LEGAL MOBILIZATION AND EFFECTIVENESS OF COURTS IN POST-COLONIAL STATES

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Abstract

Most countries in the contemporary world have written constitutions which contain a charter of rights and express provisions enabling constitutional review by courts. In post-colonial countries, where legal systems were established *de novo* relatively recently, courts have generally failed at upholding the rule of law. Only a handful of courts have held political elites accountable for abuse of power. Still others have aligned with political elites and assisted in the closure of political space for less powerful interests.

What explains this variation in the effectiveness of courts in post-colonial states? Based on a comparative analysis of high courts in Pakistan, Turkey and Egypt, I argue that the basis of power of effective courts is primarily located in constituencies of support in society, in spheres that lie beyond the influence of elites. The initial support for judicial power does come from elites, who establish courts and influence them for the protection of their privileges. Courts will continue to perform this function, unless they have access to an alternative source of power, which is to be found in public support. When effective, societal support may countervail the influence power elites have over courts. High courts in Pakistan and Egypt have at various times been effective, based on such societal support. The Turkish judiciary, by contrast, does not have a similar constituency in the public, and has instead supported the interests of political elites.

Societal support for judicial empowerment, I argue, can be effectively constructed through legal mobilization, defined as the publically-faced activities of the legal profession. A precondition for effective legal mobilization is the embeddedness of the profession in society and politics, which, in postcolonial settings, depends on the nature of the political context during the formative years of the profession’s development. Through comparative historical analysis, I show how the leading role of the profession in decolonization contributed to embeddedness in
Pakistan and Egypt. By contrast, the Turkish profession was on the receiving end of a restructuration process initiated by powerful military and bureaucratic state elites. Further, mobilization potential also depends on professional autonomy and on the nature of the public sphere.
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# Table of Contents

**Abstract** iii  
**Acknowledgements** v

## Part I: Theoretical Framing

1. Introduction: Legal Mobilization and Judicial Power in Post-Colonial States 1

## Part II: Model Building: Legal Mobilization and Judicial Effectiveness in Pakistan

2. The Transformation of the Supreme Court of Pakistan 39  
3. The Displacement Problem and the Mobilization Potential of the Bar in the Sub-Continent 95  
4. The Pakistan Lawyers’ Movement (2005-09) in Comparative Perspective 124  
5. Public Support and the Expansion of Judicial Power 171  
6. The Mechanics of Judicial Empowerment 192
Part III. Model Testing: Judiciary and Politics in Egypt and Turkey

7. Legal Mobilization and Effectiveness of Courts in Egypt and Turkey 225

Part IV. Conclusion

8. Alternative Explanations, Pathologies and Prescriptions, and Unintended Consequences 268

Selected Bibliography 298
Legal Mobilization and Judicial Power in Post-Colonial States

Most countries in the contemporary world have written constitutions which contain a charter of rights and express provisions enabling constitutional review by courts. There has been a remarkable global dispersion of these constitutional restraints over the last few decades. Whereas before 1950, there were only a small number of courts empowered to conduct constitutional review, at the start of the twenty-first century 158 out of 191 constitutions explicitly provided for judicial mechanisms for constitutional review.¹ A large number of nation-states adopted constitutionalism following decolonization, and a considerable number followed during the third wave of democracy. For some, the textual delimitation of public authority, especially through rights provisions and establishment of constitutional review mechanisms, was a large step toward the creation of a political order in which the political elite would be prevented from abusing power and human dignity would be safeguarded.²

The rapid spread of constitutionalism globally would have one believe that the rate of dispersion may be linked with the effectiveness of the norm in transforming the domestic political order, such that actors in other nations may feel a deep desire to emulate the success of the constitutional systems. However, an assessment of the performance of courts in the

² Scheppele notes this about courts in the former Soviet world. She writes, “Even though the politicians do not always approve of them, constitutional courts are enormously popular institutions in general wherever they are actually working independently throughout the former Soviet world; citizens see in these courts a real hope for the recognition of human rights and the rule of law.” See Kim Scheppele, “Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe,” in International Sociology, Vol. 18(1): 219-238 (March 2003)
developing world with regard to the effectiveness of dispensing constitutional justice suggests otherwise. Of around hundred courts in countries across Asia, Africa, and Latin America that have been formally granted constitutional review powers, the vast majority have failed in preventing powerholders from engaging in illegal conduct and unjust enrichment, and in protecting the rights of the citizens enumerated in the constitutions. In a further set of countries, the results have been even bleaker. In these jurisdictions, courts have played an active role in helping preserve the privileges of powerholders and in preventing hitherto powerless groups and individuals from mobilizing for the purpose of furthering their legitimate interests and aspirations. Finally, in a small minority of jurisdictions, courts have been quite effective at checking political elites who abuse power, and in redressing violations of fundamental rights.

The focus of this study is on understanding the development of constitutionalism and rule of law in post-colonial states. Specifically, why are some high courts more effective than others at checking the power of political elites and in protecting constitutional rights? Developing an argument to explain the variation explained above requires at least two prior inquires into the nature of judicial institutions, especially with regard to the particularities of the political context in which they are located. First, what is the basis of judicial power? And, second, how does the power of high courts to check executive power first emerge and subsequently expand?

In seeking to understand the effectiveness of courts in post-colonial settings, I have conducted two kinds of analyses. First, I employ a longitudinal research design to analyze the process of the transformation of the Supreme Court of Pakistan from a relatively less effective court before 2005 to an effective court starting 2009. Through this inductive analysis, I build a

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model to explain the expansion of judicial power in postcolonial settings. Second, I engage in a model-testing analysis by comparing judicial politics in Egypt and Turkey to see whether the theory developed can offer a plausible explanation for the difference in judicial effectiveness between the two countries.

Based on the comparative analysis of the high courts of Pakistan, Turkey and Egypt, I argue that the basis of power of an effective court is primarily located in constituencies of support in society, in spheres which lie beyond the influence of political elites. The initial support for judicial power does come from political elites, who establish the courts and subsequently influence them for the purposes of protecting their privileges and interests. Courts will continue to perform this function, unless they develop an alternative source of power, which is to be found in public support. When such societal support is effective, it may countervail the influence power elites have over the court, even if such elites directly control the executive. High courts in Pakistan and Egypt have at various times been effective, based on such societal support. The Turkish judiciary, by contrast, has not had a similar constituency in the public, and has instead supported the interests of political elites.

Societal support for courts, I argue, can be constructed through legal mobilization, which I define as the publically-faced activities of the legal profession. While the profession is itself an important constituency of support in society, a court is more likely to be effective when the profession mobilizes to create public support in the larger society. A precondition for effective legal mobilization is the embeddedness of the profession in society and politics, which, in postcolonial settings, depends on the nature of the political context during the formative years of the development of the profession. Through comparative historical analysis, I show how the leading role of the legal profession in decolonization contributed to embeddedness in Pakistan
and Egypt. By contrast, the Turkish legal profession was on the receiving end of a restructuration process initiated by powerful military and bureaucratic state elites. Further, I argue that mobilization potential also depends on autonomy of the profession from state and political society, and on the nature of the public sphere.

I. Clarifications

At the outset, before discussing the theoretical context and my argument, a few clarifying remarks are in order regarding the focus of this study.

First, in this study, I am seeking to understand a particular aspect of judicial power, which I call judicial effectiveness. Since there are a few related concepts that scholars have previously studied, it is important to briefly distinguish the subject of the present analysis. I define judicial effectiveness as the ability and willingness of a high court to challenge the power of hegemonic elites who directly or indirectly control executive institutions, to open up political space for less powerful interests, and to protect citizens’ fundamental rights against the interests of political elites. The most commonly studied related concept is that of judicial independence. Defined variously by scholars, a common thread is a focus on neutrality, such that an independent court is supposed to remain uninfluenced by considerations that are not normatively relevant to the question before it. For instance, Ferejohn, Rosenbluth and Shipan define the concept as follows: “To the extent that a court is able to make decisions free of influence from other political actors, and to pursue its goals without having to worry about the consequences from other institutions, it is independent.”

\(^4\) The problem with this process oriented conception, I think, is that it is only partially consistent with the aspiration that a court will in fact uphold the

\(^4\) John Ferejohn, Frances Rosenbluth and Charles Shipan, “Comparative Judicial Politics,” in Carles Boix and Susan Stokes (eds) *The Oxford Handbook of Comparative Politics* (Oxford University Press; 2009)
rule of law and protect citizens’ rights. It is possible, for instance, that judges who are free from the influence of political actors will nonetheless not be effective in the sense I defined. In making my argument, I am assuming that there is no dearth of elites abusing powers for personal gain, especially in developing countries, but also in more developed contexts. Hence, even if a court claims that it takes orders from no one, but fails to hold political elites accountable for abuse of power, it cannot be considered an effective court even if it is independent from the influence of the elites. While independence is necessary for judicial effectiveness as I define it, it is not sufficient to guarantee that a judiciary will indeed uphold the rule of law by challenging the power of elites who engage in illegal conduct.

Second, this study does not purport to present a theory for explaining judicial effectiveness in all political contexts. The focus of the study is on postcolonial states. While most such states are more commonly called developing countries, I have delimited my analysis to postcolonial states because this frame of viewing such states seems more relevant in terms of understanding the functioning of judicial institutions. While the starting point of a development-focused inquiry would be the economic characteristics of the state, a postcolonial focus privileges the particular nature of institutional development in such countries. Most notably, legal systems in the postcolonial world were established de novo after the displacement of indigenous legal institutions. The conditions under which the process occurred, and the involvement of subject populations in the process, varies across postcolonial countries. Some would question my inclusion of Turkey as one of the three case studies in this study of postcolonial legal systems. In response to that, I briefly discuss two justifications for the inclusion of this case. First, while Turkey may not have experienced direct colonial rule of the kind the British established in India, it was certainly subject to considerable pressure from
imperial powers before the founding of the modern republic.\(^5\) Second, and more importantly, modernizing elites in Turkey jettisoned the indigenous legal system that had developed over centuries, and replaced it wholesale with a European-inspired system soon after the formation of the republic.\(^6\) This is precisely the institutional change that is most crucial with respect to the question of judicial empowerment in postcolonial countries, and hence in this regard at least, Turkey is functionally similar to postcolonial states.

