges. Iftikhar Chaudhry re-assumed the office of Chief Justice on 22 March 2009. Lawyer's Movement is credited with reshaping the power relations in the country. As one of the participants of the FGDs described:

Lawyers Movement was the 'big bang' that created a new Pakistan. The politics would never remain the same again.

Another added:

Lawyers Movement was the water shed moment in the history of Pakistan that reset the relationship and power equation between various state institutions in Pakistan.

Following sections discuss aims and objectives, structure, tactics, sources of funding and communications strategy of the Movement.

### **6.2.1 Aims and Objectives of the Movement**

The Lawyers' Movement, as will be further discussed in following sections, brought together a number of diverse groups that had their own interests and political objectives. The regime's actions against judiciary, however, provided them an opportunity to unite on the one-point agenda of reinstating the deposed judges. This became the focal point of the movement because of the strong public opinion (especially in urban centers) in favour of the judges and because it served a number of other objectives each of constituent group in the movement had. For opposition political parties, for example, it was an opportunity to embarrass the regime and create hurdles to the re-election of General Musharraf as President while retaining the office of Army Chief. It also provided an opportunity to mobilise their support base and demonstrate their street power as a means to get a better bargain from the regime, as the PPP eventually did by getting General Musharraf to relinquish the office of Army Chief and offer amnesty from pending court cases under the National Reconciliation Order (NRO). This also made it possible for the exiled top leadership of both mainstream political parties, the PPP and the PML-N, to return to the country. It also provided an opportunity for other political parties such as the PTI, JI and ANP, to expand their support base. The PTI, in particular benefited due to aggressive stance of its leaders and its ability to attract youth. The ensuing political crisis also provided an opportunity to the newly liberalised media to flex its muscles and play a key role in shaping national discourse and cultivating public opinion. It was also an occasion for civil society groups in Pakistan to build public approvals by echoing public sentiment. Finally, it made the lawyers and judges household names and brought tremendous social prestige to the legal profession and its practitioners at all levels, leading inevitably to economic benefits in the long term. The Musharraf regime had sufficiently alienated the

religious and right of the centre political parties for these to join the pro-democracy centrist, secular and left-leaning parties on the shared agenda of weakening and outflanking the regime.

The Movement also had considerable long term implications. The major party of the ruling coalition, the pro military PML-Q with its support base in Punjab, was almost eliminated from the parliament in the 2008 elections. This showed a tremendous turnaround in public sentiment in Punjab, which was traditionally considered to favour military rule. Other allied parties, such as the MQM and JUI-F, were able to barely maintain their support base and, in the case of former, had to put to rest its ambitious plans to expand its influence in Punjab and other parts of the country. A number of political parties, such as the PML-N, PPP, PTI, ANP and JI, were able to gain considerable political capital from the movement. Media and civil society organisations also emerged as key influencers of public opinion. The biggest beneficiaries, however, were the bar and the bench, who were able to get more than elbow room at the table and emerged as key power brokers. All these interest groups, as well as the key sections of society including the urban middle classes, were able to align their interests with the notions of 'rule of law', 'judicial independence' and 'supremacy of the constitution' and unite under the agenda of reinstating all the judges illegally sacked by the Musharraf regime. The movement was therefore able to mobilise masses like never before. Ali Ahmed Kurd, prominent leader of the movement and former President of SCBA acknowledged in his interview for this thesis that:

The key to Lawyers' Movement's success was participation of the wider public, especially the youth. This did not happen when lawyers protested against (enforcement of) the LFO in 2002.

## 6.2.2 Structure of the Movement

At the core of movement's leadership were the lawyers represented by various regional bar associations. The structure of the movement, therefore, was a loose confederation of lawyers' associations as well as other allies, all with their own motives, interests and objectives. Lawyers in Pakistan overwhelmingly practice as self-employed or through private partnerships and are not usually associated with chambers, as in the UK and many other countries (Abbas and Jasam, 2009). Therefore, joining the Lawyers' Movement was decision of individual, self-practicing lawyers who, probably for the first time in Pakistan's history, discovered and evolved a new kind of professional identity for themselves.

Nevertheless, a small committee of prominent lawyers, who also remained key position holders of various bar associations, was formed to co-ordinate and steer the movement. This was named the National Action Committee of Lawyers (NACL) and comprised Aitzaz Ahsan (former President of Supreme Court Bar Association (SCBA)), Ali Ahmed Kurd (President of the SCBA), Munir Malik (former President of the SCBA), Hamid Khan (Member of the Pakistan Bar Council (PBC) and former SCBA President) and Tariq Mehmood (retired judge). Most decisions were taken in consultation with the SCBA (which comprised around 1700 top lawyers licensed to practice law at Supreme Court level) and the PBC executive body (the apex body of lawyers in Pakistan, comprising representatives of all provincial bar councils). Over 150 local/provincial bar councils and associations, with a combined strength of 85,000 to 90,000 members, formed the critical mass required to stage regular protests and boycott legal proceedings to disrupt the judicial system (Ahmed and Stephan, 2010). These normally independent organisations, with their own jurisdictions, agreed to come together under the NACL as the umbrella organisation. It was not, however, under any agreement or as a result

of any formal procedure. It was, rather, a result of a mutual understanding of circumstances and shared objectives. Their union was voluntary and internally motivated. The decentralised nature of the movement, with networks of affiliated bodies spread all over the country, made it very difficult for the Musharraf regime to suppress the movement by simply locking up central leaders. At times when Ahsan and other leaders were under house arrest or in jail, there were others available to take up their role and continue the movement (Ahsan, 2012).

The movement also benefited from the charismatic leadership of Aitzaz Ahsan, a well-respected constitutionalist and a leader of the Pakistan People's Party (PPP), the largest political party in Pakistan. He and Ali Ahmed Kurd, through their renowned oratory and persuasive style, were instrumental in pulling large crowds to protests. This also helped the activists to stick together when, inevitably, there were disagreements between various factions. These disagreements were mostly tactical in nature; for example, over whether to disperse the thousands of protesters after the first long march in 2008, with many wanting to stay on for a sit-in until the judges were reinstated. On other occasions, some lawyers associated with the PPP withdrew from the movement at the direction of their party after the PPP formed government in 2008. These did not include Aitzaz, who refused to take part in elections and remained committed to the Lawyers Movement despite his affiliation with the PPP (Ahsan, 2014). Overall, such divisions failed to undermine the movement and turned out to be only minor hindrances.

Largely due to its network of local bar associations and their interactions on almost daily basis, the movement had a communication mechanism already in place. Information from the central leadership and feedback from the members travelled seamlessly through these established channels to support effective coordination. Use of ICTs (Khan, 2012), especially

mobile phones, social media and electronic media, was also critical; this is discussed in a separate section. The efficiency of communications was evident from the fact that the leadership was mostly able to react instantly to political developments and difficult situations. For example, when the federal Minister for Parliamentary Affairs was besieged in his vehicle by a mob of angry lawyers in Lahore, the central leadership was able to take action in time to rescue him, defuse the situation and preserve the non-violent nature of the movement (Ahmed and Stephan, 2010).

### **6.2.3 Key Alliances**

The Lawyers' Movement was able to bring together large number of organisations, interest groups and other actors under a one-point agenda of restoring the deposed judges. A number of allied actors had their own agendas and saw this impending change as serving their interests. There were also grievances as a result of prolonged authoritarian rule by the military, and the dismissal of judges and their defiance triggered a predictable response among disgruntled parties. Despite ideological, ethnic, sectarian and political divides, therefore, a number of stakeholders came together and made the Lawyers' Movement a rallying point against the Musharraf regime. Some key allied actors are discussed below:

*Media:* The media had become liberalised for the first time in history of Pakistan, ironically, during Musharraf regime in the early 2000s. This was probably the time to test (and expand) its limits, if any, on freedom of expression and strength to stand against the executive. It also provided them a chance to cement their relationship with and expand their audience and project their image as a platform that gave voice to the people. Almost all media organisations provided unprecedented coverage of the Lawyers Movement (Ahmed, 2012) and competed to take the lead in breaking news and producing content that they thought would resonate

with the audience. Mushtaq Minhas, a journalist and anchor person who became a champion of judge's cause and successfully used his popularity as a result to launch a political career stated in his interview for this thesis:

We (journalists/anchor persons) were instantly able to set the narrative right upon hearing the news of Justice Chaudhry's sacking. We instantly felt that there will be adverse reaction to regime's action among the public.

When asked during interview conducted for this thesis if media was not a beneficiary of Musharraf's policies to liberalise the industry, prominent journalist and anchor person Hamid Mir replied:

Not at all. We did not think we were beneficiaries because electronic media liberalisation was a result of our struggle spanning many years. Once satellite technology became available, many channels started broadcasting from Dubai. The government allowed private channels to ensure that it can effectively regulate them. Yet, we had to renew broadcasting license every week and it could be revoked by the government without any notice at any time and for any reason. We were rather extremely annoyed with the government's antics.

The protests were therefore broadcast live through electronic channels for several weeks and regular updates were given about progress of different processions and other developments related to the movement. Leaders of the movement became household names and the movement was the talk of the town. Intense televised debates on the need for and importance of the rallies and boycotts of court proceedings created awareness amongst the people and encouraged them to take a stance. General Musharraf soon realised the significance and impact of live media coverage for the effectiveness of the movement. He was caught in a difficult situation as he had on several occasions taken credit for liberalising the media industry and projected this as evidence of his liking for and transition towards 'real'

democracy. Therefore, re-asserting control over the sprawling media would not only be difficult but also embarrassing and discrediting. It was a difficult situation, which he wanted to avoid, but he nonetheless went ahead with targeting one media group that had taken the lead in building an anti-government narrative. This was the Jang/Geo group, which happened to be the largest media organisation in Pakistan, with the highest circulation of Urdu and English language newspapers and the most-watched television news channel. Cable operators around the country were forced to switch off Geo News transmissions and an assault at channel's head office in Islamabad was launched via police. The idea was to set an example for the media to force other media organisations to behave. The move backfired badly, as journalist unions responded in unison. Although Geo News remained off air for a while and suffered losses worth billions of rupees, it refused to budge and continued to telecast political talks and shows highly critical of the government (Ahmed, 2012). These were at times streamed online, while their videos were shared through social media and other online platforms that had mushroomed overnight (Khan, 2012).

*Political Parties:* Political parties were sceptical in the beginning and carefully calculated the pros and cons of a resurgent judiciary before throwing their weight behind the Movement. Various political parties had their own interests and objectives. Some like the PML (Q), MQM and JUI (F), were part of the ruling coalition and were bitterly against any challenge to the Musharraf regime. The opposition parties, however, saw this as an opportunity that could yield considerable political capital, rid the country of Musharraf's authoritarian rule and pave the way for electoral democracy, creating more space for them to operate and a realistic shot at joining or forming government. During the early phases of the movement, the top leadership of the two largest parties, the PPP and PML (N), was in exile; however, the

movement weakened Musharraf enough to enable Benazir Bhutto, chairperson of the PPP to come back despite his disapproval. Bhutto was also secretly in talks with Musharraf to have criminal cases against her family dropped, allegedly in return for supporting him to continue as president even if the PPP came to power. The deal broke down, however, once Bhutto arrived in Pakistan and saw the reality on the ground. She lent her full support to the deposed judges and PPP workers started turning up in large numbers at anti-government protests (Ahsan, 2014). This changed after her assassination just before the 2008 elections and, although the PPP won a majority in the National Assembly, Bhutto's widower and new chairperson of the party, Asif Zardari, withdrew support from the movement. The PML(N) had more of an incentive to support the Movement since it was directly affected by Musharraf's coup in 1999. It therefore continued its support for the movement and went on to take an oath from its parliamentary party to stand by the deposed judges at any cost. After the elections, it soon pulled out of the coalition government, in part over disagreement on the restoration of the judiciary; however, it was the imposition of governor's rule in Punjab province (where the PML(N) had majority) by the PPP that swung the PML(N) decisively into action. This led to the second long march, in 2009, that succeeded in forcing the restoration of the judges. The PML-N benefitted immensely from its participation in the movement. The movement allowed it to galvanise its support base in Punjab and reemerge as the leading political party in the province. The momentum thus generated led it to win an overwhelming majority in the 2013 elections. It also succeeded in creating a soft corner for itself among reinstated judges. One of the first judgements by the restored judiciary was to declare the imposition of governor's rule in Punjab illegal and to remove the Musharraf-imposed restriction on Nawaz Sharif contesting elections. The PPP, on the other hand, suffered for the rest of its tenure from having alienated judges through its reluctance to restore them until it

was forced to do so as a result of public pressure. Pakistan Tehreek-i-Insaf (PTI), led by cricketer-turned-politician Imran Khan, and Jamat-i-Islami remained fully committed to the Lawyers' Movement along with other regional parties such as the Awami National Party (ANP), Pakhtunkhwa Milli Awami Party (PkMAP), National Party and Baluchistan National Party (Mengal).

Having the support of these political parties proved crucial to the success of the Lawyers' Movement (Bhutto, 2007), but it did also create co-ordination problems and misunderstandings. On the day of the final long march, some political parties, such as the PTI, wanted to continue with the march and topple the government despite the fact that the PPP agreed to restore the judges and accept all demands. Also, having parties and workers from both the right and the left of the political spectrum was difficult to manage; however, the leaders of the movement succeeded in maintaining its identity as a 'lawyers' movement (Ahsan, 2013), and constantly protected their right to steer the movement. This meant that, despite allegations that the PML(N) had hijacked the movement and inevitable tensions between secularists and Islamists (Hoodbhoy, 2014), the movement retained its neutrality and successfully pooled resources to achieve its stated objective.

*Civil Society:* Civil society comprised human rights groups and large number of non-government organisations (NGOs) working in the development sector in the country. These, however, had low approval rates among the people due to their reputation for being foreign funded and to resistance against their activities that were perceived as efforts to 'westernise' the country. NGOs were also regularly accused of working for foreign powers, in particular the USA, and being used by their donors to gain leverage over economic, social and development policy in Pakistan (Actionaid, 2013).

The Lawyers' Movement was, therefore, a turning point for civil society as well. The restoration of the judges was an entirely internal issue for Pakistan. It was also clear that restoration of the chief justice would create a hurdle for General Musharraf in co-operating with the US on contentious issues such as handing over terror suspects to the US without due process. That most NGOs supported the Lawyers Movement was, therefore, a pleasant surprise for many and helped raise their stature in the country. The Lawyers Movement also provided an avenue for key organisations such as lawyers' associations and journalist unions to show their strength and attempt to achieve real political change. Other organisations that gained prominence during the movement include prominent lawyer and human rights activist Asma Jahangir's Human Rights Commission of Pakistan (HRCP); Jahangir was at one stage severely assaulted during street demonstrations against General Musharraf. Her unconditional support for the Lawyers' Movement and her participation in various debates on television were among the main source of assistance from civil society.

Civil society also provided the platform for the movement to gain sympathies outside Pakistan through its extensive links with the development sector and academia around the world. Organisations such as Human Rights Watch (New York), the International Commission of Jurists (Geneva), the International Federation for Human Rights (Paris), the National Lawyers Guild, South Asia Bar Association, Commonwealth Lawyers Association and other civic organisations around the world released regular statements in support of the Lawyers' Movement and demanded the restoration of the judiciary. A number of professional associations sent fact-finding missions and delegations to report on the movement and a host of reports, academic papers and other materials were produced on the topic (e.g. HRW, 2007; IBA, 2009). Talks by the movement's prominent leaders were organised around the world,

leading to the award of the Medal of Freedom to deposed Chief Justice Iftikhar Chaudhry by the Harvard Law School. He became only the third person ever to receive the prestigious award. Similarly, in 2007 he became first non-American to be selected for the lawyer of the year award by the US-based National Law Journal. These collaborative efforts by the civil society organisations in Pakistan and abroad raised the profile of the movement and ensured wider participation and support.

It must also be noted, however, that international support did not materialise as much through governmental channels as through civil society linkages. Most Western governments, including the US, were largely indifferent to the movement. President Musharraf had already become an important partner in the US-led 'war on terror' and was seen as a stabilising force in a country largely seen by the West as on the brink of disaster. This thesis, therefore, agrees with Levitsky and Way (2006) that transnational relationships and linkages between civil society groups are more effective in creating a broad domestic constituency for democratic norms than efforts by Western governments.

#### **6.2.4 Sources of Funding**

The Lawyers' Movement was mostly self-funded, at least in the beginning. Lawyers did not organise big public rallies in the early stages of the movement; rather, momentum was built through Justice Chaudhry's long processions en route to the Supreme Court to fight his case in front of the full bench, or while traveling out of town to deliver a speech at the bar councils. Such processions would take many hours as the vehicles moved at a snail's pace, attracting large crowds along the way to greet Chaudhry (Ahsan, 2013). Over time, various bar associations started fundraising campaigns. The Lahore High Court Bar Association, for example, started with Rs 1000 (approx. US\$10), which increased to Rs. 1 million (approx.

US\$10,000) in a few weeks (Ahmed and Stephan, 2010). Apart from contributions from the lawyers, there was also some support from local medium-sized businesses and the mercantile class in Pakistan. At later stage, once the movement had grown in scale and activists had to move around the country to mobilise more lawyers and initiate strikes, they required funds. Bhutto (2007) claims that the PTI, the third-largest political party in Pakistan, collected funds from overseas Pakistanis in Canada, the UK, the US and other countries. This was a substantial support to the Lawyers' Movement. Some lawyers from overseas, especially from the Pakistani community, provided funds for the movement as well.

Any additional support in form of media coverage, public participation in the rallies or the support of civil society came voluntarily and free of cost. The activists did not hold any significant overnight stays or set up tents for any number of days on the streets. Apart from the travel expenses of movement activists to different parts of the country, another major expense was to host Justice Chaudhry to address different bar councils. Security arrangements, logistics, venue and other preparations had to be made. This is where the decentralised structure of the movement came in handy. Most of these events were organised by the local council who collected their own funds. Key public gatherings and the two well-coordinated long marches were substantially funded by the PML (N) and PTI along with voluntary donations by the Pakistani diaspora all over the world, local professionals and lawyers themselves. The political parties in particular made substantial resources available for the movement to sustain itself. As prominent lawyer, human rights activist and former President of the SCBA Asma Jehangir described in her interview for this thesis:

Political parties joining the movement gave it a huge boost. At the early stages we were using borrowed resources even to make banners and play cards, but then we

suddenly had dedicated vehicles, Pina flexes and huge stages were being built for public gatherings.

### **6.2.5 Tactics employed by the Movement**

The Lawyers Movement used a number of tactics to achieve its objectives. Some of these are detailed below.

*Non-Violence:* Leaders of the movement emphasised non-violence (Amitab, 2007) throughout the movement and made sure protesters maintained discipline. This proved to be a key strength of the movement, as people were encouraged to participate in large numbers and protests had an air of festivity. There was some violence, however, during the movement, particularly during Chief Justice Chaudhry's procession in Karachi, where the pro-Musharraf MQM party allegedly attempted to sabotage the event. In another incident, a suicide bomber blew himself up at PPP camp during one of the protests and, on few occasions, police used heavy-handed tactics to disperse the protesters. The Musharraf regime was squarely accused of most of the violent incidents and this resulted in further loss of credibility for the government (Shoaib, 2010).

*Court Boycott:* Every Thursday lawyers and judges boycotted court proceedings and held protests and rallies all over the country to protest. This proved extremely successful in keeping the movement alive even at some desperate times and provided a constant reminder of the issue to the general public. Sacrifices however also had to be made by the lawyers, especially those at lower echelons who depended on daily earnings. Aitzaz Ahsan describes this during his interview for this thesis:

Lawyers sacrificed a lot during the Movement, especially those at the lower levels of judicial hierarchy. They suffered loss of income, many lost their lives as well. It is however their resolve and steadfastness that made the movement successful.

*Large Processions and Addresses to Bar Associations:* Bar associations from various areas in the country would take turns to invite Justice Chaudhry for an address. On his way to the venue, a large convoy of vehicles would move at a snail's pace with people greeting him with rose petals and garlands. Justice Iftikhar Chaudhry was adamant during his interview for this thesis that:

We were addressing various bar councils. It built pressure on government and other forces. It was this pressure due to which we eventually prevailed and were reinstated.

This would, of course, be broadcast live on television, turning each of these processions into significant public protests.

*Television Presence:* Leaders of the movement spent a lot of time participating in debates, discussions and talks on electronic media to educate people about their objectives. The Internet was also used, particularly social media, to propagate the movement's messages. At one point when Geo News was forced off air, one of its prominent anchor persons, Hamid Mir, started recording programs in public areas such as press clubs and bar councils. This attracted large audiences and the recording of the program would then be made available on the Internet for broader viewing (Ahmed, 2012).

*Use of Information and Communication Technologies:* Pakistan had made remarkable advances in the diffusion of mobile phone and the Internet and had a significant social media presence in the urban areas of Pakistan by 2007 (Rafiq and Gao, 2008). The Lawyers' Movement provided the first opportunity for these platforms to be put to use for political

organisation, and the results were impressive. Mobile phones, for example, became primary tools of communication between leaders who were under house arrest or jailed during the movement. Activists or family members of these leaders would somehow smuggle the phone and a SIM (registered in someone else's name) in order to communicate. On a few occasions, Justice Chaudhry even addressed the Bar Council gatherings during his confinement via mobile phone, which was placed next to the microphone to amplify his voice. Similarly, a number of photo/video sharing and blogging websites mushroomed during the course of the movement to upload videos of various talk shows that discussed issues related to the Lawyers' Movement. Pictures and videos from various events would instantly go viral on social media and news about future events was shared through these networks, including SMS messaging on mobile phones (Khan, 2012).

Along with these aspects of resource mobilisation for the movement, including its structure, sources of funding, key alliances and tactics, the framing of issues was also extremely important. This is discussed in the next section.

#### **6.2.6 Framing**

Framing of grievances and larger issues related to the Lawyers Movement was extremely important to attract people and create sympathy for the movement's objectives. It was also a challenge, however, because the movement comprised various groups with distinct world views, political orientations, objectives and interests. To create a narrative that would attract adherents from across the political, cultural, ethnic, sectarian and class divisions was a significant task. Following are some of the key features of the movement's narrative.

*Universal Principles:* The leaders of the movement called on established universal principles of justice, fairness, accountability, equality and transparency to challenge the actions of the Musharraf regime and demand rule of law and judicial independence. The principle of 'equality before the law' appealed to large segment of population, who had grievances against the political and economic elite and considered themselves to be mistreated. Similarly, 'rule of law' also appealed to those who despised the use of political contacts and bribery to get work done rather than strict adherence to the laws and regulations.

*Democracy:* The movement went on to delegitimise General Musharraf as a dictator whose real strength lay in his 'uniform' (position as the Army Chief) and not popularity among the people. A rhythmic song, *Chacha wardi landa kiyon nahi?* ('Why doesn't uncle take his uniform off?') mocked General Musharraf and became an instant hit. It was played at all events and people, including children, chanted along with the singers. In various discussions and speeches, the movement's leaders often said that 'even [the] worst democracy is better than [the] best dictatorship'. Never had military rule been challenged publicly on this scale in the country.

*Revision of History:* The proponents of the movement challenged the history taught in schools and the official narrative of state institutions (in particular the military) by pointing out the massive failures of previous military regimes, such as the 1971 debacle when Pakistan lost its eastern territory under the leadership of General Yahya Khan, and the social reengineering attempts of 1980 that resulted in a drugs-and-guns culture in the country under the watch of General Zia-ul-Haq. Even Musharraf was thoroughly criticised for the Kargil misadventure and for toppling an elected government.

*Socialist Tinge:* Although the movement never formally declared its association with socialist ideology, some of its leaders, particularly Aitzaz Ahsan, regularly referred to socialist ideals to make a point. He often used the poetry of the great socialist poets Faiz Ahmed Faiz and Habib Jalib during his speeches. Aitzaz's own poem, which he wrote while confined to his house, became the biggest hit of the movement and he was asked to recite it in his peculiar rhetorical manner at almost all his public appearances. Soon, a large number of activists had memorised it and it acquired the status of the anthem of the movement. The complete poem is very long, but two passages are translated and reproduced below:

The history of the world is witness  
Without justice there can be no democracy  
If we have justice our country  
Can be saved from utter destruction

Without justice all [democratic] institutions remain weak  
Without justice all individuals remain oppressed

Without justice citizens are helpless  
Without justice there is nothing but sorrow

Just think, in the history of the world  
When has the law giver been imprisoned

Just for the ego of a dictator  
Justice has been trampled

[...]

But hark! true law givers will return to the halls of justice  
We will provide the people with bread, clothing, and housing

Flour, electricity, water, fuel will become available to the people  
The unemployed will find employment and work of their choice

The state will be like a mother, it will care for all citizens  
The army will be respected only when it stays at the border

March on, march on, tell the world,  
that our steps cannot stop

March on, march on, tell the world, that our heads can no longer bow  
The road ahead is not long, we can see our destiny

The oppressor is running scared, victory is our destiny

Victory is our destiny  
Victory is our destiny  
Victory is our destiny

A pop band named *Laal* ('Red') was formed by some members of the youth, who set the poem to music and sang it at all major events of the movement. They also sang the poems of Faiz and Jalib and released an album, *Umeed-e-Sahar* ('Hope of a New Dawn'), that remained number one on the charts for a long time. Another of their popular songs was Faiz's classic poem *Hum dekhain ge* ('We shall see'):

Promises that you make to us,  
Of the day, the hour, the moment of our victory,  
The promise of the promised land,  
Of course, we shall wait and see.  
The shackles, this burden around our necks,  
Will turn into cotton and vanish in thin air,  
And when we common people will stake a claim  
On this land that is our very own,  
When the tyrant rulers will submit to defeat  
At the hands of us simple folks,  
Of course, we will wait and see.

The movement promised, among other things, legal and governance reforms, social and economic justice and economic reforms, and made a number of other promises that were beyond its immediate objectives. Nevertheless, overt socialist slogans did energise large numbers of people to participate in the movement.

*Islamic Idioms and History:* Given the conservative nature of society in Pakistan and a large religious constituency, there were plenty of Islamic idioms, narrations of historical incidents

and notions that were used to align the purpose of movement with the teachings of Islam. They argued that at the heart of Islam lie social and economic justice. The early Islamic emirate, led by the Caliphs who succeeded the Prophet (Peace be upon him), they claimed, was the golden era of Islam when even the Caliph was held accountable for his actions. Certain examples were quoted from Islamic history, in which the Caliph had to appear in court and, even when the verdict went against him, it was duly accepted and implemented. Various verses from the Qur'an and Hadith (the sayings of the Prophet (pbuh)) were used to demonstrate the importance of justice, equality and accountability. It was even argued that the first four Caliphs were elected as a result of a consultative process that laid the foundations of democracy in Islam and that dynastic authoritarian rule started with Caliph Yazid (a disliked figure in history for murdering the Prophet's (pbuh) maternal grandsons and their families) who took over after the death of his father, the Caliph Muawiyah (Hoodbhoy, 2014).

*Populist Slogans:* A number of other popular slogans were frequently used, such as 'Justice for Chief Justice', 'Go Musharraf Go', 'Adlia ki Bahali tak... Jang rahay gi, Jang rahay gi' ('Struggle will continue till the restoration of judiciary') and 'Hum Mulk bachanay niklay hain... Aao hamare saath chalo' ('We are out to save the country, come join us!'). These were mostly messages of defiance, of hope and of resilience to continue the struggle till the end.

### **6.3 Lawyers' Movement and Judicial Independence**

A key objective of this chapter is to analyse how the Lawyers' Movement helped shape judicial behaviour and it is, therefore, important to establish the link between the two. There is plenty

of evidence that suggests that judges were only able to defy the executive due to support by the masses. Justice Ejaz Afzal admitted in his interview for this thesis that:

Lawyers and civil society stood up to start remarkable agitation against the (Executive's) action. We were addressing various bar councils. It built pressure on government and other forces. It was this pressure due to which we eventually prevailed and were reinstated.

Historically, despite some individual examples to the contrary, judges had never collectively resisted the establishment's wishes. Considering this, Munir Malik (2008) describes four carefully deliberated and agreed objectives of the movement without which there was no chance for the Chief Justice's restoration. The first was to win the argument in the 'courtroom of public opinion' (p. 75). Second, to convince the political leadership (which often relied on foreign powers or deals with the military establishment to achieve political goals) that it was possible to mobilise the masses and change the system. Third, to change the mindset of what Malik describes as the 'military, bureaucratic, feudal and capitalist establishment' to recognise that it was untenable for them to rule the masses with impunity without acceding to their aspirations. The fourth key objective (relevant to discussion in this section), however, was to empower the judges to decide on the basis of their conscience and ensure pro-people application of law. Malik argues that the judges had, until then, more the mindset of state functionaries obliged to side with the ruling oligarchy than of civil servants. The movement, on the other hand, emphasised the moral authority and credibility that stems from the support of the masses and gives judges the ability to exercise the writ enshrined by the Constitution. The movement, therefore, focused on putting pressure on the judges to respond to public expectations of them and redeem their independence in the process. They

were still between the hammer and the anvil, but this in itself was a testament to the movement's success in exerting adequate pressure on the judges.

This section will discuss three key decisions that judges had to make during the tumultuous period in 2007–2008 when the ruling regime used every tactic in the book to persuade judges to render favourable decisions. First was the decision to constitute a full bench of the Supreme Court to hear the case against Justice Choudhry instead of in camera proceedings at the Supreme Judicial Council. Second was the verdict of the full bench on the removal of Justice Choudhry, and third was the dilemma faced by judges over whether or not to side with the executive when the state of emergency was imposed on 3 November 2007 and their careers were at risk.

### **6.3.1 Supreme Judicial Council or the Full Bench?**

CJ Chaudhry and his legal team were convinced (Kurd, 2014; Ahsan, 2014; Malik, 2008) that the Musharraf regime had planned for his swift trial and conviction in the Supreme Judicial Council (SJC), whose composition was thought to be in the executive's favour. The SJC includes the Chief Justice (or acting CJ in his absence), the two senior judges of the Supreme Court and the two senior judges of the four Chief Justices of the High Courts. Doubts about the judges included in the SJC arose for the following reasons. Firstly, the reference against the Chief Justice was moved at a time when the second senior most judge, Justice Bhagwan Das (who belonged to the minority Hindu community and was considered incorruptible), was on annual leave and out of the country. He (Das, 2014) later confirmed that he was contacted by Pakistani intelligence officers during his vacation in India and asked to extend his leave; they even offered to get his Indian visa extended, an offer he refused. Secondly, the two most senior judges (after Chaudhry and Das) at Supreme Court, Justice Javed Iqbal and Justice

Dogar, both met with CJ Chaudhry as he was leaving to meet General Musharraf. Both judges hugged him and wished him the best of luck. This made Chaudhry suspicious that something was cooking and that they were possibly aware of, or even complicit in, what was to follow (Malik, 2008). Both judges, being next in line for the position of Chief Justice, would have been direct beneficiaries if he was removed. Also, one of the High Court Chief Justices chosen in the SJC, Justice Iftikhar Hussain of the Lahore High Court, was known to carry a grudge against CJ Chaudhry (ibid.). Thus, when Justice Iqbal hastily took oath as the Acting Chief Justice within few hours of CJ Chaudhry's arrest and convened a meeting of the SJC and setting a date for an in camera hearing, it was clear the military regime had a plan for Chaudhry's removal as soon as it was possible.