Third, in studying judicial effectiveness, I characterize courts in certain periods, sometimes spanning decades, as effective, partially effective, or ineffective. Admittedly, this exercise of placing a label on a court’s jurisprudence involving hundreds or thousands of cases is an act of generalization, and is not intended to be perfect. While there may certainly be exceptions, there may also be a discernable jurisprudential continuity over the period to useful treat it as analytically distinct. This is similar to American legal scholars’ characterization of various eras of the US Supreme Court’s jurisprudence. For example, much has been written about the *Lochner* era, which spans around four decades starting with the US Supreme Court’s decision in *Lochner v. New York*.\(^7\) During that period, the Court assumed an activist posture, invalidating state and federal legislation regulating market relations. As Charles Warren observed, however, a significant number of constitutional challenges to socio-economic


\(^6\) Noting the case of Turkey, Gallanter notes that “legal colonization may also occur from within.” See Marc Galanter. “The Displacement of Traditional Law in Modern India,” in *Law and Society Review, Special Issue Devoted to Lawyers in Developing Societies with Particular Reference to India* (Vol. 3, No. 2/3; Nov 1968 – Feb 1969); see also “The Reception of Modern Law in Turkey,” in *International Social Studies Bulletin*, 1957, 9; 7-81

regulation were also rejected by the Court during this period. Still, there was sufficient continuity among the nearly two hundred instances of annulment of socio-economic legislation for scholars to label the period as the *Lochner* era.

Finally, on the question of case selection, I have already offered a preliminary observation about delimiting the analysis to postcolonial states. The three countries considered, Pakistan, Egypt and Turkey, share a number of features which make them suitable for comparison. To begin with, all three legal systems were established *de novo* based on European precedents. In all three jurisdictions, the pre-colonial legal system had been based on *sharia* law, and was replaced wholesale by new foreign-inspired systems rather than being incrementally transformed. The legal profession had of course existed with regard to judicial officers in *qazi* courts, but in all three cases there were also attorneys who provided legal counsel, even if they had not yet become sufficiently organized to form a professional association. In considering the similarity among the cases, it is interesting to note that such representatives were known as *vakils* in all three countries in the pre-colonial period. All three countries are large countries, and in each there have been power holders with authoritarian tendencies who have exercised significant influence over state institutions. The countries vary considerably, however, in terms of the effectiveness of courts, as explored below.

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8 Charles Warren, *The Supreme Court in United States History, 1836-1918* (Little, Brown, and Co; 1926). Quoted in Choudhry., Id. 5
9 While acknowledging Warren’s observation, Choudhry notes,”*T*[he *Lochner* era was characterized by a judicial resistance to the regulatory, redistributive, and activist state the likes of which the American constitutional system has not since seen.” See Choudhry, *The Lochner Era*, 5
II. Theoretical Context

This study focuses on examining the bases of judicial power. While few studies have previously attempted to understand the particularities of institution building in post-colonial settings in terms of the challenges of establishing effective judiciaries, a number of scholars have theorized the construction of judicial power in democratic and authoritarian settings. There are two distinct, albeit related, inquiries that this literature focuses on. The first concerns the process that led to the adoption of constitutional review in countries around the world, either by granting review powers to the existing judiciary or by setting up separate constitutional courts. The second concerns the functioning of, and the political salience of the jurisprudence of the courts after their establishment. I find that the first question theoretically less interesting, since the vast majority of countries today have adopted constitutional review as part of their written constitutions, and there is hence relatively little variation among countries in this regard. There is, however, tremendous variation in how such constitutionally empowered courts interact with other actors in the political system across countries, even though the underlying constitutional provisions are arguably not as significantly different.

One strain of scholarship, dominant in the literature on judicial politics, views the construction of judicial power through the lens of the separation of powers framework. There are a variety of mechanisms that have been postulated that focus on the activities and interests of a select group of actors that exist in a somewhat rarified political space. Generally, courts themselves are either conceptualized as being at the receiving end of decisions that emerge from the strategic interaction among political elites, or, at best, are viewed as junior partners supportive of the privileges of the elites. In essence, the basis of judicial authority is to be found in the delegation of decision-making powers by political elites. The basis of a number of such
accounts is the political fragmentation thesis, according to which judicial independence is most likely to emerge in a setting in which the political class is not sufficiently cohesive to be able to govern effectively in accordance with its preferences, giving rise to conflicts which are then resolved through courts. From a comparative analysis of judiciaries in Japan and the United States, Ramseyer developed a party competition thesis, which posited that alteration of power through continued elections is likely to facilitate the emergence of judicial independence. Ginsburg further developed this insight based on an empirical study of East Asian courts, and formulated an insurance model to explain the emergence of constitutional review and judicial power in new democracies. In democracies in which party leaders believe they are likely to be defeated in continuing elections, such leaders will favor the institutionalization of constitutional review as a safeguard or ‘insurance’ in the event of the party’s defeat. Another influential delegative-empowerment model for explaining judicial empowerment in democracies has been presented by Hirschl. For Hirschl, judicial empowerment does not fundamentally represent qualitative shift in the politics of a country towards greater equality and respect for the protection of fundamental human rights. Instead, it is a strategy employed by powerful political elites to preserve their status and privilege in society. Elites feel compelled to empower the courts because of perceived threats to their privileged position arising from hitherto disempowered and underrepresented groups and interests that can gain influence in elected bodies. Under threat of

12 Ginsburg, “The Global Spread of Constitutional Review”
13 See also Rebecca Chavez. “The Rule of Law and Courts in Democratizing Regimes” in Gregory Caldiera, Daniel Keleman and Keith Whittington (eds), The Oxford Handbook of Law and Politics (Oxford University Press; 2010); Chavez, Rebecca, The Rule of Law in Nascent Democracies: Judicial Politics in Argentina (Stanford University Press; 2004)
the erosion of the power, political elites use their disproportionate influence over the legal arena to empower courts to engage in judicial review. Given the purpose of empowerment, however, political elites build in procedure to keep the courts in check, such as by controlling judicial appointments. This ensures that the constitutional jurisprudence of the courts remains in line with the preferences of the political elites. Hirschl labels his explanation as the “hegemonic preservation” model of judicial empowerment, and explains the rise of judicial review in Israel, New Zealand, South Africa, Canada and other countries based on delegation of power to courts by hegemonic elites.

Recently, scholars have also employed the delegative-empowerment model to study courts in authoritarian settings. In a seminal work on the role on judicial institutions in authoritarian countries, Ginsburg and Moustafa sought to challenge the assumption that courts are irrelevant to politics in authoritarian countries. ¹⁵ Through an analysis of a collection of case studies, the authors built a case for courts as institutions with much influence on political life in such contexts, serving primarily a rule-by-law function for dictators who have a penchant for a legalistic and rules-oriented political order. From their inductive study, these scholars infer a number of functions courts perform in service of authoritarian elites. For instance, given the sustained use of repressive methods for controlling political opposition may be costly, the regime may employ the court for the maintenance of social order without having to utilize the state’s security and intelligence apparatus. Political opposition may hence be sidelined under the legal cover provided by the rulings of judicial institutions. In addition, courts in authoritarian settings can provide legitimacy to regimes that usurp power from the people, and to solve the principal-agent problem with regard to lower level administrative agents of the state. Through a detailed

empirical study of the Supreme Constitutional Court of Egypt, Moustafa points out that courts in authoritarian settings can be used by the regime to ensure the credibility of commitments in the economic arena. He explains that the judiciary in Egypt was empowered by Anwar Saadat in the 1970s as a means to attract foreign investment, including by allowing the court to establish a new property rights framework immune from governmental interference. Authoritarian leaders hence rely on judicial institutions for the preservation and legitimization of their power, as well as for routine governance. In order to perform these functions effectively, courts are often given a semblance of autonomy. As E. P. Thompson noted, “the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation.” However, authoritarian elites ensure through a number of mechanisms that courts do not attempt to erode the authority of the regime. This includes use of direct threats, retaining control over appointment and removal procedures, employing the legislature to overrule judicial rulings, and through establishing special courts such as the security and military courts in Egypt and the special court for clergy in Iran.

The delegative-empowerment model is not without persuasion. There is no doubt that it is legislative elites that set up courts and grant them constitutional review powers. And it is also understandable that in doing so, such elites are primarily motivated by their own interests, the most important of which are likely to retain power and preserve privilege. This proposition seems to hold even if the large scale acceptance of constitutional review globally points to some degree of emulation, and possibly either an unthinking acceptance of the concept, or a means to trumpet a commitment to rule of law for populist reasons. Leaving aside this debate, it appears

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that the delegative-empowerment thesis does provide a plausible account of the basis of judicial power, in both democratic and authoritarian contexts. With regard to the focus of this study, however, while the model may explain judicial independence or judicial empowerment, it cannot account for judicial effectiveness. While it is understandable that political elites would empower courts to mediate conflict among them or why they would induct judges as part of the power structure to maintain their hegemonic status, it is unclear why elites would empower a court that attempts to deconstruct their power. Even if we assume a principal-agent problem, such that the elites, the principals, may not fully control the behavior of the agent, the court, we would want to know why the elites would continue to tolerate a court that shows willingness to rule against their interests. And if there are indeed empirical examples of courts attempting to do that, we are motivated to look elsewhere to locate alternative bases of judicial power.