The challenge for Chaudhry's defence team, therefore was as much a political one as it was legal. With no executive authority or ability to influence judges in any other way, the only option they had was to use public opinion to put pressure on the judges. This meant dragging out the trial as long as possible and mobilising people to support the demand for an open trial of the Chief Justice in front of a full bench of the Supreme Court. In this regard, a number of tactics used by the defence team proved valuable in persuading the judges to hold an open trial, presided over by the full bench of the Supreme Court (minus judges that were somehow either party to the case or potential beneficiaries of its outcome).

Lawyers, civil society organisations (including journalist unions) and political workers belonging to various opposition parties responded to the call for a demonstration in front of the Supreme Court building during CJ Chaudhry's first hearing. On the day, he decided to walk to the court while police officials attempted to wrestle him into their official vehicles. His coat was torn in the scuffle and he was seen being pulled by his hair in images widely broadcast by

television channels. These images were repeated thousands of times over the next couple of years and became a symbol of what the struggle was about. On the day, however, police relented and, after, negotiations allowed CJ Chaudhry to use a private vehicle to go to court. The defence team then managed to secure invitations for him to address all major bar councils in various cities in Pakistan. CJ Chaudhry would travel to these cities by road with a large procession of supporters going back for miles. He was welcomed at every small or big town along the way with people lining the roads and streets and throwing garlands and rose petals on the procession. Many Lawyers' Movement leaders would also address people gathered along the way, with the journey taking hours, at times even days, to get to the venue. Such displays of public support, broadcast live on multiple channels, were an agonising sight for the executive. Fiery speeches during these events at the bar associations and ensuing debates on live talk shows, along with other tactics (discussed in previous sections) used by the movement leadership ultimately built up pressure from which even judges were not immune.

Prominent journalist Hamid Mir (2015) is convinced that the judges would not have shown much resistance were it not for the media, civil society, lawyers and public at large standing behind them. He recalled his conversation with one of the judges who was harassed by phone messages sent to his family members and friends that declared him a 'gay' (considered an insult in Pakistan). The judge was visibly shaken by the embarrassment this smear campaign had caused and the fact that he was unable to do anything about it. Prominent journalist Mushtaq Minhas (2014) agrees that it was the pressure from the 'bar' and public opinion that empowered judges to give a clear verdict in favour of Justice Chaudhry.

The unbelievable scenes of protest on the streets and the scale of mass demonstrations were having their effect. Justice Jawad Khawaja was the first judge of the (Lahore) High Court to resign in protest. He describes his attempt to gather his fellow judges in the tea room right after the removal of Justice Chaudhry to evolve a unified stance; however, the meeting ended on a bad note with considerable disagreement among the judges (Rumi, 2010). He added: 'After the incidents in the Tea Room, I had made up my mind that [resignation] was my only option'. By the time the deposed CJ Chaudhry visited Lahore to address High Court Bar Association, public pressure had reached such proportions that all the judges of the Lahore High Court went to welcome him and attend his lecture. According to Justice Khawaja, 'the participation of 17 judges in the welcome ceremony was a sign of change in their views'. He later expressed that he would not have resigned if it was possible to achieve such unanimity and a united stance in the early days after the removal of CJ Chaudhry (Rumi, 2010). Fellow High Court judges in all provinces started to attend the address(es) by the deposed Chief Justice at various bar associations, clearly supporting the movement and defying the military regime. This showed that, legal arguments aside, the whole legal fraternity was increasingly showing its resistance to the executive's transgressions. The pressure on the members of the SJC, as well as the judges at the Supreme Court, was also immense. During Chaudhry's hearings in front of the SJC, loud slogans by thousands of supporters in favour of Chaudhry could be heard in the court room.

Munir Malik (2008) presents an insider's account and a fascinating tale of conversations and negotiations between the lawyers leading the movement and the judges during the trial of Justice Chaudhry. He describes in detail the pressure on the judges from both the executive and the movement for a favourable judgement. One gets a feeling they were being torn in

two due to the constant pull in opposite direction, with their careers effectively at stake. He especially describes some conversations with Justice Javed Iqbal, initially thought to be close to the military regime, and his subsequent change of heart (of sorts) once it became clear that the public mood was clearly in Justice Chaudhry's favour. Malik also describes in detail the reluctance of the judges at various High Courts to attend Chaudhry's addresses at their local bar association (despite being invited) and the way many of these were won over by the lawyers. In one of the telling episodes described by Malik, Acting Chief Justice Javed Iqbal called him into his chamber to discuss some urgent matter. When he entered the chamber, Justice Iqbal was pacing back and forth in his office. Upon seeing Malik, he took his hand and said 'Trust me, trust me', to which Malik replied, 'Sir, only time will tell. I will judge you by what you do and not by what you say' (Malik, 2008; 54).

The defence team was able to draw out the proceedings before the SJC long enough for Justice Bhagwan Das to return and take his position as the acting Chief Justice. It was after this that the lawyers' petition for a full court bench and an open hearing was accepted. A 13-judge bench, headed by Justice Khalil-ur-Rehman Ramdey, then took up the matter, putting on hold the proceedings at the SJC. The public pressure played the most vital role in limiting the ability and legitimacy of the SJC – formed along the designs of the executive – to issue a swift conviction against CJ Chaudhry, and it was the same pressure that eventually resulted in the formation of a larger bench. This was the first legal victory achieved by the defence team, but the credit for this goes as much to the political mobilisation of the movement as it does to the legal brilliance of the team.

### 6.3.2 To reinstate the CJ or not?

The judges came under a great deal of pressure during the proceedings, both from the executive and from the lawyers, civil society and public at large. Their offices, court rooms and even residences were bugged by the intelligence agencies and calculations were made by the lawyers representing the executive as well as those representing the deposed Chief Justice about those in favour of reinstatement and those against it. It was as much a struggle to lobby judges to take one side or another, as it was to present a convincing legal case. At the start of proceedings, Aitzaz Ahsan argued that, if powers to detain a judge are conceded to the President on the basis of a reference, then there was no stopping similar action against every unwanted member of the bench. To this Justice Ramdey replied (albeit in a witty tone) that he should not scare them (the judges on the bench) as they were already scared (p. 170).

The emergence of evidence of judges' conversations being taped and movements watched by the intelligence agencies annoyed the members of the bench. An immediate unanimous order was issued directing the head of the Intelligence Bureau (the civilian intelligence agency) to clear the office space and residences used by the judges of all bugging devices and provide a written report confirming this had happened. The Supreme and High Court administration was barred from providing access to any document or information to the intelligence agencies and their personnel were barred from entering the court premises. The court order is reproduced below and marks yet another unprecedented step in the history of the judiciary in Pakistan. Instead of being intimidated by the conniving tactics of the military regime, the judges had shown defiance.

During the course of the hearing before us of this matter for about two months, it has been reportedly pointed out to us... that the intelligence agencies were swarming this

Court and the Hon'ble Judges of the High Courts in the country and were prying into their private matters... We now feel compelled as having been left with no other option but to command that no un-authorized person including the official of intelligence agencies of whichever department of the State, shall enter the office of this Court or the offices of the High Courts in the country; that no one shall seek access to any record of this Court including the High Courts nor shall any official of the said courts, if so requested, supply any document or information or even show or make available any document or record of any court of law to such officials or unauthorised persons. The Director General of the Intelligence Bureau is ordered to have an inspection of the premises of this Court as also the premises of the residences of the Hon'ble Judges of this Court, carried out regarding the availability of any bugging instruments or devices therein and shall then submit a personal affidavit about the non-existence thereof.

The public support for Justice Chaudhry was evident from the fact that Court Room No. 1, where most of the hearings were scheduled, would be packed and completely dominated by his supporters. Such was the environment in the court room that when judges were about to give the verdict, and police requested the defence lawyers to form a human chain in front of the audience to avoid any untoward incident, it alarmed the defence team that verdict may not be in their favour. The overwhelming support for Justice Chaudhry's cause was clearly evident from audience's reaction to various remarks by judges during proceedings and during the arguments by the prosecution and defence. At one point during the proceedings, judges had to pass an order to enforce a strict code of behaviour for everyone present in the court room. Nevertheless, the public mood was evidently clear to the judges, not only through the ensuing debates and demonstrations outside the court room, but also through the sample present inside the court room throughout the proceedings.

The protests continued throughout the proceedings in cities and towns all over the country. In the words of Malik, 'We had to remain mobilised to assist the Supreme Court in dispensing

justice without fear or favour and that the second wheel of the chariot of justice [lawyers] would keep watch over the first wheel [the bench] as they ride towards the shared destination of establishing the Rule of Law and civilian supremacy' (p. 194). Yet, a night before the verdict was to be announced, most members of the defence team estimated seven judges of the bench to be sympathetic to them. When the verdict was eventually handed down, most of it was backed by *all* the judges on the bench, who declared that the Chaudhry 'shall be deemed to be holding the said office and always deemed to have been so holding the same'. The court unanimously set aside the orders by the President and Supreme Judicial Council (dated 9 March 2007) and held that the Judges (Compulsory Leave) Order (used to remove Justice Chaudhry) was unconstitutional.

Justice Ramdey, who headed the 13-member bench of the Supreme Court, has shed light on the deliberations among the judges in reaching the historic judgement of 20 July 2007 (Farooq et al., 2012). He gives the struggle of the people central importance in empowering the judges to give a bold verdict. He believes:

The courts in any country reflect the aspirations, expectations or, to be more precise, the conduct of the people themselves. The courts of law are not equipped with tanks and guns and fighter planes. Their strength lies in the people and the public. So it's always the strength of the public or the weakness of the public which determines the strength or weakness of the judiciary in any country at any time (ibid., n.p).

He gave the the examples of US Presidents Nixon and Clinton, who were summoned by the country's judges and had to comply because they knew that the US public was standing behind the respective judges. So, he continues,

...the effectiveness of the courts depends on how weak or strong public opinion is. Unless there is awakening and there is awareness amongst the people, that this

institution belongs to them and they need this institution to protect them from any aggression or any encroachments of any kind and unless the people show their determination to stand behind the courts and the judiciary, the courts will become ineffective.

When asked if this was what influenced the decision by the bench on 20 July 2007, he replied in the affirmative and argued that

In 61 years [of Pakistan's history] this is the first time that people have expressed their concern for the judiciary and expressed and displayed their determination that they are behind the judiciary and if anybody plays around with the judiciary they will not accept it. It is only the people that can defend these institutions, protect these institutions and claim supremacy and sovereignty of these Institutions.

### **6.3.3 To Accept or Reject the PCO (November 2007)**

Another key dilemma for the judges came in November 2007 when President Musharraf, in his capacity as the Chief of Army Staff, declared a state of emergency in the country and put the judges in detention. The actions of the military regime and the promulgation of the Provisional Constitutional Order have been discussed above. This section focuses on how judges responded to this and why. Throughout history of Pakistan, judges have been the first targets of military coups. November 2007, however, was a unique situation, when the military regime of Musharraf while being in power launched what was widely referred to as a 'coup' against the judiciary. The main purpose of imposing emergency rule was to get rid of judges hostile to his re-election as President while keeping the post of Army Chief. In the past, judges who refused to take a new oath to abide by the PCO were unceremoniously considered retired. After his first coup in October 1999, when Musharraf (then 'CEO' of the county) asked judges to take fresh oath (and thus agree to abide by the laws arbitrarily promulgated by him),

he was met with resistance by the Chief Justice of the Supreme Court, Justice Saeed uz Zaman Siddiqui. Justice Siddiqui was visited by senior military officers who insisted that he, along with all judges of the Supreme Court, take the fresh oath. Justice Siddiqui consulted with his fellow judges at Supreme Court as well as the Chief Justices of the High Court. All of them assured him of their support for whatever decision he took; however, when he finally refused to take a fresh oath and conveyed his expectation that his fellow judges would do the same, he was disappointed to learn that only six judges of the Apex Court and 13 in total (including seven of the High Courts) either refused to take oath or were not offered one by the military regime.

In 2007, upon hearing the rumours about the impending imposition of emergency rule, seven judges of the Supreme Court led by CJ Chaudhry gathered in the evening to issue a restraining order to all government functionaries against any unconstitutional act. The order directed all law enforcement agencies to avoid taking any steps against the Constitution or implementing any such order issued by any state authority or functionary. This was, however, to no avail; all these judges, along with several others, were taken into custody and emergency rule was imposed on 3 November 2007. A massive crackdown followed, as officials of almost all bar associations, key journalists, civil rights activists, political workers, judges and other key leaders of the Lawyers' Movement were rounded up and put behind bars. The judges were soon asked to take a fresh oath under the PCO; however, in an unprecedented show of defiance, around 60 judges of Supreme and High Courts refused to take the oath. They included 14 out of 17 judges of the Supreme Court. Despite the stick-and-carrot approach used by the regime, the vast majority of judges remained steadfast in their refusal.

Justice Ramdey, who was one of the judges who took oath under PCO in 2000, but refused to do so in 2007, explains the apparent contradiction:

I have no reluctance and hesitation in saying that I also took an oath under the PCO in the year 2000. On all those three previous occasions [1958, 1977, 1999] rightly or wrongly, fortunately or unfortunately, the steps taken by the army chiefs were generally welcomed, not just accepted but generally welcomed by the public at large. Of course some of the judges, as I mentioned earlier, showed their character and refused to take oath under the PCO. But generally, since everybody seemed to have accepted it – the whole nation seemed to have accepted the imposition of those martial laws – the judges also went along. Technically of course there was reason for not doing it but generally, politically and according to the atmosphere the taking oath of the judges was never really ever an issue. (Farooq et al., 2012; n.p)

Contrasting that with the 2007, he argued, ‘This time, for the first time in the history of Pakistan, this had become an issue’. Justice Ramdey described the situation when, after removal, his family was being forcefully evicted from his official residence but was saved by a large crowd that gathered to support him.

The reason that I am in this house [his official residence] is the people. Whenever they [authorities] tell me to leave [the house], a procession comes and stops the eviction. They were about to throw my belongings out from my Islamabad residence. Everyone turned up there. I was here (in Lahore) watching the proceedings on TV and wondering what is going on. Now if you start pulling the hair of the Chief Justice and a soldier slaps him then the Chief Justice will accept the slap. He can’t take on the soldier. Or if I, being a 60 or 61 year old man, am attacked by a soldier then I would not be able to fight back. It’s for the people to defend me if they want to defend me. This is a test of the people. (ibid.)

It is clear, therefore, that, inspiration from the act of standing up to the military by Justice Choudhry aside, it was public support that made the difference in shaping judges’ attitude

towards the excesses of the military regime. However, there was another key difference. Whilst on previous three occasions the military Chief's actions were seen in the context of the broader contest for power (to which judges did not feel a party), it was down to individuals to decide whether to take the oath under the PCO or not. In 2007, the feeling of a direct confrontation with the military regime fuelled the sense of camaraderie among the judges as they felt that their institution was directly under threat, that this was a direct assault on the judiciary. Justice Ramdey describes this aspect as follows:

Those [previous] martial laws were not an assault on the judiciary, [however] this was an assault on the judiciary. The judges thought that this was not a political act but an assault to destroy the institution of the judiciary. (ibid.)

The feeling of being besieged by the regime and sensing the overwhelming public support for their institution resulted in the kind of defiance that was inconceivable only a few years earlier in Pakistan. A new institution was therefore born that relied on support from the masses at large. As Malik (2008) described, after his reinstatement Justice Chaudhry not only held the office of Chief Justice of Pakistan, but also that of the 'Chief Justice of the People of Pakistan'.