The trouble with the elite-centric delegative account is not only that it is normatively unsatisfying, in terms of viewing constitutional courts as merely serving the interests of powerful individuals and institutions. The shortcoming is also in offering plausible explanations for a significant number of court rulings with reference to elite interests. The observation that courts sometimes challenge the decisions of the powerful without really benefitting an alternative constituency of power elites has motivated some scholars to look beyond elite interests in explaining judicial independence. One strand in the literature, focusing manly on western democracies, had identified public support as contributing to judicial independence. Scholars note that public opinion is often more favorable of courts compared with other political institutions, and through cases studies point out the potential of backlash when current office
holders attempt to curb the court’s powers.\textsuperscript{18} While this literature provides a useful counterargument to the elite-centric theories, it does not explore the origins of public support for courts, and hence is unable to account for the considerable variation in support for high courts across countries. Just as some social movement scholars note grievance is not enough to spur mobilization, the need for an effective court or resonance with constitutional values is arguably not sufficient for mobilization of public support. In line with the critique of resource mobilization theorists of the relative deprivation thesis, we need a sociological account of how such support is constructed and maintained, including the role of various societal institutions, networks and resources. Another strand in the literature does delve a bit deeper and attempt to locate the origins of public support for courts in civil society activism in support of the rule of law, including in the developing world.\textsuperscript{19} While these studies are valuable in noting the presence of effective judiciaries that appear to uphold the rule of law, they are less persuasive in explaining the origins of judicial power. The problem has to do with treating civil society as a unified category, such that a panoply of actors including non-governmental organizations, the media, lawyers, business organizations, other professional groups, and human rights activists are thought of as representing a reform network. While sustained collaboration among such diverse entities to be able to form a reform network seems questionable, the main shortcoming is that some of these groups are likely to have much higher mobilization potential than others, and may likely be much more significant in supporting judicial power than other societal groups.


Few scholars, especially among political scientists, have considered the role of the legal profession in supporting the expansion of judicial power. The neglect is curious, since judges themselves belong to the profession. Early studies from the 1970s and 1980s on the role of legal profession in society focused on monopolistic tendencies of the profession in the pursuit of material enrichment.\(^{20}\) However, starting the late 1980s, scholars began to study the historical role played by lawyers in the politics of western countries. Through case studies focused on England, France, Germany and the United States, a few scholars constructed a theory of lawyers’ role in the development of political liberalism in the west in the eighteenth and nineteenth centuries.\(^{21}\) They argued that lawyers had played a highly consequential role in fighting for a moderate state, and for civil and political rights. Subsequently, through an analysis of nearly twenty additional national case studies, a new theoretical framework focused on the ‘legal complex’ was formulated by these scholars.\(^{22}\) The legal complex is comprised of number of actors with legal training, including lawyers, judges, legal academics, civil servants etc. These several occupations, which are connected through societal networks, have the potential to mobilize for expansion of citizens’ civil and political rights. The present study shares with the legal complex literature the intuition that legal profession is worthy of examination as a separate category of social actors. With the study motivated by some somewhat different goals, the search for a theory to explain judicial effectiveness in post-colonial settings, it aims to contribute to this scholarship by examining the bases of judicial power that can countervail the delegative


empowerment of courts by elites. In particular, the focus is on isolating and investigating the core mechanisms through which societal actors can prevail in supporting the rise of judicial effectiveness.

III. The Argument

Before offering an account of the origins of judicial power, it is important to acknowledge that there is variation in the effectiveness of high courts across jurisdictions. This variation is even more pronounced when we consider developing countries. A large number of courts in such countries simply play little or no consequential role in the political sphere. Then, there are two kinds of courts that are quite powerful, but vary in terms of whether they consistently align themselves with the political elites or make periodic attempts at upholding the rule of law notwithstanding the influence of powerful actors. Several studies discussed above, especially those falling under the delegative model, fail to adequately acknowledge this variation. Hence, they provide an accurate but incomplete account of the nature of judicial power.

In this study, I exploit two kinds of variations to understand judicial power in post-colonial settings. First, this study was motivated by an observation of the radical transformation of the Supreme Court of Pakistan between 2005-09. The fact that the court’s jurisprudence was markedly different in the pre-2005 and the post-2009 periods presented an opportunity to attempt to isolate the intervening forces that caused the rapid expansion of judicial power in the country, and to reject hypotheses that were inconsistent with the observed events. The theory developed from the Pakistan case was then studied further using the variation between the Turkish and Egyptian cases, in an attempt to see whether a plausible link could be made between the
hypothesized cause and the observed effects. Below, I present the main strands of the argument developed from this comparative analysis.

\textit{Epistemic Power of Courts}

Imagine two jurisdictions, A and B, each with its own high court, Court A and Court B. The jurisdictions are, let’s assume, similar along a number of political dimensions. They have more or less identical constitutional provisions, a similar level of political fragmentation, and comparable level of economic development. Let’s imagine that by speaking with a random sample of the population of jurisdiction A, one learns that the majority of citizens have sufficient knowledge of the functioning of Court A to be able to have an informed opinion about the court. The citizens have basic information about Court A: they can name at least one judge who serves or has previously served on the bench, they can identify its building, can describe a handful of matters in which the court has been involved, and can explain in very basic terms the constitutional function of the court. In jurisdiction B, however, citizens have little if any knowledge about Court B, and hence are unable to provide an informed opinion of the high court. They cannot name any single judge, identify the court’s building or provide any examples of matters that the court has adjudicated. Needless to say, the citizens would likely not have any opinion of Court B. This study suggests that, on the basis of the described difference between the two high courts, of the knowledge and valuation of the courts in the public sphere, Court A is likely to be more effective than Court B.

An investigation into the effectiveness of judicial institutions necessarily involves an examination of the bases of judicial power. Noting a rise of the judicialization of politics in several countries, many view the basis of judicial power as being located in the actions and
strategies of political elites. Courts are able to adjudicate politically consequential issues because this role has been delegated to them by political elites. While such delegative-empowerment has no doubt been a basis of judicial power in some countries, the problem with this model, as noted above, lies in the claim that such delegation is the exclusive or the most important source of any high court’s authority. The roots of such thinking lie in a certain conception of judicial institutions in comparison with the other branches of the government. As Hamilton put it most famously in *The Federalist* No. 78:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This perception, of the weakness of the judiciary owing to the lack of its capacity to implement its judgments, I believe, is shared by scholars who locate the basis of high courts’ power in delegative empowerment by political elites. The implicit argument seems to be that there would be no point for a high court to adjudicate claims against the elites from whom its power derives, since the elites, who control the executive, would either simply ignore the order or rein in the power of the court. This conception of the basis of institutional power, however, seems to be based on a problematic assumption of viewing power in terms of having direct access to the means of violence. Such an account of power, I agree, can plausibly explain how military generals have played a dominant role in the politics of countries such as Pakistan, Turkey and Chile at various times. However, it is less successful in explaining why the military has not wielded significant political power in the domestic politics of consolidated democracies, even though it is no doubt the most powerful institution in such countries in terms of brute or hard power. In order to understand this, and to examine whether there may be additional sources of
judicial empowerment, requires us to engage in a more sociological analysis of the bases of institutional power.

On the basis of an inductive analysis of rapid expansion of judicial power in Pakistan, I argue that courts have another kind power, which I call epistemic power, the locus of which is primarily in society and is independent of the direct influence of political elites. This is the power of the court to influence a public sphere comprised of citizens who are knowledgeable of the court, receptive of its judgments, and consider it a legitimate institution. In partial agreement with Hamilton, such epistemic power does arise primarily from the ability of the court to issue its “judgment” on the questions that come before it. However, under certain conditions, such judgment can be both forceful and willful, and can even prevail against holders of much greater hard power who are ready, willing and able to use such power to protect their interests. In its potential conflict with those with guns, a court’s main weapon is its voice, through which it expresses its opinion. The power of voice, I argue, depends on who speaks, how the speaker reaches the audience, and how the audience perceives what is said. Under certain conditions then, when the judiciary is perceived as highly legitimate and has channels available to impress its opinion upon a receptive citizenry, it is not unlikely that it may succeed, at the very least, in issuing an opinion that is inimical to the core interests of very powerful individuals and institutions. And, further, it is not inconceivable that, even if such powerholders control executive institutions and refuse to implement the judgment, they will nonetheless be negatively affected by the impact the opinion will have on the public mind.

While there are a number of empirical cases exemplifying the delegative empowerment of judiciaries by elites, there are also others, albeit fewer, examples that demonstrate that a court may have a strong basis of support in society. This study provides the example of Pakistan’s
Supreme Court, which became a much more powerful and effective court within a span of a few years between 2005 and 2009. This basis of this transformation did not lie in a change in the constitutional text or in the orientations of the political elite. Instead, I argue the change was mainly in the valuation of the judiciary in the public mind. Through evidence from surveys and interviews, I show how, at a time the Supreme Court was adjudicating cases against powerful incumbent elites, it was considered by citizens as the most legitimate among several state institutions. On the basis of the theory built in part II of this study, I also analyze the jurisprudence of the Egyptian judiciary in the latter half of the twentieth century. The partial effectiveness of Egypt’s Supreme Constitutional Court (SCC) during this period in holding power elites accountable and in opening up the political space for opposition groups can, I argue, be explained by the support of the judiciary in society. For example, in the mid 1990s, when the regime attempted to curtail the power of the SCC, there was public backlash against the regime. Adil Omer Sherif, an SCC judge at the time, commented that the SCC had “raised popular consciousness of the necessity of maintaining the democratic process and respecting individual rights and freedoms, and these two elements were behind the defeat of this attack on the Court.”

In building my theory on judicial power, I also show how public opinion has provided a basis of support for judiciaries in western countries, when they have been under attack by elites who control the executive. I discuss how Roosevelt’s 1937 proposal to pack the US Supreme Court met with strong public opposition. In her detailed study of court-packing crisis, McKenna shows how there was a vigorous reaction against the bill by bar associations, in the press, and among citizens generally.

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24 Marian McKenna, Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937 (Fordham University Press; 2002)
of thousands of telegrams and letters received by congressional offices, ninety percent were against the proposal.\textsuperscript{25} Similarly, when the West German Federal Constitutional Court (FCC) was about to rule against the government in 1952 on the question of the constitutionality of certain treaties, the executive decided to clip the court’s powers. The Minister of Justice is even reported to have claimed that he “would blow up the entire constitutional court himself.”\textsuperscript{26} However, following public fury against plans to undermine the court’s authority, the cabinet issued a declaration in support of the FCC.\textsuperscript{27} 

Note that in each of the cases discussed above, powerful incumbent elites who controlled the states’ executive were unable to prevail against the judiciaries, even though their decisions and interests were being challenged by the courts.\textsuperscript{28} But given the account of brute power discussed earlier, one may question whether such diffuse public support may be effective in providing support for a judiciary pitted against elites who control the executive. While the

\textsuperscript{25} Ibid, 303-304
\textsuperscript{27} The declaration, which was personally delivered by Chancellor Adenauer to FCC judges, stated, “The cabinet unanimously declares that it never conceived of encroaching on the rights or the dignity of the constitutional court, or even to question them. The cabinet respects the FCC as an integral part of the democratic Rechtsstaat....” Ibid, 346
\textsuperscript{28} As this study is being completed, another powerful instance of judicial effectiveness can be observed in Brazil. 43-year old federal Judge Sergio Moro has been the main driver of a corruption investigation involving nearly $2 billion embezzled from Pertobas, the state-run oil company. The investigation, called Operation Carwash (Lava-jato) implicates a number of the most powerful business and political elites in the country, some of whom have been handed jail sentences. The investigation also contributed to a political and constitutional crisis in the country, after Judge Moro released a tape of a conversation between incumbent President Rousseff and former President Lula, which indicated that the latter was being offered a ministerial position to shield him from the investigation. This led to a wave of anti-government protests in the country. During the course of the investigation, Judge Moro’s name has become a household word and he has emerged as a hero in Brazilian society. His increased popularity was arguably an important factor in his ability to investigate very powerful elites, as illustrated by former President Lula’s brief detention for purposes of investigation in March 2016. Interestingly, Moro seems to have been aware of societal support as a basis of judicial power, and to have used it strategically to further the investigation. As stated in a recent newspaper report regarding the release of the tapes: “But the move is also part of Mr. Moro’s… strategy of mobilizing public opinion to reinforce his cases. In a 2004 Brazilian law journal article, Mr. Moro wrote favorably of the power of public opinion to “ostracize” powerful defendants who are otherwise likely to slip away on appeals.” See “Brazil Protestors Find Hero in Crusading Judge Sergio Moro” (Wall Street Journal; March 17, 2016). Also see “Release of tapped phone calls between Lula and Rousseff sparks mass protests in Brazil (The Guardian; March 17, 2016)
mechanisms through which public support may empower a court will necessarily depend on the particular political context, through an examination of public support for the Pakistan’s Supreme Court, I find that such support can indeed provide an effective basis for judicial power. To begin with, one of the most common ways in which power elites have dealt with activist judges, especially in developing countries, is to simply remove the judges from office, transfer them to another jurisdiction, or to threaten to do so. In addition, threatened elites have gone further, in attempting to threaten or to actually harass judges, including by illegally detaining or physically harming them. For example, when the Chief Justice of the Lahore High Court accepted a petition against the Zia regime in 1980, he was forcibly removed from his office and made an acting judge in another court.\textsuperscript{29} Indeed, the constitutional crisis that presented a prelude to judicial empowerment in Pakistan was precipitated by the suspension of the activist Chief Justice of the Supreme Court in 2007. In this case, the Chief Justice, Chaudhry Iftikhar, was also illegally detained and physically manhandled by the regime’s security personnel. In Egypt, similarly, the regime has directly threatened judges on the SCC from ruling against the regime.\textsuperscript{30} The transformation of Pakistan’s judiciary shows that once the court has considerable public support, it becomes harder from the political elites to use such methods to threaten or harass members of the judiciary. For example, while Musharraf’s regime used brute force against the Chief Justice as noted above, once it became clear in the ensuing months that such methods of influencing judges would lead to a public backlash in form of an anti-regime street movement, the regime had to resort to imposing emergency rule to prevent judges from ruling against it’s interests.

Secondly, if a court has public support, it can sidestep to an extent the Hamiltonian problem of not being able to implement its judgment except through the executive. For a court

\textsuperscript{29} The episode is discussed in more detail in Chapter 2
\textsuperscript{30} Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt (Cambridge University Press, 2009), 169
that has no epistemic power, an unfavorable ruling would do little. It would just fall on deaf ears, or irritate elites to a level where they would threaten or harass the judges, or curtail the court’s authority. However, a court which has a constituency of support in a public which is receptive to its opinions can have an impact on the power of elites, even if they are unwilling to implement the court’s judgments. The post-2009 Supreme Court of Pakistan, for instance, passed a number of rulings against incumbent political elites who refused to implement the court’s orders. Consider the example of the Supreme Court’s orders to the executive to write a letter to Swiss authorities to initiate proceedings implicating the incumbent President in corruption cases related to foreign bank accounts. While officials initially refused to implement the court’s orders, the orders had a large reputational cost for the political elites, given the citizenry was receptive to the court’s judgments. Finally, and in large part due to the court’s ability to shame the implicated elites, the Supreme Court’s ordered the removal of the incumbent democratically elected Prime Minister from office for his failure to direct his subordinates to write the letter, which was implemented.

Public support hence provides a court with epistemic power, which allows it to pass judgments against the interests of powerful elites that such elites would not have otherwise tolerated. A prior question, however, is why citizens would support an unelected judiciary that has the power to conduct constitutional review of the decisions of the government. This question is readily answered with respect to authoritarian contexts, where the government has not been elected by the people. However, in a democratic context, why would citizens support a counter-majoritarian institution, which has the power to annul the decisions of the elected representatives of the citizens? While this question has preoccupied a number of legal scholars and political theories who have discussed the normative implications of the “counter-majoritarian problem,”
based on analysis of the Pakistani case, I build a model to explain why citizens may favor such an institution in democratic context. While others have noted that a constitutional court solves informational and coordination problems for citizens, I argue that citizens may want an effective court because of their inability to find a policy package in form of a political party platform that is exactly congruent to their interests. Judicial review can be a mechanism for policing the activities of political parties in power with reference to constitutional principles, not only with respect to the party one disfavors but also for the party that a citizen has voted for. The model is based on an empirical insight regarding citizens’ opinion of the Supreme Court in Pakistan, which was remarkably positive across party lines.

*Legal Mobilization and Public Support for Courts*

If the basis of judicial power that enables courts to rule against those who possess greater hard power is to be found in public support, a prior question is how such support is created and maintained. The argument presented in this study is that the most effective mechanism for building public support for courts is through legal mobilization. I define legal mobilization as the publically faced activities of members of the legal profession, including individual initiatives and those undertaken through organizations the membership of which is significantly comprised of legal professionals. Legal mobilization can take various forms, including publication of articles, writing letters, making public declarations, holding meetings and conferences, engaging in public demonstrations, initiating rights litigation, boycotting court proceedings etc. Such activities must be undertaken with a view to engage with the society for the purpose of influencing it on a question of public importance. Hence, I do not include in the definition of legal mobilization
routine meetings of bar associations, or events at which the narrow corporatist interests of the profession,\footnote{For example, meetings to discuss welfare programs for lawyers, fundraising for building a new bar association building, or ceremonies to appoint new bar members or leadership etc. (unless such events are used to make statements or declarations of general public interest).} are deliberated.

While previous studies have discussed the role of civil society in building the rule of law, a shortcoming of this literature is that fails to disaggregate civil society in terms of the ability of various organizations to facilitate the empowerment of judicial institutions. On the basis of an analysis of the empowerment of Pakistan’s Supreme Court, and comparative analysis of the high courts of Egypt and Turkey, I argue that the legal profession is best placed in society to act as a judicial support network. I do not dispute that in some countries there may be human rights NGOs that may play a more significant role for judicial empowerment than the country’s bar association. My argument is that if that is the case, the bar has not mobilized successfully in support of the rule of law, such that societal support for the judiciary may have been qualitatively higher had the bar been more active.

From an analysis of the case studies, I find that there are a number of factors which make the legal profession significantly more important compared with other civil society actors in supporting judicial empowerment. To begin with, the interests of the profession are broadly aligned with that of the judiciary, such that lawyers would likely have an incentive to support an increase in judicial power. If courts are efficient and effective, then clients are likely to trust them as a mechanism for dispute resolution, which would generate potentially greater incomes for lawyers. In this regard, lawyers would be especially interested in expansion of access to justice and for a wider subject matter jurisdiction for courts, since this would increase the caseload and create more opportunities for representation. Moreover, the more powerful and
legitimate the judiciary is in the eyes of the citizenry, the more prestigious the profession is likely to be. Second, members of the legal profession are ideally placed to monitor state elites’ attempts at interfering with the powers of the judiciary. One reason for this is that it is part of the job of being a lawyer to know court procedures. Another, perhaps more important reason is that some of the methods employed to curtail the powers of courts may be subtle and legalistic, but still consequential, and only legally trained professionals would have adequate knowhow to understand their impact.