## **6.4 Conclusion**

A number of inferences can be made from the analysis of the Lawyers' Movement using Resource Mobilisation Theory and Framing Theory. Firstly, it is evident that at the heart of the Lawyers' Movement were the majority of lawyers in Pakistan, who participated voluntarily in their individual capacity and were loosely organised under various local and national bar associations. There was near consensus among lawyers on the restoration of deposed judiciary and this became the primary objective of the Lawyers' Movement. Lawyers' commitment to the movement was evident from their participation in it despite the risks

involved. They paid most of their expenses out of their own pockets, travelled, spent considerable time protesting on the streets and added to a narrative that justified their demands. One can argue that the legal fraternity emerged as a key political actor with adequate resources, organisation and a winning narrative that successfully competed with the status quo forces. In this respect, key alliances were formed with political parties and national and international civil society groups to pool together resources, amplify the movement's message and build on the critical mass achieved by the lawyers. All of this was done without compromising on the core objectives of the movement and the centrality of lawyers' leadership to the movement.

The movement was able to overcome significant challenges in forming an unlikely coalition of diverse groups. This shows the changing nature of politics in Pakistan where, along with the traditional structures of caste, tribe and ethnicity, new forms of identity and structures for collective bargaining seem to be emerging. Lawyers (and for that matter journalist unions, civil society organisations and other actors involved) participated in this highly political process as 'lawyers', 'journalists', 'members of civil society' and not as members of a particular network/community based on kinship ties or belief. Also, most of the participation in the movement was from urban areas, in particular (because of sheer numbers) from the urban areas along the General Trunk Road that connects Peshawar to Lahore. Significant participation was also noted in the urban centres of Balochistan, such as Quetta, and those of Sind, such as Karachi. This is not to say that rural Pakistan did not at participate in the movement, but to only argue that the dominant demographic areas were the urban centres of the country. Similarly, lawyers and other professional associations and the core membership of the movement were drawn from the most highly educated segments of

society in Pakistan and thus are typically members of the middle class, which steered this movement and provided critical mass for it. Lastly, youth participation was key to the movement's success. In the absence of student unions, most of this youth contingent became involved in the movement either on individual basis or through a newly emerging political party, the PTI led by Imran Khan. This provided a boost in ratings for the PTI as well and helped put it on a trajectory that resulted in the party's excellent performance in the 2013 elections.

The contrasting behaviour of the established political parties, the PML(N) and PPP, also demonstrates the target audience and dominant demography/class base of the movement. While the PML(N), which traditionally has its support base in the urban areas of Pakistan, especially Punjab, remained fully committed and at the forefront of the movement until the restoration of the judiciary, the PPP withdrew its support for the movement after winning the elections and forming government in 2008. Since PPP draws most of its electoral support from rural areas, particularly those in Sind and South Punjab, it calculated that withdrawing support from the movement would have little impact on its electorate. In the past, social movements in East Pakistan led to civil war and the dismemberment of the country, while on another occasion General Ayub Khan was forced to hand over the reins to General Yahya Khan under tremendous public pressure. In both these instances, the nature, demography and the leadership of the movements was significantly different from those of the Lawyers' Movement. On both occasions it was the working class and peasantry that played more of an instrumental role in the political upheavals, while the educated middle class in Pakistan has traditionally refrained from participating in politics. It is, therefore, a new phenomenon in Pakistan and needs to be explored in more depth to analyse how and why this segment of society is playing an active role and what implications this has for politics in the country.

Mass mobilisation during the lawyers' movement was critical in shaping judicial behaviour. It empowered the judges, created a sense of camaraderie among them and developed institutional interests where judges felt that they would either sink or swim together. Sustained pressure on judges throughout the movement resulted in key decisions going in favour of the protesting lawyers, leading to reinstatement of Justice Chaudhry and other judges twice within two years. Many judges who sided with the executive, in keeping with the judicial history of the country, were ultimately removed by a resurgent court creating a new precedent and deterrent for the future. As evident from the views of various judges quoted in this chapter, the credit for the newfound assertiveness of the judiciary belongs squarely to the Lawyers' Movement and the public pressure. Since restoration, the judiciary has attempted to draw its legitimacy directly from the people, building a pro-people image and constantly taking up issues of public concern (Waseem, 2012; Kalhan, 2013). This has resulted in its meddling in the executive domain as well, considerably increasing its sphere of influence. By successfully keeping mainstream public opinion in its favour, the judiciary has been able to carve out considerable political space for itself. This also means, however, that instead of strictly considering the technical and legal merit of the cases it considered, the political fallout of its judgements also became a key consideration and that the court assumed for itself a role in articulating and fulfilling the aspirations of the people. The Lawyers' Movement, therefore, cemented the judiciary's newfound position as an arbitrator of power and propelled it to unprecedented status in the body politic in Pakistan. The next chapter summarises and discusses the key findings and concludes the thesis.

## Chapter 7: DISCUSSION AND CONCLUSION

### 7.1 Introduction

The thesis has focused on explaining the puzzle of change in judicial independence in Pakistan. For years the judiciary largely rubber-stamped decisions made by the executive, especially during prolonged periods of military rule. Its transformation, therefore, from a subservient institution to a challenger of the ruling oligarchy is unprecedented and demands systematic analysis and discussion. This chapter summarises the findings of the thesis and discusses these in the light of existing literature on the topic. The aim here is to extend the understanding of change/persistence in judicial behavior and to answer two critical questions: how and why does change in the judicial behavior materialise, and how is this expected to affect the country's politics and society? However, before discussing these questions, it is useful to provide a summary of the discussion in previous chapters.

Chapter 1 asked how and why the judiciary in Pakistan has been able to assert its independence in recent years, in contrast with its traditional subservience to the executive. The question essentially is about the underlying factors that shape judicial behavior and it is important to understand the judicial emergence witnessed in a number of countries in recent years. The Pakistani case is particularly important in this regard, as judicial activism has preceded, and in many ways catalyzed, the country's return to democratic rule. The chapter also discussed the research methodology in detail.

Chapter 2 defined the dependent variable, i.e. judicial independence, and discussed in detail the literature on judicial behaviour and assertiveness including *de jure* and *de facto* measures

of judicial independence. It critiqued key frameworks such as legal, attitudinal and strategic models used to explain judicial decision making and their variants. The chapter then highlighted literature on social movements and theorised the role they play in deriving constitutional meanings. It further expanded on the link between institutional and social change and identified Resource Based Theory and Framing theory as useful tools for understanding the interplay between the two. In so doing, the chapter locates the change in judicial independence in the support for the judiciary among key segments of the society and its role in the greater class struggle in a society. It presents the judiciary as a key arena for social contestation to play out and establishes the link between the class origins of the judiciary and its support base in the wider society.

Chapter 3 analysed the role historically played by the judiciary in Pakistan, particularly its subservience to the executive, and compared this with its resurgence in recent years. The chapter demonstrated the change in the trajectory of decisions in accordance with or against the wishes of the executive. It divided the history of judiciary into pre- and post-Lawyers' Movement eras and used the concepts of *de jure* and *de facto* judicial independence to show that there has been a drastic change in the autonomy and influence enjoyed by judges in the latter. Since reinstatement, the higher judiciary in Pakistan has sought to cement its newfound independence by gaining considerable say in the appointment, promotion and transfer of judges. Salaries, post-retirement benefits, judicial infrastructure and other facilities were also largely enhanced. Along with these *de jure* measures, decisions on cases of political significance, including those against powerful intelligence agencies and the indictment of former military director Pervez Musharraf on charges of treason, show markedly improved *de facto* independence. This is also epitomised by the effective sacking of

elected Prime Minister Yusuf Raza Gillani through an order convicting him of contempt of court. The government immediately accepted and conformed to the order, demonstrating the increased influence enjoyed by the courts.

Chapter 4 discussed the underlying structural changes in Pakistan that are shaping social relations in the country. These include urbanisation, emergence of a sizable middle-class, improved education and a demographic youth bulge. The chapter analysed how these seismic social changes are contributing to unprecedented instances of urban mobilisation such as the Lawyers' Movement. The chapter also substantiated the emergence of an urban, educated middle class and explained how it is increasingly shaping the discursive space and electoral landscape in the country. It argued that emergence of electronic media, especially the penetration of mobile phone and internet networks, has provided the middle class, its major beneficiary, the tools to amplify its voice and articulate its concerns, grievances and demands. This has put the traditional political system, relying on patronage networks based on caste, tribe and other kinship ties, under stress. New means of production, especially the expansion in the services sector, have given rise to new forms of identity and new mechanisms for collective bargaining. This has essentially changed the nature of bargain between the state and society in general and is increasingly threatening to shape the structure of the state itself. Changing judicial behavior is, therefore, a manifestation of these deeper social transformations and their impact on state institutions. The chapter calls for more research on the symbiotic relationship between institutional change and change in the class structure of society.

Chapter 5 focused on the alliance between the superior judiciary and the emerging urban middle class that underlies recent judicial empowerment. It explains how courts cultivated

support among key sections of society that eventually proved critical in protecting it from the court-curbing and court-packing plans of the executive. Since 2005, the judiciary has increasingly taken up issues that resonated with the simmering sentiment of the urbanised middle class. These included key issues of accountability, transparency and abuse of power by the ruling elite. In doing so, the judiciary was able to build strong alliances with the urban middle class including civil society, intelligentsia and opposition political parties. The court effectively used judicial tools such as *suo motu* powers as well as the Human Rights Cell to build and serve a large constituency. Key factors that shaped the judiciary's world view on these issues included a change in its own class base. While for most of the country's history the judiciary, much like the bureaucracy and military, had been dominated by the elite with feudal or industrial backgrounds, the first decade of the 21<sup>st</sup> Century saw a number of senior judges who took pride in their humble family backgrounds. Furthermore, they were also affected by the general ideational consensus among the judicial fraternity around the globe, whereby judges are increasingly asserting themselves and expanding the interpretation of constitutional protections such as human rights to include a range of issues considered in the executive or legislative domain. This was evident from the emerging discourse on these issues in the newly liberalised private electronic media, itself dominated by and catering to the emerging urban middle class. Therefore, the changing class structure of judiciary, trends in global jurisprudence and the aspirations and frustrations of the urban middle class represented by the media together created an environment in which judges felt obliged and empowered to play a more active role in raising uncomfortable questions for the ruling elite.

Chapter 6 analysed the central role played by the Lawyers' Movement in bringing together the judges and the support base it cultivated through judicial activism among the urban

middle classes. It identified key instances in which judges might have acceded to the expectations and demands of the establishment had they not been supported by the masses. The chapter also analysed the objectives, structure, composition and strategies employed by the movement using Resource Mobilisation Theory as well as framing models and showed how these can be operationalised to understand social movements. The use of social and electronic media to organise, propagate and solicit broader support as well as mobilising the resources required to launch and sustain such a movement were discussed. The chapter analysed the class composition of the movement and highlighted the dominant role played by the urban, educated, middle-class youth. It explained how and why an unlikely alliance of diverse civil society groups, political parties and professional associations emerged to pursue common goals. The role of the Lawyers' Movement in politicising a new generation of Pakistanis is also discussed along with its implications for politics in the country.

Finally, this chapter summarises the key findings of the thesis. It discusses their implications for research on judicial politics in general and in the case of Pakistan. The next section discusses key findings of the thesis that can considerably extend our understanding of judicial behavior and contribute to the theories that aim to explain this.

## **7.2 Extending theoretical understanding of Judicial Independence**

This thesis has argued that standard models that seek to explain judicial behavior are only partially useful, as they fail to take account of the agency exercised by the judges and do not incorporate the structural factors that shape institutional practices. The thesis, therefore, considerably extends the number and scope of independent variables that affect judicial assertiveness and also helps define the dependent variable itself, especially in the context of

transitional countries. Traditional models have been limited to the analysis of the political environment alone and the competition or fragmentation within political arena. Although a large number of studies have found these models useful (Chavez, 2004; Helmke and Rios-Figueroa, 2007), there is also an emerging set of studies that point to their inadequacies (Segal and Spaeth, 2002; Baum, 2009; Pacelle, 2011; Landau, 2014; Ocantos, 2016). This thesis adds to these alternative perspectives by bridging theoretical gaps and helping extend the traditional explanations. It primarily argues that theories of judicial independence must take into account the agency exhibited by the judges (as discussed in Chapter 5) as well as the wider social contestation (as discussed in Chapter 4) that may culminate in various social movements and which stem from socio-economic changes.

One of the key arguments in the thesis is that judicial empowerment in Pakistan is not merely the result of political fragmentation allowing judges to fill a vacuum. In fact, the Supreme Court started asserting itself in 2005, when the ruling military regime faced no serious political challenge and the opposition political parties were in disarray. It was, therefore, the courts' own choices that shaped the nature, scope and direction of its activism, including its intervention in the political domain. The ensuing wrangling with the executive climaxed with the forced removal of the Chief Justice by the President. Even at this time, there was hardly a political party or player who could challenge the ruling regime. This thesis, therefore, views the ability to defy an all-powerful executive as a credible measure of judicial independence, especially under authoritarian regimes. Also, it contends that going against the military-backed, all-powerful executive cannot be explained by the strategic model, which focuses on the judiciary identifying cleavages and taking advantage of a fragmented polity. Furthermore, it argues that it was not democratisation that created an amenable environment for judicial

assertion; as discussed, the military regime seemed fully in control when judiciary took on the executive. It was only after lawyers-led street protests erupted that the opposition political parties developed the inspiration and courage to seize the opportunity. The court's doctrinal choice was, therefore, entirely of its own making. It was its own activism that led to the emergence of alliances that ultimately protected it from the retaliation of the executive. This had a profound impact on accelerating the transition towards democracy and resulted in a return to civilian rule. Thus, going beyond the strategic and fragmentation models, what other factors shape judicial decision making and doctrinal choices? How can we explain judicial behavior in circumstances, such as in case of the Pakistani courts, where traditional models do not seem to adequately explain the phenomenon?

In literature, it is generally recognised that the courts come under different sorts of pressures including both *ex ante* on the question of judicial selection and *ex post* on the repercussions of or reaction to their judgements. These pressures are generally thought to be influenced heavily by the kind of party system within which a court operates. Judges in countries with a strong party system (such as the US and Mexico) are more likely to be tied to a political party. These affiliations generally help explain their choices in dealing with both sets of pressures (Sanchez et al., 2011). However, in countries where political parties are weak, such as Pakistan, Brazil (Rios-Figueroa and Taylor, 2006) and Colombia (Landau, 2015), judges have sought to forge an alliance directly with key sections of the society, such as the emerging middle class that includes civil society, intelligentsia and professional associations among others in Pakistan's case. The Colombian court, as will be discussed in detail, emerged essentially as a court of the middle class and civil society. Similarly, the Brazilian court also primarily serves the middle class and has taken a consistent stance against bureaucratic

obstacles to the provision of public services (Scheppelle, 2004). Pakistani courts, in this regard, have tapped into the frustration among the middle class over lack of accountability and transparency and the abuse of power by the state machinery, and has emerged as a credible deterrent and check against transgressions. This elevated its stature and allowed the educated and professional sections of society in particular to rally behind it. This thesis, therefore, agrees with the likes of Hammergren (2007), who argues that 'judicial populism' may be higher in countries with weak political parties, leaving the judiciary no choice but to pander directly to the middle class rather than working through the party system. This kind of judicial activism, however, may be considerably lower where political parties are strong and judges are able to rely on these instead of the public at large.