Apart from the factors discussed above, which relate to the nexus of the legal profession with the judicial arena, I also present an argument about the legal profession possessing a qualitatively different mobilizing potential compared with other professions or social organizations. This argument is based on a comparative analysis of recent lawyers’ and doctors’ movements in Pakistan. From this analysis, I am persuaded that few other societal actors can be powerful enough to launch movements that can even bring down a strong authoritarian regime, as happened in Pakistan during 2007-09 (see conclusion, where I argue that the lawyers’ movement played a central role in spurring the transition to democracy). The reason for this is not only that lawyers are organized in professional associations which have a large membership to be able to launch an effective movement. Though this helps, and is a necessary condition for successful mobilization, several other professions also have these characteristics but much lower mobilization potential compared with lawyers.

Lawyers’ special mobilization potential comes, first, from their biographical availability. While lawyers work is important and highly consequential to their clients, it is not urgent enough so that lawyers cannot neglect their work to engage in publicly oriented activities. By contrast, when doctors left their work to protest in the streets in Pakistan in 2011-2012, around 300
patients died owing to their negligence, which led to society-wide condemnation. Lawyers, on
the other hand, were widely celebrated for their two-year long movement, in which they
regularly boycotted court proceedings. In addition, lawyers’ incomes are derived from clients’
fees, which gives them an advantage over professionals employed by the public sector, or even
those employed by large companies, in terms of the ability to mobilize. Second, compared with
other professions, lawyering skills are not easily transferrable internationally. With a lower
possibility for exit, lawyers are likely to have a higher impulse to reform, since they are locked
into the domestic context. Third, legal work is inherently political in nature, being based on
constitutional or statutory material derived from that state. Moreover, the set of activities,
customs, practices and strategies employed by lawyers are transferrable to the political realm.
Litigation, for instance, is inherently adversarial, and involves contestation and argumentation.
Fourth, the legal profession is unique in that while one part of it is located in society, another part
dominates a entire branch of government. Since judges themselves are members of the legal
profession, they share a professional identity, and are often part of a dense network of
connections, with other members of the profession. This shared identity and common network is
likely to be quite strong in certain common-law based legal systems in which there is an osmosis
from the bar into the bench, such that members of the judiciary are usually chosen from among
practicing lawyers. Finally, I found that there are only a few professions which involve close
face-to-face interaction with clients, which includes medicine and law. What is special about
these professions is that clients share their deepest secrets, under strict confidentiality, with
experts, on whom they place reliance. Such intimacy, I argue, contributes to mobilization
potential because the professional has a very strong, close and personal connection with clients,
and can influence clients’, and hence citizens’, thinking on important issues.
Given legal mobilization can be a powerful force in the public sphere, how does it influence judicial empowerment? From an examination of the rapid expansion of judicial power in Pakistan, I found a number of mechanisms through which lawyers can build support for courts in society. To begin with, the larger part of the profession itself belongs to society, and acts as a nucleus of support for courts threatened by powerful elites. But, more importantly, legal mobilization can play a significant role in expanding support for the court among the citizenry. Through declarations, demonstrations and other public acts, lawyers can educate citizens about the existence of, and the functioning and importance of, constitutional review. In addition, by engaging in contentious mobilization, as lawyers often do, lawyers can enhance the legitimacy of the court as an institution worth protecting. This is especially so if the mobilization is high risk, since citizens would place a higher value on the cause espoused by the mobilization. Third, lawyers have a more direct role in enhancing the courts’ power and legitimacy. Politically contentious cases, including human rights cases, are brought to the court by lawyers on behalf of clients. If the case involves a powerful defendant, this is no doubt a risky endeavor for the lawyer. Legal mobilization, however, can embolden members of the bar to undertake such cases. This happens because the elites may be wary of threatening or harassing lawyers, from the fear that the profession will mobilize in face of such an action. The presence of an activist lawyer backed by a powerful bar, in turn, strengthens the judiciary’s ability to adjudicate the case impartially. Finally, given lawyers’ work involves argumentation, as noted above, they can effectively build the case for judicial independence in the public sphere. They can frame events such as the removal of a judge from office as an attack on the judiciary or the constitution itself, and their argument is likely to have weight since they are considered experts on legal and constitutional issues.
The Mobilization of the Legal Profession in Postcolonial States

The legal profession can potentially be a major force in the construction of judicial power. However, the profession does not mobilize for judicial effectiveness and rights protection in all countries. While some scholars have suggested that lawyers have a liberal political orientation which disposes them to take an active part in public affairs, there is considerable variation in legal mobilization across countries. Among the countries considered in this study, for instance, there has been considerable legal mobilization in Pakistan and Egypt over the last several decades, but not in Turkey. If legal mobilization does indeed contribute to judicial effectiveness, a prior question concerns the origins of an effective legal profession capable and willing to mobilize against powerful state institutions.

In western countries, the legal profession has developed over several centuries, and has played an important political role by mobilizing for a moderate state, judicial autonomy and civil rights. In England, for instance, there was already a sarjeants’ order in the fifteenth century with defined admission criteria and its own costume. Noting the political role of an autonomous bar, Halliday and Karpik argue that its establishment preceded even the formation of the modern English state in the sixteenth and seventeenth century, and that it became a “pillar of English constitutionalism.” With thus having been embedded in society and politics, radical barristers mobilized for rights protection and against corruption through the courts in the eighteenth and nineteenth centuries. In France, lawyers similarly engaged in contentious activities such as disrupting the judicial system by going on strikes, and supported the empowerment of the parlements against the royal court in the eighteenth century. German lawyers had also by the

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early nineteenth century mobilized, and in 1830s launched a campaign for a “free bar” in support of the autonomy of law.

The development of the legal profession in the postcolonial world stands in sharp contrast to the gradual, incremental and uninterrupted development of the profession in western countries over several centuries. In many postcolonial countries, indigenous legal systems were jettisoned wholesale, and replaced by new European-inspired systems. The legal profession was also constructed de novo with little or no institutional continuity with the pre-colonial profession.

This gave rise to what I have called in this study the ‘displacement problem’ related to the development of legal institutions. Legal institutions do not develop overnight. As social institutions, once established, they need time to become embedded in society. The opportunities for development are usually not available continuously, and often emerge owing to fortuitous circumstances over time. Consider for instance an event from the fall of 1731, when the Order of Barristers in France disrupted the working of the Parisian court system by going on a strike for three months. The core issue was the autonomy of the Order, for which barristers had struggled hard for the past half century. The Crown’s incursion was precipitated by the action of a minority of barristers, who sought to defend priests that had dared to launch a confrontation against both the church and the state. Even though the Crown threatened the minority of barristers that had sought to protect the recalcitrant priests, it was perceived by the majority as an assault on the autonomy of the Order of Barristers. The collective mobilization of the barristers ultimately led to the withdrawal of the threat by the Crown. This episode of contention was not a preplanned event by French lawyers to orchestrate the independence of their profession. It emerged because

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of an unrelated issue, the actions of a minority of the bar, but presented a political opportunity to fight for the autonomy of the profession.

In many countries in the developing world, the modern legal profession was established during the colonial period around the late nineteenth century. In some countries colonial authorities themselves established the profession, while in others modernizing elites replaced indigenous legal institutions with those borrowed from Europe. To further compound the displacement problem, in some settings such as Egypt and colonial India, the legal profession was dominated by European lawyers, and native lawyers were only able to join the profession a few decades after its establishment. With such a sharp disconnect, with such little time for development, and given legal systems were established with a colonial imperative and were not contextually tailored, one would not expect such professions to become sufficiently embedded in their respective societies to develop sufficient mobilization potential. As social movement scholars have noted, new organizations are less successful at mobilization because they still have to develop ties in society, develop professional sophistication and learn about the mechanisms through which they can play a role in a particular social context. Importantly, in terms of mobilization against state institutions, a ‘history of accomplishment’\textsuperscript{34} can be a key asset. Such history, as noted above, develops incrementally as political opportunities emerge, and once there is sufficient precedent, is likely to endow an older organization with higher legitimacy and prestige in society compared with a new organization that has little connection with the indigenous context.

In the very early years after their establishment, legal professions in colonial India and Egypt functioned as expected, given the displacement problem discussed above. Around the mid

\textsuperscript{34} John McCarthy and Mayer Zald, “Resource Mobilization and Social Movements: A Partial Theory.’ In \textit{American Journal of Sociology}, Vol. 82, No. 6 (May 1977), 1233
to late nineteenth century, the native legal professions were insignificant actors in the political context in these countries, and law was not considered among highly reputable professions. By the mid twentieth century, however, lawyering had become the most prominent, prestigious and powerful profession in both colonial India and Egypt. Lawyers dominated public life in these countries during the earlier half of the twentieth century. In colonial India, most of the important political leaders of this period were lawyers. Lawyers dominated the Indian National Congress, and nearly all of its prominent leaders including Mahatma Gandhi, Motilal Nehru, Jawaharlal Nehru, and Vallabhai Patel, were lawyers. Prominent leaders of the Muslim League were also lawyers, including Muhammad Ali Jinnah, Muhammad Iqbal, Muhammad Shafi and Liaquat Ali Khan. In Egypt, similarly, lawyers were at the forefront of political life, which included figures such as Mustafa Kamil, Muhammad Farid, Saad Zaghlul and Mustafa el-Nahhas. The prominence of lawyers can be gauged from the fact that of nineteen Egyptian prime ministers between 1919 and 1952, fourteen held law degrees and an additional two had previously served as judges. Further, almost all cabinets during this period were comprised of a majority of lawyers.

Lawyers’ political role in colonial India and Egypt in the early half of the nineteenth century, I argue, led to the indigenization of the profession and its embeddedness in society and politics. The dominance of lawyers over party politics, in legislative councils and cabinets is highly significant, but not the most important aspect of their political role with regard to my argument. The most important aspect was that lawyers were at the forefront of the anti-colonial

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35 Indeed lawyers were so dominant in the Congress that Rohit De has argued that the party was “largely composed of lawyers” and acted as a “classic legal complex” in the late 19th and early 20th century. See Rohit De, “Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942-1944,” in Terrence Halliday, Lucien Karpik and Malcolm Feeley (eds), Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex (Cambridge University Press; 2012, 59)
36 Reid, Lawyers and Politics in the Arab World, 118
struggle, and confronted not only an authoritarian regime, but a foreign occupier which
controlled the military apparatus in these countries. In both countries, lawyers emerged as the
leading force in nationalist action owing to the nature of the political context. Having lost wars
of independence, in India in 1857 and in Egypt in 1879, the military was not only discredited, but
was taken under the direct command of the British. Hence, armed resistance against the colonizer
became a virtual impossibility. Resistance against the colonizer in such a political context was
possible only through institutional channels, and took the form of constitutional agitation and
civil disobedience. The method of imperial governance in these countries, which was
bureaucratic and legalistic, also facilitated the rise of the political role of lawyers. Hence,
contentious politics often revolved around various constitutional actions, legislative acts, and
governmental commissions. Lawyers were ideally placed to navigate through constitutional and
parliamentary procedure, and with their command over European languages, to confront imperial
authorities using institutional channels both within the country and internationally. As early as
1912, the Lieutenant General of Bengal Sir Andrew Fraser warned of “Vakil Raj” or the rule of
lawyers, and argued that “this power of the bar is regarded by people generally as a power which
undermines the prestige and diminishes the beneficence of British rule.”\footnote{Andrew Fraser. Among Indian Rajahs and Ryots: A Civil Servant’s Recollections and Impressions of Thirty-Seven Years of Work and Sport in the Central Provinces and Bengal (London: Seeley & Co., 1911, 57)} Further, the pro-
British Rajah of Bengal, Maharajah of Darbhanga, complained to the British about the role of
pleaders as follows: “they rule the courts; they have all the power of the local bodies; and they
have a practical monopoly of the Legislative Councils. We cannot oppose them.”\footnote{Ibid, 58} In an
interesting parallel, the British High Commissioner wrote the following about the legal
profession in Egypt in 1934: “Lawyers are in Egypt the last element the Government should
By contrast, while the legal system was also developed *de novo* in modern Turkey, the legal profession played no significant role in Turkish political affairs in the formative period spanning the early half of the twentieth century. The most important leaders who ruled Turkey during this period were all military strongmen. This included the triumvirate who controlled the Committee of Union and Progress (CUP), including Jamal Pasha and Enver Pasha, both military officers. Mustafa Kamal (later Ataturk), the founder of the modern republic was a military general, and his successor Ismet Inonu, who was President from 1938 to 1950, had also been a high ranking military officer. Further, it was not only that few opportunities emerged under consolidated authoritarianism for the legal profession to engage politically, and become embedded. In their mission to modernize the society, Kemalist elites made it a priority to remanufacture the legal profession, to make sure that its goals and ideologies remained aligned with that of the ruling elite. It is important to note that pre-republican profession did initially attempt to challenge the increasingly authoritarian tendencies of the Kemalist elites. However, as a result of the restructuration process during the early half of the twentieth century, the profession constructed by the elites as part of the new European-inspired legal system remained quiescent during the latter half of the twentieth century.

The deep connection with political life in colonial India and Egypt, I argue, catalyzed the indigenization of the profession in the sub-continent, which solved the displacement problem and led to the formation of a bar that became firmly embedded in society and politics. The magnitude of the task of orchestrating a decolonization movement against the powerful and cohesive British

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administration, the pace of change, and the centrality of lawyers in the process, I argue, indigenized and embedded the profession. The formative period of the profession’s development is characterized by rapid development that happened in what Beissinger has, in a different political context, called a “thickened period of history.” This is a period in which “the pace of challenging events quickens,” social processes that “earlier required decades now develop in a matter of months,” and there is a potential “to move history onto tracks otherwise unimaginable, affecting the prisms through which individuals relate to authority, consolidating conviction around new norms” all of which happens “within an extremely compressed period of time.”

While the legal profession has been politically consequential in several western countries, arguably, it was never as dominant in the politics of those countries as it was in colonial India and Egypt in the early half of the twentieth century. Metaphorically, in these countries during this period few indigenous institutions could flourish. The soil was, for instance, inimical to the growth of a sovereign military force. However, with the only possibility of resistance limited to institutional channels, and with anti-occupier sentiment prevalent across society, the milieu was just right for the legal profession to take a leading role in what was the most important political project of the period. The profession hence grew like a tall oak dwarfing other institutions and professions in society. Once developed, it retained its embeddedness in that soil, and its stature in the garden, even if the nature of the soil began to change. In Turkey, it was instead the military-bureaucratic institutions that flourished like tall oaks, leaving institutions like the bar to grow under its shadows. To the extent that the profession was able to grow in such a milieu, it was further pruned and cultivated to prevent it from overshadowing the larger oak.

With regard to embeddedness of the legal profession in Pakistan and Egypt, it was not

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41 Ibid
only that it was able to develop ties in society, develop professionalization and discover the methods for effective mobilization in the particular social and political context. Importantly, in leading a resistance movement against a colonial power in the formative period of its development, the profession developed a strong liberal orientation, that was fundamentally opposed to authoritarian tendencies and strongly favored expansion of political rights. This mobilization potential, and the political orientation, built over several decades after the establishment of the professions, continued into the second half of the twentieth century. As Kohli has noted in connection with the impact of colonialism on the formation of institutions in the developing world, “continuity is in the nature of institutions, as patterns that endure through a variety of underlying mechanisms such as internal order and shared norms, boundaries vis-à-vis the broader social context, socialization of new members, and support from the society in which they function.”

Hence, we find in Pakistan and Egypt continuing anti-government mobilization by the bar in the post-colonial period. By contrast, even after the end of the single-party period in Turkey in 1945, the Turkish bar remained politically quiescent. In terms of institutional continuity, it is interesting to note that bar in Egypt and Pakistan developed even before the founding of the modern republics, whereas in Turkey the bar was established under the supervision of state elites after the founding of the modern republic.

Effectiveness of Legal Mobilization

I have argued above that legal mobilization can contribute to judicial effectiveness. But, when is legal mobilization itself effective? In comparing Egypt and Pakistan on the one hand, and Turkey on the other, I have already noted the importance of the embeddedness of the profession in

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society and politics. But, even in countries where the profession is comparably embedded, or within the same country at different times, the mobilization potential of the profession may vary. Below, I briefly note the conditions in which legal mobilization is likely to be effective.

Through an analysis of sustained two-year legal mobilization in Pakistan which succeeded in eroding the power of an authoritarian regime, I isolate some basic factors which may aid legal mobilization. The size of the profession, for instance, is one such factor. While at first glance size appears to be an advantage, larger numbers may also be a disadvantage if the profession is not effectively organized. In terms of organization, it can add considerably to mobilization potential if lawyers’ associations are spread across a large number of cities and smaller towns, and are federated and interlinked. Previous literature on the role of the legal profession, including the legal complex scholarship, seems to focus primarily on lawyers in national capitals at the top of the profession. These lawyers are often seen as influencing politics through cases in higher courts that become *causes célèbres*. However, the present study shows the remarkable power of the legal complex to influence politics through nation-wide mobilization. Though the lawyers’ movement in Pakistan was most visible in seven large cities, bar associations in dozens of smaller towns were extremely active in the struggle for judicial autonomy. The federated structure of the movement rendered police repression an ineffective tool against the widely dispersed mobilization of lawyers. Further, it was mobilization through local-level bars that enabled the leadership of the movement to coordinate two ‘long marches,’ in which many thousands of lawyers from across Pakistan converged to the capital.

In addition to size and organization, I identify two additional factors that may considerably affect legal mobilization. First, I argue that autonomy of the profession is essential for successful mobilization. While the importance of autonomy from the state is readily
understandable if the goal is to mobilize against the interests of those who control the executive, it is not immediately apparent what impact association with political society may have. Some have argued that alliances with opposition parities may be of value to civil society actors attempting to mobilize for the rule of law. Through a comparative analysis of two lawyers’ movement, in Egypt and Pakistan, I argue that autonomy from political society increases the mobilization potential of the profession. This is because such an alliance is likely to create a relationship where party interests predominate, and the association, thus captured, is likely to be influenced by the party to follow a broader set of agendas that is incongruent with the interests of the profession. In particular, the primary interest of parties is to win the electoral game and exercise public power through the state apparatus. Professional associations, by contrast, belong to the realm of civil society, and focus on protecting the interests of the profession. A temporary alliance, as the comparative research on bars in Egypt and Pakistan indicates, may aid mobilization if the bar is able to maintain its autonomy. However, when party interests infiltrate the bar, such as when bar elections are contested along partisan lines, there may be a significant weakening of the bar’s mobilization potential.

Finally, since I have defined legal mobilization as the public-facing activities of the legal profession, the channels of access available to influence the public sphere matter immensely for effective mobilization. In addition, as noted above, the alternative source of judicial power, which can countervail the delegative authority endowed by political elites, is the Court’s epistemic power in the public sphere. Even in an environment where media is not free, legal mobilization can be partially effective in supporting judicial empowerment, as was the case in Egypt. However, the rapid expansion of judicial power in Pakistan during 2005-09, I argue, can

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43 Chavez, Rebecca. “The Rule of Law and Courts in Democratizing Regimes”
be explained by the remarkable liberalization of electronic media starting 2002, which radically transformed the nature of the public sphere in the country. While around six million citizens had been exposed to private media sources in the form of newspapers around 2002, by 2007, the public sphere had expanded to include nearly forty million citizens who had access to about fifty private television channels, including a large number of news and current affairs channels. This access to an expanded public sphere significantly enhanced the capacity of legal mobilization to enhance the epistemic power of the court, and thereby to support the rise of an effective judiciary.