While this may explain *how* the judiciary may go about asserting itself in political environments with or without strong party systems, it does not explain *why*, even at unfavorable times, it may decide to take on the executive in the first place. The time period between 2005 and 2007 in Pakistan is critical in shedding light on why Chief Justice Chaudhry and his colleagues started challenging the ruling regime. This is where, as analysis in this thesis shows, one must look beyond the political power equation between various players to two sets of factors identified in this thesis. First is the diffusion of global legal discourse and the emergence of constitutionalism and judicial activism internationally. Second, and perhaps more important, is the changing class origins of judges in the wake of socio-economic changes in the society and the wider class contest that affects institutional as well as individual practices. The thesis points to the emergence of 'new constitutionalism' in a number of countries that has shaped the jurisprudence globally. The diffusion of ideas through landmark decisions in these countries, as well as their dissemination during discussions on judicial

forums and publications, helped shape a world view within the judiciary (as discussed in Chapter 5) in Pakistan, which saw itself playing a much greater role than that envisaged by its predecessors. This led to the expansion of its jurisdiction to even policy and legislative matters via evolving new interpretations of human rights laws and use of *suo motu* powers that were later termed as 'judicialisation' of politics.

These findings are consistent with those of Ocantos (2016), who studied post-transition human rights trials in Latin America. He points to the increasing use of international human rights laws in the region to argue that diffusion of legal vision and ideas from around the world alters the judiciary's disposition. These include the judicial actors' understanding of their role in a political system and colors their legal preferences. The diffusion of international legal norms, for example, made it possible for civil society and the legal fraternity in Argentina to challenge the legal status quo by prosecuting human rights violations in the distant past contrary to the locally established precedents. The evidence from Pakistan, particularly the strengthening of the connections between the judiciary and the international legal community during and after the Lawyers' Movement (as discussed in Chapters 4 and 6), shows that judges today are more influenced by global legal norms on issues such as rule of law, constitutionalism, democracy and human rights than ever before.

Closer to home, the Supreme Court of India had already embarked on an ambitious journey to expand its influence after emergency rule was overturned in the country in 1977 (Baxi, 1979). The court particularly used Public Interest Litigation (PIL) to take on central government agencies and local government actors in the areas of human rights, environmental policies, accountability, the right to information and corruption to gain widespread approval and cemented its primacy in the judicial appointments procedure. The

court went on to expand its judicial review powers to constitutional amendments by invoking 'basic constitution' doctrine. In a recent study, Mate (2015) credits the emerging discourse on broader social justice and liberal reforms in the Indian professional and intellectual elites for the rise of the Indian judiciary. He argues that judicial norms and values are shaped by broader political and intellectual discourse and terms this as 'elite-institutionalism'. The interaction and dialogue between the judges and other elite professional groups, such as lawyers, academics, government officials, media elites, business leaders, NGO activists and journalists, affect perceptions within the judiciary about its role and responsibilities in the political order. This, in his view, is a key variable that shapes judicial perspectives and drives judicial activism. While partially agreeing with Mate's explanation of judicial empowerment in India, this thesis further expands it to include structural changes that underlie the emergence of an alternative discourse. It argues that one must look beyond discursive space to identify the rise of new interest groups, alliances and coalitions willing and capable of allocating the required resources to change the established order. Mate (2015) implicitly points to this by crediting the 'nexus' between Indian media and social advocacy groups for bolstering the court's PIL agenda. In striking similarity to the Pakistani case, he admits that, for the most part, the Indian Supreme Court was seeking legitimacy directly from the people.

It is evident from the findings of this thesis that judges in Pakistan were influenced by the jurisprudence and legal doctrine evolved by their counterparts next door. Along with using similar judicial tools, they openly threatened use of the doctrine of 'basic structure of constitution' to strike down any constitutional amendment that in their view infringed the independence and autonomy of judiciary. This forced the parliament to reverse aspects of the 18<sup>th</sup> Amendment (passed by overwhelming consensus) pertaining to judicial

appointments to the satisfaction of judges through the 19<sup>th</sup> Amendment. The evolving judicial doctrines, therefore, play a key role in shaping judicial norms, values and world view. However, these must also be in line with domestic realities and coincide with structural changes that have a far greater impact on the outlook and behavior of judiciary.

Secondly, this thesis argues that the dominant class base of the judiciary in Pakistan has changed (as discussed in Chapter 5) owing to the trend of greater numbers of students from the middle class, even from smaller towns, taking up law as profession. This coincides with the emergence of the middle class in general, the disproportionate influence it has achieved in shaping narrative at national level and its penetration of other state institutions such as the military, bureaucracy and media. This resulted in a shared class consciousness and world view and a natural alliance between the emerging middle class and the judiciary. The institutional outlook was therefore, increasingly being shaped by the discontents, aspirations and understanding of the middle class. Thus, the judiciary's response to the perceived challenges faced by the country was largely in accordance with the understanding shared by large sections of the urban middle class. Thus, judicial activism not only became a way for judges to contribute and achieve their own emancipation but also that of the middle class.

Studies examining the role of class origin on judicial decision making are scarce. This thesis therefore agrees with the likes of Howard (1981), Ehrmann (1987) and Neumann (1957), who emphasised the role of class origins of judges in determining their world view and, thus, their positions on a range of issues. In the case of Pakistan, the interview data shows that judges with middle-class origins are less tolerant of patronage-based politics and expect greater transparency, meritocracy and accountability of executive power (which is perceived as being dominated by the industrial, feudal or military elites). On the other hand, despite a number

of populist rulings against privatisation and environmental protection, they did little to challenge the fundamental structures of the economic system. Cases with regard to land reforms and other redistributive measures remained pending. This shows the influence of 'class consciousness' in making certain issues more relevant to judges owing to their own class origins. These concerns, when echoed by media and other institutions with similar class biases, promoted the judiciary as the 'people's court' and made 'judicial accountability' almost synonymous with 'public accountability'.

The changing class origin of judges and the diffusion of judicial doctrines from abroad contributed a mindset among judges that made their clash with the ruling regime inevitable. Furthermore, the alliance they built with the middle class and the solidarity shown by the urban middle class in preventing the court-packing designs of the executive propelled the judiciary into its new role as a key power broker. However, what does this judicial emergence mean for the country; what are its implications and impact on society, and particularly politics, in Pakistan? The following section focuses on these key questions by summarising the findings and comparing these with those from studies in other contexts.

### **7.3 Empirical Findings**

The thesis attempts to understand the factors responsible for change in judicial behavior in Pakistan. It analysed a number of key court cases to highlight shifts in judicial doctrine and discussed in detail the struggle between the judiciary and executive. In particular, it discussed the dismissal and reinstatement of senior judges and the role the Lawyers' Movement played in this. The thesis recognises the Lawyers' Movement as the watershed moment in the judicial history of Pakistan that changed the course of judicial decision making by substantially

empowering judges. The thesis compared the level of judicial independence before and after the Lawyers' Movement using a range of *de facto* and *de jure* measures. *De jure* measures included gaining greater influence over judicial appointments, defending and strengthening security of tenure for judges, establishing independence of judiciary as a key plank of the Constitution as well as increased perks, privileges and facilities for judicial staff. *De facto* measures include taking up cases of political significance, including those against powerful intelligence agencies and former military director Pervez Musharraf; the ousting of elected Prime Minister Yusuf Raza Gillani through an order convicting him of contempt of court; and adjudicating key political conflicts such as the Memogate scandal, where judiciary arbitrated between the military and the PPP-led coalition government.

The analysis clearly shows improved judicial independence after the Lawyers' Movement compared to any other era in the history of Pakistan. This chapter has so far discussed how and why this change materialised and has summarised the findings and compared them with those reported in studies in other contexts. The rest of the chapter discusses how these changes are expected to affect country's politics and society. The section below is divided into two sub-sections. The first discusses the change in power equation between various state institutions as a result of the emergence of new power centres, while the second looks at the potential implications of structural changes/trends for the politics in the country.

### **7.3.1 Changing power equation between State Institutions**

Most of the literature has focused on explaining why some courts are independent while others are not. However, debate over the choice and definition of the dependent variable means that questions such as how courts use their independence and the impact of judicial

independence on the development of the political system remain understudied. This section seeks to focus on these questions, particularly the implications of judicial independence for transitional democracies.

The topic has not been studied in diverse contexts, but scholars generally seem to agree with one of two schools of thought. Some promote a strong, independent court that is able to hold government accountable for its actions, ultimately leading to benefits such as high economic growth. Others remain critical of strong courts and argue that their emergence results in a shift of political power from elected institutions to unelected courts. This debate is relevant to both academia and international efforts for judicial reform and the rule of law. A more nuanced understanding of the implications of the kinds of judicial independence in a variety of contexts is therefore required. It is important to understand whether courts can help develop a constitutional culture in places where this has not existed or has been very weak. Another key question is whether judicialisation improves political systems or has the opposite effect. These are difficult questions and the existing literature on judicial politics does not provide a clear picture. This thesis does not provide a definitive answer to these, but scholars can build on this research by taking up questions such as these for future research. Here, only a brief discussion of these can be initiated.

Judicial activism in Pakistan has had its fair share of criticism on the grounds of undermining elected institutions. The court has been accused of judicial over-reach and interference in policy issues that are clearly in the domain of executive. It is also criticised for forcing parliament to accept its demands by threatening to invoke the doctrine of 'basic structure of constitution'. Some commentators have interpreted this as a shift of power from elected to non-elected bodies and even feared that the threat to democracy may not emanate as much

from the military as it does from the judiciary. The 'Bangladesh model' (referring to judicial endorsement of a technocratic government in Bangladesh) was feared during both civilian governments since 2008. Underlying these contentions has been a fear of the judiciary joining hands with the military to purge the system of 'corrupt' politicians. It must, however, be pointed out that in all political crises since 2008 the judiciary strongly opposed any unconstitutional action by military and showed no inclination to derail democracy despite holding governments accountable and fiercely defending its turf. It therefore maintained a fine balance between judicial activism and restraint, keeping a check on the executive without rocking the boat. In some ways, it wrested the role of adjudicator from the military by intervening in political conflicts such as Memogate, accusations of vote rigging in the 2013 elections and the Panama Leaks case and provided space for dispute resolution.

Judicial activism, and particularly the Lawyers' Movement, has also been criticised for an underlying bias toward right-of-centre political tendencies. Although the movement started as a coalition of groups from both the right and the left of the political spectrum, it has at times been accused of having been hijacked by the right wing. The leaders of the movement acknowledge that there were some ideological tensions between the constituent groups within the legal fraternity, as well as the coalition partners. However, they point to a number of steps they took to ensure that the focus remained on the common goal of restoration of the judiciary. In one instance, a 'neutral' weekday, Thursday, was chosen instead of Friday (which has religious significance and is traditionally used by religious parties for protests) for the weekly boycott of judicial proceedings. Also, there was a fine balance between the populist socialist sloganeering and arguments inspired by religion in the narrative propagated by the movement. Still, increasing references to Islamic scriptures and traditions during

judicial proceedings and judgements have been pointed out by some interviewees. This seems to represent the overall ideological orientation of the urban middle class to which members of the emerging judiciary increasingly belong. Furthermore, these references also resonate with the same class base and create a favourable image of the judges. Beyond these references, however, the judiciary has not shown much appetite to pursue a religiously conservative agenda, and in fact the number of cases in the Federal Shariat Court has dropped significantly. Also, the judiciary gave a landmark decision by declaring Mumtaz Qadiri guilty of murdering Salman Taseer, the governor of Punjab, on the pretext of his alleged blasphemy. This highly charged case brought some criticism from ultra-conservative sections of society but was largely well received among the masses. On the more substantial socio-economic issues, the judiciary has taken sporadic interest in the plight of workers and environmental degradation, but these have not translated into any major shift in judicial doctrine. The overall orientation of the highest court remains centrist, enabling the development of a support base for 'rule of law', 'constitutionalism' and 'judicial independence' irrespective of ideological divisions.

Other criticisms of the judiciary seem to be more pertinent. These include its failure to overhaul the judicial system at the lower tiers. Despite the centralised Human Rights Cell and Public Interest Litigation, most of the cases dealing with the general public are heard in lower courts where allegations of massive corruption, inefficiency and injustice persist. It still takes years for a case to be decided, litigation remains extremely expensive and little relief is available for those unable to afford the costs. The perception of judges being swayed by offers of rewards or intimidation by the powerful is rife. Lawyers have more of an image as brokers mediating between the parties, including police and judiciary, to find a settlement that is

prone to similar interference. Despite some efforts by Chief Justice Chaudhry and subsequent Chief Justices to enforce a six-month deadline for depositing cases, clearing the backlog and eliminating corrupt practices, it remains an uphill battle. With all the newfound power and independence of the higher judiciary, the breakdown of justice at the lower tiers remains the biggest failure of the judiciary in Pakistan. The data collected for this thesis confirm that only minor improvements have been made and a number of administrative, cultural and structural factors such as weak prosecution, dysfunctional policing, lack of protection for witnesses, lack of training and availability of resources as well as cultural resistance to litigation, continue to impede the performance of the lower courts.

Furthermore, the enhanced powers of the Chief Justice within the higher judiciary have been criticised as a centralisation of power. This impression is strengthened by the fact that there has rarely been dissent among the bench in the key cases decided by the judiciary since 2009. It seems the judges have an unwritten covenant to back their 'leader' in order to protect, promote and express judicial power. The Chief Justice is therefore seen more as a judicial 'strongman' rather than the 'first among equals' envisaged in the constitution. Since the 20<sup>th</sup> Amendment, not just the judiciary, but the Chief Justice personally, have unprecedented influence to appoint judges. Unsurprisingly, therefore, it has led to allegations of favoritism by some critics within and outside the judiciary. Also, the Chief Justice's control over administrative, financial and other aspects of the institution has also been strengthened considerably. Such concentration of power is seen unfavourably in the literature as it makes the office of Chief Justice a lucrative job that increases competition among the judges. Secondly, it means that various political players only need to sway one judge for the whole institution to follow suit. While these are genuine concerns, in the peculiar case of Pakistan,

the emergence of the Chief Justice as a symbol of judicial independence and a tendency shown by judges to follow suit seems to be a necessary evil to present a united front to a dominant executive. The judiciary already has bitter experiences of divisions within their ranks that only benefitted the executive and other powerful players. Secondly, they have evolved strict criteria based on seniority for the appointment of the Chief Justice and took the unprecedented step of giving succession details for the next ten years at the retirement of Chief Justice Chaudhry. This was widely seen as an attempt by the judges to ensure a smooth transition and transparent appointment and to ward off any potential competition for the position among themselves. Lastly, despite having unprecedented powers and status, the Chief Justice is susceptible to the institutional thinking, which on critical issues has gone through substantial evolution over the last two decades. Furthermore, the office also critically depends on the support of institutions such as the Pakistan Bar Council and Supreme Court and other bar associations that are critical to the emergence of judiciary in the first place. The agreed succession mechanism and internal institutional constraints limit the extent to which the Chief Justice, despite this concentration of powers, can deviate from prevalent institutional thinking.

On the other hand, there is also ample evidence that suggests progress in the strengthening of the democratic system through judicial activism. Firstly, placing the 'constitution' centre stage while defying authoritarian streaks during both military and civilian dispensations (as noted in chapters 4 and 6) was important. Concepts such as 'supremacy of constitution' and 'rule of law' were reinforced, and introduced to a new generation of Pakistanis. This certainly increased the relevance of the Constitution for political and social actors. The focal point of discussions, from the TV talk shows to the street, was whether certain actions of the powerful

were constitutional or not. Frequent references were made to the relevance of the Constitution to the social order to which people aspired. In short, the court made the sacking/reinstatement of the Chief Justice a question of the sanctity of the Constitution and its transgressions by powerful actors. More importantly, it was able to rally people and inspire a movement for the aforementioned principles rather than for the tenure of a specific person. The consensus on and struggle for these principles continues and has had a significant effect on democratic consolidation in a transitional state such as Pakistan. The emergence of a 'constitutional culture' is seen in literature as a positive attribute (Mazzone, 2005; Werner-Muller and Scheppele, 2008) if not a prerequisite for sustainable democracy.

A number of scholars have acknowledged judicial empowerment as one of the key catalysts for the return to democracy in Pakistan. It not only paved the way for the demise of the Musharraf regime; in the view of many, it also altered the power equation between various state institutions. Essentially this means that judicial empowerment blurred boundaries between various institutional domains of influence, ensuring ongoing power struggles between them. This has been acknowledged by prominent authors such as Moeed Yusuf (2012), Asim Sajjad Akkhtar (2014), Akbar Zaidi (2014), Cyril Almeida (2012) and Siegfried Wolf (2014) among others. Although there are notable dissidents, such as Rizvi (2015), Haider (2015) and Siddiq (2017), there seems to be broad consensus that, compared to the overt rule of the military and even the ostensibly civilian dispensation in the 1990s, the institutional power equation has changed. The difference of opinion largely is over the extent to which it has changed and the nature of change. Furthermore, there is again broad consensus that the emergence of an independent and empowered judiciary is a key indicator, instigator and beneficiary of the altered power equation between state institutions. This thesis, however,

does not limit itself to the analysis of the altered power equation at the institutional level, but also expounds upon the structural shifts in the political economy that are shaping institutional dynamics. It is important here, therefore, to summarise the findings of this thesis in this regard and discuss the potential implications of these structural changes for politics in the country.

### **7.3.2 Changing Political Economy in Pakistan**

Chapter 2 identifies changes in the material conditions and economic base of a society as well as the discursive processes that help people make sense of social realities. The thesis goes on to discuss a number of such changes in Pakistan in subsequent chapters, especially Chapter 4. It is clear from the data gathered for this thesis, as well as the secondary quantitative data presented in these chapters, that a number of socio-economic trends are shaping the social reality. Underlying these trends are distinct changes in the political economy of Pakistan as a result of the emergence of new modes of production and accompanying shift in the distribution of resources in the country. This section discusses key trends that are shaping contemporary Pakistan and then analyses their implications for judicial empowerment as well as politics in general.

#### **7.3.2.1 *Changes in Material Conditions***

The thesis identifies four key demographic trends that underlie the emergence of judiciary. The first is rampant and unabated urbanisation. Pakistan is the fastest urbanising country in South Asia, with the urban population expected to constitute a majority in the country. There have also been marked changes in the rural economy, which has become increasingly monetised giving rise to consumerism and linking people to distant urban and international

economic networks. The penetration of mobile, internet and cable TV networks, and with these the flow of information, has created middle class aspirations of certain lifestyle changes in line with urban trends and continues to transform the rural land scape.

The second key demographic shift shaping contemporary Pakistan is the emergence of a sizable middle class in the country. This thesis relies on Ghani (2014) and Dur-e-Nayab's (2011) weighted composite index to estimate the middle class in Pakistan. The expanded view of the middle class puts it at around 35 per cent (or 61 million) of the population. Interestingly, in urban areas the middle class is expected to be around 54 per cent. The thesis also notes the growth of a services sector in Pakistan dominated by the white-collar occupations, salaried and self-employed entrepreneurs and professionals. The size, influence and significance of this segment of society seems to be increasing. This new professional class is different from the *petty bourgeoisie* (shopkeepers and small independent producers) and is increasingly distinguishing itself from other classes due to the skills it possesses and its ability to shape the discourse in public affairs.

It is pertinent here to discuss the rising levels of education among the urbanised middle-class, which, with the expansion of the services sector, has created new paths of upward social mobility over the last couple of decades. The telecommunications, media, banking and finance, insurance, software development, private health and education as well as the non-governmental development sectors have proliferated, boosting the service industry that now contributes 60 per cent of Gross Domestic Product. Agriculture, in contrast, has shrunk considerably while the manufacturing sector has shown mild growth (each accounts for around 20 per cent of GDP). Since most of the service industry is urban centric and requires a skilled workforce, it is the urban middle class that has been its major beneficiary as well as

the driving force. The expansion of the private education sector and the class composition of its customer base also provide strong evidence of this phenomenon. The number of private schools rose by 69 per cent from 1999 to 2008, compared to a mere eight per cent increase in government schools. Similarly, between 1999 and 2008, the higher education sector grew by 137 per cent compared to a paltry increase of 17 per cent in public higher education. The middle class segments of the society are the main drivers and beneficiaries of the rise in private educational institutions. This means a significant increase in the number of educated middle-class urbanites compared to any other era in the history of Pakistan.

The third key demographic change shaping contemporary Pakistan is the 'youth bulge'. Unabated population growth rate has resulted in large number of young people in Pakistan. The population doubled between 1975 and 2005 while the median age fell to 21 years with 60 per cent of the population under 30 years of age. Reading these numbers along with the increasing size of the urban population and the middle class, one can safely argue that a large, urban, educated middle class has emerged with a significant proportion of second generation and young urbanites.

These demographic changes were critical for the Lawyers' Movement to emerge. Lawyers have always been concentrated in the urban and semi-urban centres to ensure their proximity to the judicial infrastructure, including the session and high courts that tend to be in district headquarters. Also, lawyers predominantly belonged to the professional, educated middle class. In the last two decades, legal studies, like other subject areas, have seen a boom in higher education. This is closely linked with the rise of the private higher education sector and the emergence of a number of law colleges around the country. This also coincided with a general trend in Pakistan (in the emergent middle class) of going abroad for higher studies.

Many of the lawyers who started practice or got involved in teaching law and other associated roles were foreign qualified and had a favourable view of democracy, rule of law and separation of powers. The lawyers, since the movement for restoration of democracy (MRD) against the military dictatorship of Zia-ul-Haq, have remained torch bearers of these principles. Their struggle against Zia, and later during the early period of the Musharraf regime, did not bear fruit in the short term. However, with swelling numbers (epitomised by the increase in bar association membership) and rampant urbanisation and expansion of the middle class, a critical mass was achieved that could seriously challenge the status quo. The emerging middle class desired accountability, equality, rule of law and checks on the executive's power. The lawyers were able to effectively translate this sentiment into a movement for the restoration of the judiciary. It is important to note that although people from all segments of the society, including rural areas, participated in the Lawyers' Movement, its leadership and core support base remained urban, educated and middle class. The Lawyers' Movement, therefore, became the vehicle for greater societal contestation between the traditional feudal, industrial and military elite and the newly emerging middle class.

### **7.3.2.2 Changing Narrative/Discourse**

The shift of public mobilisation to urban centres and the ascent of the urban middle class has resulted in the emergence of new slogans and issues that epitomise its priorities in terms of demands from the state. Gone are the days of the lure of *roti, kapra aur makaan* ('bread, clothing and shelter') as well as any form of land redistribution. Instead, issues such as corruption, nepotism, meritocracy, good governance, dynastic politics, electoral reforms, accountability, economic growth, tax-to-GDP ratio and even, at times, the ability of key

ministers and the Prime Minister to speak fluent English have been the key issues in the discourse. A strong narrative in favour of political continuity and against military takeovers (and the military's overt role in politics) has also emerged. 'Rule of Law' and an 'Independent Judiciary' are also key public demands. Through subsequent mobilisations by doctors and teachers, demands for better job security, rates of pay and working conditions have also emerged among the professional work force. 'Service Delivery' and 'development' especially of infrastructure such as energy, communications, health and education services have become the key demands that most affect voting behaviour.

Some of these changes are a result of changing modes of political communication as the emerging urban middle class (especially youth) prefers communicating through electronic means. The middle class has triumphed not just over the working class but also over the elite class in utilising electronic forms of communication (e.g. social media). As a result they have achieved the ability to 'amplify' their voice far more than their numbers would suggest. Research shows that users are now increasingly relying on social media to access information that is critical in shaping their minds and their political behaviour. The political economy of corporate media dictates that since urban middle-class is the most important consumer base for the manufacturing and service sector in Pakistan, the electronic media's content (including that of the news channels) is heavily geared towards this market segment. As advertising revenues is determined by ratings that exclusively represent urban Pakistan, the media is bound to project and further amplify the political aspirations and expectations of this segment. The judiciary's populism since Iftikhar Chaudhry's ascent to power has largely been a result of playing to this gallery through the media. New political players such as the PTI have

been able to rely on these new modes of communications to become second largest political party in terms of number of votes.

The availability and effective use of electronic means of communications by the educated middle class has also resulted in the emergence of a number of non-profit organisations that act as pressure groups scrutinising the use of power by various political players. These organisations operate at both national and international level and help shape opinions on a range of issues, including governance. Described by John Keene (2009) as 'Monitory democracy', these organisations are increasingly playing a key role in keeping the government 'on its toes'. They are at times more effective in holding governments accountable, representing and shaping public opinion and providing a barometer of various aspects of governance than the elected and non-elected state institutions such as the parliament, judiciary, media and political parties. In Pakistan organisations such as the Free and Fair Election Network (FAFEN), the Human Rights Commission of Pakistan (HRCP), the Sustainable Development Policy Institute (SDPI) and international organisations such as Human Rights Watch, Transparency International and others are also increasingly playing a key role in keeping a check on the government. The rise of these additional forms of scrutiny of the exercise of power is a result of a number of the socio-economic changes mentioned in this section. With the increase in number of stakeholders seeking to be heard, and in the channels available for dissemination of information, it has become very difficult for the state to maintain the kind of hegemony over narrative that was possible with state-controlled media. It can therefore be argued that the national discourse is increasingly being shaped by the middle class that dominates the new and traditional print and social media. With its swelling numbers, and expanding access to Urdu-language electronic media among the lower classes

creating middle class aspirations and world views, the traditional gap between discursive space and electoral space is shrinking. This means that the electoral behavior is far more susceptible to a middle-class shaped dominant discourse today than ever before and can have serious implications for the constitution of parliament.

#### **7.4 Political Implications of Structural Changes**

Changes in the material conditions and an enhanced ability to frame the issues in a favourable way, as well as growing numbers, have provided the middle class in Pakistan disproportionate power vis-à-vis other segments of society. Evidence of the positive correlation between the emergence of the middle class and democratisation is, however, sketchy at best. There have been instances where the middle class has sided with the elites, resulting in restricted democracy or a dictatorship. In Pakistan, the middle class has historically supported military rule, seeing it as a 'saviour' that can rid the country of 'corrupt' politicians and bring good governance. It is, however, interesting to note that, contrary to the past, the middle class in Pakistan is now increasingly interested in politics. This is evident from the data collected during FGDs conducted for this thesis, as well as from campaigns on social and electronic media, the popularity of political talk shows (and their rating mechanisms being heavily based on urban, educated households), increased turn out during the 2013 elections and the coming to prominence of new political players, e.g. Imran Khan's Pakistan Tehreek-i-Insaf party, which largely represents this segment of society (along with the ruling PML (N) that has consciously tried to woo this section of the society in the run-up to elections with some success). Increased political participation is not just limited to urbanites within the country; a new generation of Pakistani diaspora has, over time, developed its own understanding of the problems the country faces and has demonstrated on many occasions its willingness to make

a contribution. Along with philanthropic aid, the diaspora is also increasingly investing in politics; however, due to its socially and politically conservative character, right-wing parties have been the key beneficiaries. Financial support from the diaspora community, for example, has been a key source of funding for the emerging Pakistan Tehreek-i-Insaf (PTI).

The perceived importance of the state in the middle-class discourse in Pakistan and their intense involvement in politics to shape its redistributive mechanisms in their favour is in sharp contrast to traditional beliefs about their counterparts in India. Members of similar demography in India are described in literature as having retreated into their gated communities with private security, schooling and health facilities and depending little on the state for the provision of any of these services. Although some authors (e.g. Pradhan, 2013) point to the participation of the middle class in recent mobilisations in India against rape cases and in the emergence of the Aam Aadmi Party (AAP), their role is still largely considered limited. Indeed, this has been the character of Pakistan's middle class as well for most of its history; however, in the last decade or so there has been a remarkable change in its approach to the state. It will be interesting to examine similarities and differences between the political behaviour of the Pakistani and Indian middle class, including changes in their political behavior.

In Pakistan, this change seems more in line with findings of a recent study by Levantoglu (2013). The author claims that the middle class under autocracies in developing countries may demand political reforms if it perceives its future to be insecure. She argues that the key factor that conditions middle class behavior regarding political transition is social mobility. Her model associates autocracy, where power is wielded by the upper class, with lower levels of redistribution and democracy, where the median voter sets tax rates, with higher levels of

redistribution. The model shows that despite benefiting from lower levels of redistribution under autocracies, the middle class may prefer transition to democracy (and thus higher levels of redistribution in the future) if they fear downward social mobility in the future. An insecure middle class in an uncertain politico-economic environment may therefore see its interests better served under a democratic order. This ambivalent behavior of the middle class puts it in the pivotal position of being the decisive class that holds the key for a particular system of governance. Levantoglu's model builds on the work by the likes of Piketty (1995), Benabou and Ok (2001) and Alesina and La Ferrara (2005) who suggested that people who expect future upward mobility are less likely to opt for higher redistribution in the present in order to lower the tax burden on them. However, such attitudes change with the emergence of more permanent inequalities or fears of falling behind, forcing the middle class to demand greater redistribution.

The middle class in Pakistan has had to deal with a number of uncertainties in the recent past. The escalating religious violence in Pakistan and consequent threat to life and property has emerged as a key challenge. Over 50,000 Pakistanis have lost their lives since 9/11. The anti-state groups such as Tehreek-e-Taliban Pakistan, Al-Qaida and affiliates have shown a tremendous propensity to go after civilian targets, including schools. Desperate measures to secure schools after an attack on the Army Public School in Peshawar that left over 140 children dead included putting barbed wire on perimeters, hiring armed gunmen and snipers and body scanning for everyone entering school premises. Similar attacks on public areas such as shopping malls, parks, places of worship and hospitals have taken their toll. Security fears were compounded by the perception that wealth was being further concentrated among the industrial and feudal elite with which the Musharraf regime and successive governments

chose, to varying degrees, to align themselves. This meant that perpetuation of existing inequalities and, given high inflation, increasing cost of living and a rising burden of taxation exacerbated fears of an uncertain future, including insecurity for many about being able to protect their socio-economic status.

Despite these concerns, the middle class, on the basis of its newfound wealth, prestige and influence, also seems to demand its share in the decision making process. In particular, the second-generation young urbanites, who are increasingly educated and tech savvy, have shown an appetite for challenging the traditional patronage-based political system. Brought up in an urban environment where the basis of prestige and privilege lies not in caste or position in tribal hierarchy, but in professional status and social as well as economic capital, these young urbanities are all but cut off from their kinship ties. This thus gives rise to a search for new forms of identity and new means for collective bargaining and ferments conflict with a traditional political elite that relies on decades-old patronage networks for power and legitimacy. This thesis agrees with Courbage and Puschmann (2016), Weber (2013) and Cincota (2009), who argue that presence of a large, educated youth demographic provides a fertile ground for political unrest.

Along with the youth factor, the shift in the centre of gravity of contentious politics in Pakistan to urban spaces is important. This thesis tends to agree with the likes of Anthony and Crenshaw (2014), who attempt to put 'geography' and the country's 'space-economy' at the centre of the theory of democratisation. The authors argue that as the cities grow larger, they provide spaces for concentrating grievances in the form of inequalities and related identities. Furthermore, such spaces provide unique mobilisation resources such as presence of national and international media, electronic means of communications and potential allies that are

normally critical for a social movement to emerge. Overtime, such a space offers political contenders a concentrated and unique set of resources that helps them pose a meaningful challenge to the status quo.