The argument described above is developed in two parts. In Part I (chapters 2 to 6), I engage in a longitudinal analysis of the effectiveness of the Supreme Court of Pakistan. Given a change in the court’s jurisprudence, I identify the factors that contributed to the expansion of judicial power in Pakistan and develop a model to explain the effectiveness of courts in postcolonial states. In part II (chapter 7), I test my model based on an analysis of the jurisprudence of high courts in Egypt and Turkey. I find that the factors that led to judicial empowerment in Pakistan were also present in Egypt, which I characterize as having a partially effective court. However, the same factors were absent in Turkey, which I characterize as having an ineffective court.
This chapter compares the effectiveness of the Supreme Court during two distinct periods in the judicial history of Pakistan: pre-2005 and post-2009. The present study, based on an analysis of the transformation of the Supreme Court of Pakistan, employs a longitudinal research design to understand the causes of judicial empowerment in the post-colonial world. The focus of this chapter is on the change in judicial effectiveness, the dependent variable of the study. The Court’s jurisprudence in two distinct periods, 1947-2005 and 2009-2015, is explored with the objective of describing the difference in judicial effectiveness between the two periods. Primarily based on a detailed examination of cases adjudicated by the Court, I establish that the jurisprudence of the Court was markedly different in the two periods. Supplementing the analysis with interviews, surveys, newspaper reports and other historical data, I argue that the post-2009 Supreme Court was significantly more effective than the pre-2005 Court. While this chapter focuses mainly on the difference in jurisprudence between these two periods, in subsequent chapters, I build a theory for explaining the transformation through an analysis of political events during the intervening period between 2005 and 2009.

In building my argument about the Court’s transformation, I have divided the judicial history of Pakistan into two periods. These are of course periods of considerable length in the Court’s institutional history, during which significant political and constitutional events unfolded. The exercise of characterizing periods in the Court’s history in terms of its
jurisprudence is similar to scholarship on U.S. constitutional history, in which periods of jurisprudential continuity, often spanning decades, are analytically grouped together. For example, scholars have discussed the Lochner era\textsuperscript{44} in which the US Supreme Court actively annulled socio-economic regulation, or the period of the Warren Court,\textsuperscript{45} which saw an expansion in individual rights adjudication. As discussed below, although the US Supreme Court’s jurisprudence during this period was not monolithic, it was sufficiently consistent for scholars to treat it as unified, in their attempt to understand the causes underlying the direction taken by the Court in specific areas of constitutional adjudication. Similarly, in case of the effectiveness of the Supreme Court of Pakistan, I show that there is considerably similarity in jurisprudence between 1947 and 2005, and between 2009 and 2015, to treat these as two distinct periods in the constitutional history of Pakistan.

The most significant cases decided by the pre-2005 Supreme Court had their origins in constitutional crises, and the Court legitimized extra-constitutional usurpations of power in each of these. This has led some scholars to argue that the Court’s core function during this period had been to legitimate and facilitate praetorian tendencies in country’s politics.\textsuperscript{46} While I discuss the jurisprudence of the Court in cases involving usurpations of power, I also consider attempts by the Court throughout this period to uphold the rule of law. The picture that emerges from this nuanced analysis is more complex than one imagining the Court as a consistently reliable tool of the executive. However, I explain that while the Court successfully aided the extra-constitutional actions of power elites by legitimizing them, it was only partially effective, at best, in its

\textsuperscript{44} See for example, Sujit Choudhry, “The Lochner era and comparative constitutionalism,” 2 Int’l J. Const. L. 1 (2004)

\textsuperscript{45} See for example, Charles Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (University of Chicago Press; 1998, 14)

\textsuperscript{46} See for instance Tayyab Mahmud, Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan, 1993 UTAH L. REV. 1225, 1244–45
intermittent attempts at holding political elites accountable to constitutional norms. Whenever the Court attempted to exert itself in upholding the rule of law, the power elites were able to curtail these efforts through various mechanisms, including outright removal of judges from office. Starting 2007, and particularly in the post-2009 period, by contrast, the superior judiciary was much more resolute and powerful. A new autonomous space had been carved out for the superior judiciary, which became increasingly difficult for the power elite to penetrate or manipulate. In this period, the Court passed highly consequential judgments against the interests of political elites of various stripes, including an incumbent military dictator and incumbent civilian heads of state and government. Apart from the judicial crisis that led Musharraf to impose emergency rule, which severely weakened his power and likely led to his resignation, the Court also removed an incumbent prime minister from office in 2012, convicting him for his failure to pursue corruption charges against the incumbent president.

The chapter begins with an exploration of the most significant cases from the pre-2005 period, followed by a nuanced assessment of the Court’s jurisprudence during this period. Next, I discuss the turning point in the Court’s jurisprudence, and argue that one particular case, relating to the reinstatement of the deposed Chief Justice in July 2007, was the first that distinguished the empowered Court from the weaker pre-2005 Court. Finally, I explore the Court’s jurisprudence and political impact in the post-2009 period, to illustrate the transformation in the Court’s effectiveness.

I. Pre-2005 Jurisprudence of the Supreme Court of Pakistan

In this section, I analyze the most significant rulings of the Supreme Court of Pakistan between independence and 2005. Each of these cases came to the Supreme Court following constitutional
crises, and the Court had been called upon to judge the validity of the actions taken by political elites. As described below, in each of these cases, the Court fashioned norms from outside the constitutional text to validate the actions of the usurpers. Most of the cases involve legitimization of takeovers by military elites, who dismantled the democratic setup on the pretext of safeguarding national interest. While the Court often went out of the way to justify these constitutional breakdowns, it did not remain a reliably ally of the incumbent political elites throughout the period of their rule. However, when the Court attempted to check the abuse of power by the incumbents, it was only partially effective. The section begins with an analysis of four major breakdowns of constitutionalism in Pakistan and the Court’s response to them, and is followed by an assessment of the Court’s jurisprudence during this period.

Necessity I: Justifying the first constitutional breakdown

The first consequential moment for constitutional adjudication arose for Pakistan’s Federal Court, the predecessor of the Supreme Court, after Governor General Ghulam Muhammad dissolved the Constituent Assembly on October 24, 1954. Both the office of the Governor General and the Constituent Assembly were creations of the Indian Independence Act of 1947 (“the 1947 Act”). Under the 1947 Act, the Constituent Assembly was also temporarily tasked with legislative functions, until the enactment of a new constitution. Though the resolution of constitutional issues was protracted by the political instability of the period, the drafting process was close to completion when the Governor General dissolved the Assembly. In his emergency proclamation, the Governor General alleged that the country’s “constitutional machinery has broken down” and that “the Constituent Assembly as at present constituted has lost the

47 Before being renamed as the Supreme Court in the 1956 Constitution, the apex court was called the Federal Court.
confidence of the people and can no longer function.”

Though dissolution was not explicitly mentioned in the proclamation, the Assembly building was shut down and Maulvi Tamizuddin Khan, the president, was evicted from his official residence. Political events preceding the dissolution suggest that the Governor General was likely irked by certain amendments to the 1935 Government of India Act by the Assembly, which expanded the legislature’s authority at the expense of the powers of his office. Moreover, it has been suggested that the Governor General disapproved of the constitutional draft being prepared by the Assembly, with its leanings towards legislative supremacy rather than strong executive authority.

In response to the dissolution of the Assembly, its president Maulvi Tamizuddin Khan filed a petition in the Sindh High Court challenging the emergency proclamation as unconstitutional. He asked the court to issue two writs, one of mandamus to prevent the Governor General’s interference in the performance of his duties as president of Assembly, and the other of quo warranto questioning the validity of appointments to the new cabinet. The full bench of the Sindh High Court hearing Maulvi Tamizuddin v. The Federation of Pakistan ruled in the favor of the petitioner. There were two important issues before the court. First, on the issue of whether the Governor General had the power to dissolve the assembly, the court held that “the Constituent Assembly’s purported dissolution is a nullity in law, and that both it and the office of its President are still existent.” The second issue concerned the jurisdiction of the court to issue writs prayed for. This power had been conferred on superior courts by the Constituent Assembly.

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48 Cited in Paula Newberg, Judging the State: Courts and Constitutional Politics in Pakistan (Cambridge University Press; 2002, 42)
49 Id., 42
50 Id
52 PLD 1955 Sindh 96
53 The court referred to the Indian Independent Act of 1947, and found no specific provision that would substantiate the claim of the Federation that the Governor General had powers to dissolve the Constituent Assembly. Id
in 1954 through an amendment, section 223-A, to the Government of India Act 1935. The question for the court was whether the assent of the Governor General was required to give effect to the legislation. Since assent had not been given to section 223-A, the Federation argued that the court lacked the power to issue the writs. The court ruled that assent was not required. In his concurring opinion, Justice Bakhsh noted the since the Assembly was endowed with the sovereign power of framing the Constitution, “it could even repeal the whole of the 1935 Act.”54

The resurrection of the Assembly was unacceptable to the Governor General, and the government appealed the Sind High Court’s decision in the Federal Court. In *The Federation of Pakistan v. Tamizuddin Khan*, the Federal Court reversed the decision of the lower court, and held that the Governor General’s assent was required for the Assembly’s actions to become valid law. Chief Justice Munir’s opinion did not discuss the question of the legality of the Assembly’s dissolution. Instead, the majority held that the Sind High Court did not have the jurisdiction to issue the writs because the enabling legislation, section 223-A of the Government of India Act 1935, had not been validated through the assent of the Governor General. Justice Cornelius authored a forceful dissent, in which he emphasized the nature of the polity as an “independent dominion” in which the Governor General’s powers, as the Crown’s representative, would be limited compared to the colonial context.56 Cornelius noted, “[To] the question of legislative autonomy which can be construed out of the Indian Independence Act, I think I can safely predicate… that it was intended to be absolute.”57