In Pakistan, particularly in large cities (and increasingly in peri-urban areas), new forms of identity are taking shape among second generation urbanites. This movement away from reliance on kinship ties has been triggered by rise of professional associations such as lawyers, journalists, teachers, doctors, transporters, merchants and other bodies that have increasingly started to play a key role in politics. Along with lawyers and journalists, doctors and teachers have also shown signs of political activism, demanding better work conditions, job security and better rates of pay. This has placed this emerging middle class on a collision course with traditional political structures within the country. The electoral politics of Pakistan has historically remained at the local constituency level, where significant networks based on kinship ties (caste, clan and ethnicity) exist as a means for collective bargaining. While these are increasingly giving way in urban centres to new forms of political organisation, the nature of bargaining has changed even in rural and peri-urban areas. Even more than the traditionally desired patronage to facilitate job opportunities in public sector, conflict resolution and contract enforcement through state machinery, electorate in even these rural demographics demand better service delivery.

Due to the transient nature of the society, both the established channels of accessing state resources and the resistance to these are being played out simultaneously, as evident from the anti-government demonstrations in 2014 and 2016. The conflict stems from the need for the traditional political class to provide patronage to key loyalists, who must be accommodated when making key appointments, starting from the family and including other

political allies. Similarly, state resources through government procurement, contracts to deliver service/development (*thaikey*) and other means have to be used to provide financial incentives/monetary benefits to loyal networks of allies. This inherently means favouring a lack of transparency, promoting nepotism, putting 'merit' on the backburner and ignoring 'corruption'.

The emergent urban middle class youth, however, is not part of and does not benefit from these patronage networks. At the same time, this segment of society demands its due (and at times even a disproportionate) share of key government appointments, representation in parliament, greater say in decision making, access to leadership positions and greater share of state resources. To complicate the situation further, it believes it is the primary engine of economic growth and is bearing the burden of paying taxes (either indirect taxes through GST or income tax levied on the salaried class) while the elites and those benefiting from the patronage-based political system evade taxes altogether. Thus, it wishes to limit the ability of the elites to disburse patronage by demanding more transparency, accountability, an end to corruption and tax reforms (generally labelled as 'good governance'). It also wants greater representation, not just in the media, judiciary, military and bureaucracy but also in the parliament and within political parties. It has a great resentment of the 'dynastic' politics and hatred of 'VIP' culture. The urban middle class is also conscious of retaining (and expanding) its access to state-sponsored education, e.g. through scholarship schemes at HEC, and has therefore bitterly opposed devolution of Higher Education to the provinces under the 18<sup>th</sup> Amendment.

A number of key economic changes, such as the expansion of services industry, has led to the emergence of a large middle class in Pakistan. A new generation of educated, tech savvy and

professional urbanities is evolving new sets of identities, aspires to modern life styles and demands more from the state. They crave opportunities for upward social mobility and expect meritocracy, transparency and good governance. They feel that being the educated and professional class that bears the brunt of state taxation, they should be making key decisions. They are largely concentrated in urban areas and are not only shaping electoral realities, but are also actively involved in the wave of street protests that engulf the country from time to time. The urban middle class has also penetrated key state institutions and now forms the dominant class base of the judiciary, bureaucracy, media and military. It has also been bolstered by the emergence of electronic and social media. This has provided it with better class consciousness and an ability to amplify its voice and to organise and dominate the discursive space. The persistence of traditional patronage networks and politics in parallel with these aspirations often brings this emerging constituency into direct conflict with the traditional political elite. This has important implications for the sustenance of the current democratic dispensation. The ambivalent character of this social segment means that whatever appeal democracy enjoys among middle class Pakistanis will hold so as long as democracy is perceived as being able to serve its interests. This means that although a military coup cannot be ruled out, the emerging middle class must be co-opted in order to launch and sustain one. This, with increasing demands among the middle class for political power and access to economic resources (which it will not be willing to forego or sacrifice) means that a coup may not have become impossible, but has certainly become very expensive. The growing appetite in the middle class for political and economic empowerment is antithetical to the closed, authoritarian and centralised nature of a dictatorship. Nevertheless, the persistence of civilian elites and their potential failure to cater to the needs and aspirations of the emerging middle class will keep the doors open for another military intervention.

## **4.5 Comparison with relevant cases**

The literature available on judiciaries around the world shows that courts are having ever greater influence over issues usually regarded as political rather than legal. Situations where members of the judiciary become involved in exercising their powers in the political domain expose them to allegations about their legitimacy, and could consequently have an adverse impact on the credibility of political institutions. The judiciaries, therefore, are increasingly seen as being in a tug-of-war with the executive and/or other state institutions and there is much to learn about their behaviour by making relevant comparisons. This will help understand the underlying factors that contribute to judicial assertiveness and identify whether there are any trends across geographic boundaries. This sections therefore aims to compare the experience of Pakistani judiciary with relevant cases to understand similarities and differences between judicial behaviour in different contexts. A recent PhD thesis submitted at Harvard University (Landau, 2015) provides a detailed analysis of how the Colombian judiciary asserted itself and managed to protect itself from retaliation by the executive. Similarly, the role of the Spanish judiciary under the dictatorial regime of General Franco provides another interesting comparison with the Pakistani experience. Both of these cases are analysed and compared with the Pakistani case below.

### **4.5.1 Case of the Colombian Judiciary**

In his PhD dissertation, through a detailed single-case study, Landau (2015) studies in detail the transformation of the higher judiciary in Colombia. Much like Pakistan, throughout Colombian history the top court had cooperated with the dominant political regimes by providing them legitimacy, reinterpreting legal doctrine to give them more latitude, striking

down laws associated with previous regimes and determining relations between various branches of government as desired by the executive. This changed with the creation in 1991 of a new constitutional court that increasingly asserted itself as a major political player in the country. This led to a confrontation with the ruling regime headed by President Alvaro Uribe, which peaked when he sought a constitutional amendment to give himself an unprecedented third term in the office. It is interesting to note how the Supreme Court in Colombia managed to survive the attacks by a powerful executive and not only retained but substantially expanded its power as the arbiter of politico-legal conflict in the country.

The case of Colombia also demonstrates how a court maintains its power over time. The analysis shows that, much like Pakistan, the catalyst responsible for protecting the court in Colombia has been its own efforts towards nurturing a support base, especially among the middle classes (Landau, 2015). This played a key role in protecting the court against court-curbing and court-packing measures by the ruling regime. Forming these alliances also strengthened the court's ability to maintain a coherent and consistent approach to enforce complex decisions, and to intervene in important cases, such as President Uribe's re-election bid, without facing any political backlash. The court adopted a sweeping pattern of judicial activism in order to make itself relevant to key sections of the society. As explained below, the key to understanding this pattern of behavior lies in identifying the alliances with groups such as academia, civil society groups and the middle class that were nurtured by the court.

Furthermore, the fundamental doctrinal principles established during the first few years of the court were rooted in a broader ideology about the role of the judiciary. The idealistic stance adopted by the court resulted in judicial activism to address the perceived failure of political institutions, particularly the Congress. In other words, the judiciary saw itself as the

only institution that was in a position to act as a check on the executive, given that legislature was perceived as incapable of performing this role. This has striking similarities to the thinking among judges in Pakistan who benefitted from the perceived weakness of political parties to encroach on the executive's domain and established themselves as a watchdog, or ombudsman, over government. Another major principle that the Colombian judiciary established was to reserve for itself unfettered powers of interpreting the Constitution and not subjecting itself to any restrictions by other institutions. It was felt that the court had to be able to enforce the Constitution without constraint and irrespective of the different roles and relationships of the other institutions and any other restrictions imposed on the authority of those institutions. A final example of the 'reviewability' doctrine in action was the court's assertion of its power to review international treaties, arguably stepping into the executive's domain. A number of tactics were used by the Colombian Supreme Court to ensure that it survived the opposition of and attacks from the executive during its transformative journey to the legal doctrines mentioned above. This also significantly resembles the evolving legal doctrine in Pakistani judiciary, which got its way on the issue of judicial appointments, on its sole right to interpret the Constitution and even threatened to strike down a constitutional amendment by invoking the 'basic structure' doctrine. The Colombian judiciary also continued to take up cases involving agreements with foreign firms, privatisation policies and even at times set the rates for commodities such as petroleum products.

Soon after its establishment, progressive members of the Colombian Supreme Court started working towards establishing alliances to strengthen and promote the judiciary. Since political parties had little influence or authority, cultivating alliances with a political party was not viewed as an appealing option. Members of the judiciary instead sought to nurture relations

with certain sections of the academic community, who were at hand to provide clerks to assist the court and write articles to support the court. Members of the judiciary also developed ties with civil society groups, which resulted in establishing a community and strengthening the court's influence in the political arena. Finally, the court was inclined to hand down decisions which were popular among the middle class, especially on economic issues. This resulted in the court being enjoying popular support from this section of society. In particular, the *tutela* (powers to take up petition filed by any citizen) has gained an almost mythical status within Colombian popular culture as an instrument through which ordinary citizens have achieved results such as access to healthcare, protection of human rights and redress of grievances against the state. This is significant in a system that has otherwise been viewed as a dysfunctional bureaucracy. The popularity of the court acted as a layer of protection from politicians who were fearful of its power. This invites comparison with the use of *suo motu* powers, the Human Rights Cell and Public Interest Litigation by the Pakistani judiciary to achieve similar objectives.

The aggressive use and expansion in the jurisdiction of Colombian constitutional court under *tutela* powers are critical to understanding how it built its support base. *Tutela* powers are unique in three ways. First, the Constitution stipulates that a case under this framework must be decided within ten days. Second, the *tutela* system is quite informal and the petitioner does not need a lawyer or to go through formal procedural barriers. Lastly, the majority of these cases are decided by the lower courts, while the constitutional court reserves the power to pick and choose cases in which it wants to intervene. This has given the Supreme Court a way to strategically choose case where it wishes to interpret major principles of constitutional law without incurring a severe work load. The *tutela* was intended to be used only in cases

involving fundamental rights violations; however, the court has interpreted the term 'fundamental rights' in a broad sense to include socio-economic rights as well. This opened the court up to a broader audience of claims concerning human rights. It is worth mentioning here the similarities with the expanded scope of human rights definition, ease of application and bypassing formal legal procedures for applications filed through the Human Rights Cell at the Pakistani Supreme Court and the *suo motu* cases initiated by the judges themselves in Pakistan. Also the exponential rise in complaints received and dealt with by the Human Rights Cell (as shown in Table 4.1) since 2009 shows that these measures by the court were as successful as those taken by Colombian court using *tutela*.

The major test for the courts arose during the period when Alvaro Uribe was president, between 2002 and 2010. Uribe enjoyed immense personal popularity, and generally controlled a solid majority coalition in Congress. He therefore commanded significant authority and was able to amend the Constitution. He also made conscious efforts to influence the court, both through threatening court-curbing reforms and through controlling the selection process. Soon after his election, Uribe launched the most serious attack the Colombian court had faced in its history. Uribe ran for office and governed on the platform of 'democratic security', which emphasised the need to take a tough stance against guerrilla groups. One of his first orders as president was to declare a state of emergency in order to take tough action against these groups. Members of his administration argued that the court lacked the power to review the declaration, and warned the court against striking down the measure. They also criticised *tutela* judges for not paying attention to economic constraints when handing down their decisions, and stated that this was the result of 'judicial stupidity'. Uribe sought to deprive the court of the power to review declarations relating to internal

unrest or social, economic, and ecological emergency, on the basis that these measures were inherently political and should not be subject to control by the judiciary. Finally, he proposed a number of important reforms to the *tutela*. These included disallowing it from being used to protect social and collective rights and requiring that judges issuing orders in *tutela* cases consider the financial resources held by government agencies and abstain from altering national or regional development plans or budgets when making their decisions. The implications of these proposals would have been to greatly weaken the reach of the *tutela* by restricting its jurisdiction in cases concerning pensions and healthcare (ibid.).

In response to the proposal, the court and its allies immediately mobilised. Civil society organisations with links to the court, as well as former judges, attacked the proposal by highlighting the serious impact it would have on children and other vulnerable social groups. Under intense pressure, Uribe lost the support of his coalition partners, who threatened to take action against his efforts to introduce court-curbing measures. In particular, many of his supporters did not want an attack on the *tutela*, which was viewed as a very popular mechanism at the time. In light of more pressing issues facing the government at the time, such as a referendum on political reform and the declaration of the state of internal unrest, the government decided not to adopt the proposal. During his remaining time in office Uribe was more cautious about how he handled matters concerning the Constitutional Court, particularly the *tutela*.

Ultimately, the court managed to protect its independence and successfully deflected Uribe's court-packing attempts. The court also managed to block his attempts to declare a state of internal unrest in the healthcare sector through a unanimous ruling. Lastly, the court moved to strike down a constitutional referendum announced by the government which would have

allowed Uribe's second re-election with a majority vote of seven to two (Landau, 2015). The saga of Uribe's re-election bid and the ensuing confrontation with the judiciary also has striking similarities to the attempt by General Musharraf to seek re-election. The role of the judiciary in interpreting the law in such high profile cases becomes a paramount political question given the stakes involved. The choices available to judges have risks as well as incentives and it is at these defining moments that the judiciary's mettle is tested. Both the Pakistani and the Colombian courts took a substantial risk by opposing their respective 'strong men', leading to not just legal, but for all practical purposes political, disputes where the support of the public at large and among influential sections of the society proved decisive. No constitutional guarantee or security of tenure could have saved the judges from being axed was it not for public mobilisation and support of key social groups that forced the respective executives in both countries to eventually relent, considerably empowering the judiciary in the process.

#### **4.5.2 Judiciary in Spain under Franco**

The transformation in judicial independence in Spain under the totalitarian dictatorship of Francisco Franco provides another example where the judiciary gained power by aligning itself with various social groups (Bilbink, 2012). Spain today is a vibrant, competitive liberal democracy, with a judiciary that is both formally independent and assertive. Some judges, however, had begun taking a stand against the Franco regime well before the transition to democracy was under way. They engaged in a form of 'high-risk activism' that is difficult to understand from a purely political fragmentation perspective. In the early 1970s, Spain was still very much an authoritarian regime, whose aging leader, Franco, had promised to leave the country 'tied up, and well tied up' (ibid. 597). Throughout his long dictatorship, Franco

had proved himself to be unhesitating in using brutal repression against the population. During the same period, the government intensified its repressive policies, declaring periodic states of emergency in which basic rights were suspended and issuing new criminal laws to increase penalties for political resistance and criticism. The regime's opponents were generally tried in military courts, or in the Tribunal of Public Order, where due process was not guaranteed and verdicts were largely predetermined.

The ordinary courts were not subjected to the government's direct manipulation, but were the target of a number of indirect controls. From 1938 to 1964, judges were required to swear unconditional adhesion to the *caudillo* of Spain (Franco) and then, from 1964 onwards, to be absolutely loyal to the head of state and the principles of the national movement. To ensure that judges remained loyal to the state, all judges were prohibited from belonging to political parties and unions. Moreover, judicial discipline and promotions were handled by the country's highest court; the Tribunal Supremo (TS), which used its power to reinforce the traditional view of a judge as a 'civil servant', whose role was to maintain 'an attitude of blind submission and obedience' to the sovereign will (Bilbink, 2012).

Much like their Pakistani counterparts in 2005, from a political fragmentation perspective Spanish judges in the early 1970s had little incentive to assert themselves against the Franco regime. They operated within a closed, elitist bureaucracy, controlled from the top by a 'co-opted gerontocracy'. At a time when the regime was 'ratcheting up its repressive policies', challenging the government in any way was an extremely high risk endeavour for any judge to undertake. Such behavior, at the very least, may have placed their judicial careers in peril, and, in the worst cases, could even have resulted in their detention or exile, or to threats against their lives and their loved ones. The 'rational' and most logical response was therefore

to play along, by performing their professional duties in a strict and passive manner.

However, in the early 1970s a group of judges and prosecutors under the name Justicia Democrática (JD) began taking a public stand against the regime. This group argued in favour of liberal legal principles. JD members resisted submission to the government, refusing to prosecute people for exercising their human rights, and sought to prosecute the police for abuses of power. Members of the group, while not sitting on the bench but nevertheless still acting in their professional capacity as judges and prosecutors, clandestinely published four annual documents. These documents denounced government affronts to legal principles and to the professional integrity of the judiciary, whose *raison d'être* was to protect those principles. In these documents, proposals were made for specific legislative reforms aimed at enhancing formal rights and protections, and at bolstering the authority and likelihood of judges to uphold them. They distributed the publications widely amongst media outlets both within the country and in the European community.

It is worth mentioning that Spain did not have a robust liberal history, even prior to the rise of Franco. The law had long been a tool used by those in power to enact their own agenda and the judiciary, while professionally trained and formally independent, was expected to function in 'complete servility to the other parts of government'. Beginning in the late 1950s, however, a new generation of legal professionals identified with a politically liberal understanding of the law and the role of the judiciary. This understanding was one that was conveyed with the support from various elements of the Catholic Church, universities, the media, and other intellectual circles. This ideological change occurred gradually, as the Franco regime relied on the church for much of its legitimacy. The regime also desired the economic benefits of European integration, which would have opened the country up to an influx of

goods and opportunities from surrounding countries as well as ideas.

From the 1950s onward, Catholic intellectuals from the Jesuit-based Asociación Católica Nacional de Propagandistas (ACNP) and the conservative organisation Opus Dei held key positions both within the state and in civil society. Opus Dei, for more strictly economic reasons, and ACNP, for more political reasons, promoted the idea of a more independent, professionally competent and rights-oriented judiciary. The more radical version of this new idea was reflected in and promoted by 'the only critical magazine of the time,' *Cuadernos para el Diálogo*. The magazine was founded by top ACNP leaders and a former Minister of Education, Joaquín Ruiz Giménez, who had broken with the regime in the late 1950s. The magazine brought together a broad spectrum of dissidents of the Franco regime as editors and contributors, with a 'moral and cultural mission' of preparing Spanish society for democracy (Bilbink, 2012).

*Cuadernos* was widely distributed and discussed in and around universities and in reform-minded professional circles. In the early 1970s, the magazine published a series of articles arguing that legal professionals, as intellectuals and jurists, had an obligation 'to seek the realisation of law (*derecho*), and not just automatic compliance with the law.' This was aimed at constituting a social guarantee for citizens 'before the absolute power of the state.' The editors supported what they identified as 'the growing understanding among jurists that the training they receive in university classrooms and in subsequent professional practice has not been given for their own benefit, but rather in order to offer to society . . . a [means of ] protection and juridical control' (ibid. 601).

Impelled by this ideological commitment, JD members sought to mobilise and cultivated alliances to deflect any backlash from the regime. Many of the founders of JD had personal

or familial ties with the clandestine communist and socialist parties. Moreover, JD began in Barcelona, where a well-coordinated democratic resistance was under way by the early 1970s, offering JD` members regular contact with and support from Catalanian leftist parties, which were illegal at the time. The group was also able to secure support, both moral and physical, from sympathetic clergy. In addition, JD members, largely individually and on an informal basis, made contact with sympathetic judges in France and Italy, where similar groups, such as the Syndicat de la Magistrature and Magistratura Democrática, had already been formed. Eventually, they played a critical role in Spain's transition to democracy and the emergence of judiciary as a powerful, independent and influential institution in the democratic period that ensued (Bilbink, 2012).

Both cases have striking similarities to the Pakistani experience. They show how the judiciary can exhibit agency in taking an independent course and evolving legal doctrines at its own will. They also show how judiciaries built alliances beyond the political parties and directly with key social groups to protect themselves from the executive's court-packing attempts. The cases also show how ideas, precedents and emerging norms from outside a country's geographic border shape the outlook and world view of judges, particularly those on the role of the judiciary in a state. They also showed the importance of public opinion, support and mobilisation as well as social movements in creating new constitutional meanings and establishing new legal realities. While both case studies discussed above analysed the changing role of judiciary through judicial activism, building alliances with key social groups and popular mobilisation and movements who saw an independent and assertive judiciary key to achieve their own objectives and interests, none goes beyond the political arena to link this institutional transformation with the wider social change. Although, there are hints and

passing references to the emergence of a vibrant civil society, expanded middle class and other social transformations in proving the critical mass required for judiciary to assert its independence, none mention it specifically or analyse it systematically. Also, while both case studies describe how the judiciary successfully resisted and defied the executive, they do not adequately explain why they did so, especially at those unfavourable times.

This thesis extends these explanations by elaborating how wider societal contestation is played out in the legal arena and how it shapes institutional norms and practices. The thesis therefore emphasises the changing class dynamics within the judiciary as part of the wider social change and the shared consciousness between the members of judiciary and emerging sections of the society as the key independent variables that shape the judiciary's outlook and behaviour. It acknowledges the role of diffusion of foreign legal ideas, international legal norms and doctrines in shaping judicial thinking, but argues that their interpretation and application need to be understood within the local context where they are influenced by a number of realities on the ground. The thesis therefore considerably extends the explanations generally offered on the emergence of assertive judiciaries in developing world.

## **7.6 Conclusion**

This dissertation contributes to the literature on judicial independence that generally explains such independence using political competition as the major independent variable. It first defined and operationalised the dependent variable (judicial independence) as the ability of judges to rule against powerful state institutions, including the executive, and went on to explore a number of independent variables that affect this. The data collected for this thesis show that judicial independence critically depends on the legitimacy and support judges enjoy

among the masses. It shows that the judiciary is a key arena for political contestation and various political players seek its support to further their interests. At the same time, the judiciary itself can actively cultivate support and build alliances to cement and at times expand its sphere of influence. This acknowledges the agency that judges may exercise in carving out elbow room for themselves in the game of high politics in a country. However, in countries that, like Pakistan, have weak political parties, it makes more sense for the judiciary to build ties directly with key sections of the society. It is evident that in this case, the judiciary built a support base among emerging urban middle class by taking up issues that were close to their heart. It used a number of legal tools such as *suo motu* actions, the Human Rights Cell and Public Interest Litigation to evolve a doctrine of judicial activism. It then used this to hold the executive accountable and took up issues such as abuse of power by state functionaries, large scale graft and financial corruption, human rights violations, environmental degradation and others. Data show a clear shift in judicial behavior since 2005, from an institution subservient to the executive to a challenger of that executive. Underlying this change of course is a change in the class origin of judges leading to the rise of an 'indigenous judge' who relates more with the common man than the traditional feudal/industrial elite. Secondly, judges have been inspired by the emergence of judicial activism on global level, where judiciaries are increasingly playing a key role in politics. The evolving doctrine of judicial activism in Pakistan created a large support base that came to the court's rescue during the Lawyers' Movement against the court-packing attempts of the executive. This further cemented the alliance between the judiciary and the urban middle-class and empowered the former to carve out a permanent seat for itself as a power broker in the country.

This thesis shows that, contrary to traditionally held beliefs in literature, it was not democratisation that created space for the emergence of an independent judiciary, but rather judicial activism that catalyzed the democratisation process in Pakistan. The country's return to democratic rule is a direct consequence of resistance by the judiciary against the military regime of General Pervez Musharraf. It was, therefore, not political fragmentation or political competition per se that allowed the judges to challenge the status quo. Judicial activism and the Lawyers' Movement brought the 'rule of law' and 'constitutionalism' to the centre stage of realpolitik in the country. Since the restoration of the judiciary, it has fiercely attempted to defend its newfound powers and sought to further consolidate these through wide-ranging fiscal, administrative and legal reforms. At the same time, it has been able to adjudicate on and help defuse a number of political crises that threatened the democratic system. The judiciary has therefore kept a delicate balance between judicial activism and restraint by holding governments accountable while avoiding 'rocking the boat' and making it absolutely clear that no unconstitutional action by the military will be tolerated.

Yet the institution has been criticised for judicial overreach into the executive and legislative domain and for the concentration of powers vested in the office of Chief Justice. It has also failed to reform the lower judiciary and make access to justice affordable, efficient and transparent for majority of litigants at the lower tiers. Furthermore, it has been criticised for a right-leaning ideological bent that has indirectly benefited the right-of-centre political parties. Also, it did not take up any cases of substantial redistribution of wealth or other progressive causes that have a fundamental bearing on the socio-economic structure of the society. Despite these shortcomings, enhanced judicial independence in Pakistan is an important case that needs to be explored in depth.

The thesis argues that such changes in judicial behavior must not be seen in isolation at the institutional level, but rather must be understood as part of the ongoing wider class struggle in the society. Institutional change, in this sense, becomes a key symptom of shifts in class structure and the balance of power among various sections of the society. The thesis uses the resource mobilisation and framing theories to understand how the Lawyers' Movement materialised. The findings confirmed that the urban educated middle class formed the dominant constituent group of the movement. The thesis also identified that Pakistan has undergone an unprecedented wave of urbanisation, expansion in the middle class, increased levels of education, youth bulge and diffusion of electronic means of communication over the last two decades. As a result, an expanding constituency of second-generation educated urbanites has emerged that is more distant than ever from the traditional kinship-based social structures of caste, clan and tribe. This has led to a quest for new identities and a number of professional bodies such as bar associations, doctors', teachers' and journalists' associations, traders' guilds and chambers of commerce, transporters' associations and others that have emerged as vehicles for political bargaining. These, along with the non-governmental sector organisations including human rights organisations and voluntary groups, have expanded the civil society in Pakistan that can mobilise more effectively for their respective or common causes. There seems to be increasing appetite among the middle class for social and political empowerment and protection of its economic interests. It loathes the corruption, inefficiency, nepotism and excesses of the political elite and has invested in shaping the state's redistributive mechanisms in its favour by supporting new political parties such as the PTI and institutions such as the judiciary.

What binds them together is a class consciousness created through shared experiences and echoing of shared concerns and grievances through electronic and social media. Changing class dynamics affect the institution from within by shaping its class coalition and dominant class base. This leads to the emergence of new institutional world views and differing culture and practices. These structural changes, therefore, acted as the antecedent factors that shaped judicial behavior in the country. The judiciary in Pakistan now largely relates with middle class concerns and appears keen to maintain its strategic alliance with this constituency. This means that the democratic future of the country hinges on the middle class's continuing perception of the benefits democratic governance may yield for it. Nevertheless, the judiciary is expected to be the key vehicle through which the aspirations and expectations of the middle class may be represented, at least until parliament, the last remaining state institution, goes through a similar transformation in its dominant class base.

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Appendix-I

**List of Interviewees**

No.	Name	Occupation
1	Justice Iftikhar Chaudhry	Chief Justice of Pakistan
2	Justice Ejaz Afzal Khan	Supreme Court Judge
3	Justice Khalil ur Rehman Ramdey	Supreme Court Judge
4	Justice Bhagwan Das	Supreme Court Judge
5	Justice Saeed uz Zaman Siddiqui	Former Chief Justice of Pakistan
6	Justice Mansoor Ali Shah	Chief Justice Lahore High Court
7	Justice Sajjad Ali Shah	Former Chief Justice of Pakistan
8	Justice Shahbaz Ali Rizvi	Judge, Lahore High Court
9	Justice Saeeduddin Nasir	Judge, Sindh High Court
10	Anonymous	Supreme Court Judge
11	Anonymous	Supreme Court Judge
12	Anonymous	Supreme Court Judge
13	Anonymous	High Court Judge
14	Mr. Aitzaz Ahsan	Lawyer/Politician (PPP)
15	Ms. Asma Jahangir	Lawyer/former SCBA President
16	Mr. Ali Ahmed Kurd	Lawyer/former SCBA President
17	Mr. Hamid Khan	Lawyer/former SCBA President
18	Mr. Khalid Ranjha	Lawyer/former Law Minister
19	Mr. Salman Akram Raja	Lawyer
20	Mr. Babar Awan	Lawyer/former Law Minister
21	Mr. Faisal Siddiqui	Lawyer/Member PBC
22	Dr. Tahir Wasti	Lawyer/Academic
23	Mr. Farhad Ali Shah	Lawyer/Member PBC
24	Mr. Mustafa Sherpao	Lawyer
25	Mr. Hamid Mir	Journalist/Anchor person
26	Mr. Nusrat Javed	Journalist/Anchor person

27	Mr. Mushtaq Minhas	Journalist/Politician
28	Mr. Ahmed Noorani	Journalist
29	Mr. Najam Sethi	Journalist
30	Mr. Huzaifa Rehman	Journalist
31	Mr. Saleem Safi	Journalist
32	Mr. Imtiaz Gul	Journalist/Analyst
33	Mr. Tahir Malik	Journalist/Academic
34	Mr. Kamran Shahid	Journalist/Anchor
35	Dr. Ishtiaq Ahmed	Academic/VC Sargodha University
36	Dr. Ali Qazilbash	Academic/Head of Law Dept. LUMS
37	Dr. Pervez Hoodbhoy	Academic
38	Dr. Muhammad Waseem	Academic/HoD Politics, LUMS
39	Dr. Rasool Baksh Rais	Academic/former Director Strategic Studies Institute
40	Dr. Ayesha Siddiqi	Academic
41	Dr. Saeed Shafiqat	Academic/Dean of Social Sciences, FC University
42	Dr. Asim Sajjad Akhtar	Academic/Politician (AWP)
43	Mr. Arif Hasan	Academic/Demographer
44	Dr. Rashid Amjad	Academic
45	Dr. Adeel Malik	Academic
46	Dr. Zubair Abbasi	Professor of Law
47	Mr. Ahsan Iqbal	Politician (PML-N)
48	Mr. Imran Khan	Politician (PTI)
49	Mr. Asad Umar	Politician (PTI)
50	Mr. Farooq Sattar	Politician (MQM)
51	Mr. Mustafa Kamal	Politician (MQM)
52	Mr. Asfandiyar Wali Khan	Politician (ANP)
53	Mr. Haider Ali Khan	Politician (ANP)
54	Mr. Aqil Shah	Politician (ANP)
55	Mr. Mushahid Hussain	Politician (PML-Q)

56	Mr. Fawad Chaudhry	Politician (PPP/PTI)
57	Mr. Faisal Raza Abidi	Politician (PPP)
58	Ms. Marvi Memon	Politician (PML-Q/PML-N)
59	Mr. Aftab Sherpao	Politician
60	Mr. Waseem Ahmed	Bureaucrat
61	Dr. Sohail Chaudhry	Bureaucrat
62	Mr. Akbar S Ahmed	Bureaucrat
63	Mr. Javed Malik	Development Consultant
64	Mr. Wajid Ali Khan	Bureaucrat
65	Admiral Asif Sandila	Former Navy Chief
66	Brig. (retd.) Rashid Qureshi	Former Advisor of General Musharraf
67	Anonymous	Colonel in Pakistan Army
68	Anonymous	Diplomat
69	Ms. Reema Omer	Lawyer/ICJ Representative in Pakistan
70	Mr. Umer Cheema	Investigative Journalist
71	Mr. Nadir Cheema	Participant Lawyers Movement
72	Mr. Habeel Khalid	Participant Lawyers Movement
73	Mr. Imran Aslam	Participant Lawyers Movement
74	Dr. Asalan Ghani	Participant Lawyers Movement
75	Mr. Saqlain Imam	Journalist