In its efforts to quash the writs of the Sind Court, the Federal Court precipitated a grave constitutional crisis in the country. There were numerous laws that had, like section 223-A, not

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54 Id.
55 PLD 1955, Federal Court 240
56 Id
57 Id
received the Governor General’s assent, which became invalid following the Court’s judgment. The Governor General responded to this legal vacuum by promulgating an emergency ordinance\textsuperscript{58} granting him the power to retrospectively validate the Assembly’s actions. In \textit{Usif Patel v. The Crown},\textsuperscript{59} the Federal Court held that the Governor General exceeded his authority in promulgating the emergency ordinance. With the crises deepened, the Governor General responded by issuing another proclamation\textsuperscript{60} granting him the authority to validate the laws, and also summoned a constitutional convention. He then requested the Federal Court for an advisory opinion on the validity of his actions. In the \textit{Governor-General’s Reference}\textsuperscript{61} the court deliberated on several constitutional issues, two of which are most important for the present discussion. First, the Court considered whether the Governor-General had “rightly dissolved” the Constituent Assembly. Justice Munir, writing for a majority of four-to-one, held that the dissolution of the Assembly was a valid exercise of the Governor-General’s powers. The Court reasoned that though such power was not explicitly granted by the 1947 Act, it could be implied from section 5 of that Act. Second, on the question of the retrospective validation of laws through the Governor General’s emergency proclamation, the majority held that this was permissible under the doctrine of state necessity. Finding no support for the Governor-General Actions in either the Act of 1935 or of 1947, the Court relied on the common law doctrine of

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\begin{itemize}
  \item \textsuperscript{58} Emergency Powers Ordinance IX of 1955
  \item \textsuperscript{59} PLD 1955 (F.C.) 387
  \item \textsuperscript{60} The proclamation stated:
    (1) The Governor-General assumes to himself until other provision is made by the Constituent Convention such powers as are necessary to validate and enforce laws needed to avoid a possible breakdown in the constitutional and administrative machinery of the country and to preserve the State and maintain the government of the country in its existing condition.
    (2) For the purposes aforesaid it is hereby declared that the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955, shall, subject to any report from the Federal Court of Pakistan, be regarded as having been valid and enforceable from the dates specified in that Schedule.
  \item \textsuperscript{61} Reference by His Excellency the Governor-General, PLD 1955 F.C. 435
\end{itemize}
necessity, which Justice Munir claimed was “part of the common law of all civilized States and which every written constitution of a civilized people takes for granted.”  

The Court thus justified the proclamation by arguing that had the Governor General not assumed the powers to validate the law, “the constitutional and administrative machinery of the country would have broken down.” Justice Cornelius wrote a dissenting opinion, in which he rejected the doctrine of necessity as a valid basis for justifying the actions of the Governor General.

Revolutionary Legality: Upholding Ayub’s Martial Law

The second Constituent Assembly was successful in drafting Pakistan’s constitution, which came into effect in March 1956, nine years after the establishment of the state. The lengthy 1956 Constitution established a parliamentary form of government, and replaced the office of the governor-general with that of a president. Notably, the 1956 Constitution included fundamental rights guarantees, and envisioned an independent judiciary empowered to conduct judicial review. The new constitutional framework was unable to resolve deeper political crises in the country, including political fragmentation and divisive party politics. Just months before the first general elections were to be held under the new constitution in February 1959, President Iskandar Mirza declared martial law in October 1958 and appointed General Ayub Khan as Chief Martial Law Administrator. The constitution was thereby abrogated, the assemblies dissolved, the central and provincial governments dismissed, and political parties banned. President Mirza argued that “the vast majority of people no longer have any confidence in the present system of government” and that the constitution “is so full of compromises that Pakistan will soon

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62 Id at 478
63 Id
disintegrate internally if the inherent malaise is not removed.” In order to fill the legal vacuum created by the abrogation of the constitution, the 1958 Laws (Continuance in Force) Order was promulgated, which mandated that the country should be governed “as nearly as may be in accordance with the late constitution.”

A political contest ensued between President Mirza and General Ayub Khan, which concluded with the forced resignation and exile of the president. Meanwhile, on the same day, the Supreme Court upheld the legality of the martial law in The State v. Dosso.

The question in the Dosso did not directly concern the validity of the martial law. Instead, the criminal appeals were related to the validity of the Frontier Crimes Regulation (FCR), which lower courts had struck down as violative of fundamental rights guarantees in the 1956 Constitution. Rather than decide the case on narrow grounds, the Munir Court set itself to the task of judging the legality of the new order. In his judgment upholding the legality of the martial law regime, Justice Munir relied heavily on Hans Kelsen’s General Theory of Law and the State.

For Munir, Kelsen’s theory of revolutionary legality provided a justificatory framework for the coup d’état and the abrogation of the 1956 constitution by the military. Selectively appropriating Kelsen’s ideas, the Court saw the success of a revolution as an important criteria of judging the legitimacy of the post-revolutionary order. The Chief Justice reasoned:

Where a revolution is successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws (Continuance in Force) Order, however transitory or imperfect, was a new legal Order and it was in accordance with that Order that the validity of the laws and the correctness of judicial decisions had to be determined.

There were at least two fundamental problems with the Court’s creative appropriation of Kelsen’s work on law and revolution. First, it is far from evident that the coup d’état in Pakistan

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64 Cited in Newberg, Judging the State, 71
65 Cited in Hamid Khan, Constitutional and Political History of Pakistan (Oxford University Press; 2005, 127)
66 PLD 1958 S.C. 533
67 Id
qualified as a revolution. In fact, the installation of martial law strengthened the power of political elites who already possessed disproportionate access to state power and resources. While the Court “swallowed Kelsen hook, line and sinker,” it did not attempt to empirically question whether a revolution had indeed taken place in the country. Second, Kelsen had argued that “efficacy is a condition of validity; a condition, not the reason of validity.” In other words, for a norm to be valid, it has to belong to an order which “on the whole is efficacious.” Justice Munir, by contrast, saw efficacy as a sufficient condition for the validity and legitimacy of the new order. By this argument, any usurpation of power, if successful, would lead to the creation of a legitimate constitution order, which is inconsistent with Kelsen’s ideas on revolutionary legality in his *General Theory*. Several commentators argue that of various avenues available to the court, including deciding the case on narrow grounds or fashioning a political question doctrine, the Munir Court chose to go out of the way to legitimize the usurpation of power by the country’s power elite. In his separate opinion, Justice Cornelius did not discuss the question of the validity of martial law, but disagreed with the majority that fundamental rights guarantees had lapsed with the abrogation of the 1956 Constitution. Cornelius invoked a natural law framework to argue for the continuity of rights protection, which, he argued, “do not derive their entire validity from the fact of having been formulated in words and enacted in that Constitution.”

The *Dosso* judgment granted a legal foothold to praetorian tendencies in Pakistan’s politics. The following year, in 1959, the Supreme Court was presented with an opportunity to

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70 *Id*
72 Cited in Newberg, *Judging the State*, 76
review its decision in *Dosso* with regard to the issue of fundamental rights guarantees. In *The Province of East Pakistan v. Mehdi Ali Khan*, the Supreme Court affirmed its previous ruling in *Dosso*, and held that fundamental rights guarantees were no longer effective following the 1958 Order. Justice Cornelius disagreed with the majority and reiterated his position regarding the existence of fundamental rights despite the abrogation of the 1956 Constitution. General Ayub, now president after the ouster of Iskandar Mirza, consolidated his grip over power, and introduced a system of basic democracies in 1959 which operated without party politics. A new constitution was promulgated in 1962 under the military regime, which introduced highly centralized presidential style of government in Pakistan. Ayub’s regime lasted for ten years until his resignation in March 1969 following political turmoil, especially in the eastern wing of the country. General Yahya Khan took control of the state by imposing another martial law, which, like 1958, led to the abrogation of the Constitution and the dissolution of assemblies. The Yahya regime witnessed one of the worst constitutional breakdowns in the country’s history, which eventually led to the secession of the eastern wing.

Necessity II: Justifying General Zia’s military takeover

In December 1971, Zulfiqar Bhutto succeeded General Yahya as President, and also became the first civilian Chief Martial Law Administrator. The 1973 Constitution was promulgated under Bhutto, which reintroduced the parliamentary system of government. The 1977 elections held under the new constitution led to a victory of Bhutto’s Pakistan People’s Party (PPP) against an

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73 In the Dosso case, the Court had held that fundamental rights, “are not a part of the law of the land and no writ can issue on their basis.” Cited in Khan, *Constitutional and Political History of Pakistan*, 129
74 PLD 1959 S.C. 387
75 In the pyramidal scheme, citizens first elected candidates to local councils, who in turn elected officials on higher administrative levels. In all, 80,000 basic democrats were elected through this system. See Khan, *Constitutional and Political History of Pakistan*, 132
alliance of parties called the Pakistan National Alliance (PNA). The PPP secured 155 seats, while PNA was only successful in securing 36 seats in the National Assembly. The PNA leadership refused to accept the results of the general elections, and alleging massive rigging, called for protests and boycott of the upcoming provincial assembly elections. The ensuing political turmoil, and breakdown of negotiations between PPP and PNA leadership, presented a new opportunity for the military to intervene in the political process. General Zia-ul Haq, Bhutto’s handpicked chief of army staff, imposed martial law in the country in July 1977, promising to transfer power to elected officials after holding elections in ninety days. The Zia-led military regime, however, postponed the elections, on the pretext of investigating election rigging by the PPP government and holding the perpetrators accountable. Meanwhile, the wife of the deposed prime minister Bhutto submitted a petition to the Supreme Court under Article 184(3) of the 1973 Constitution, challenging Bhutto’s detention by the martial law regime.

When the Supreme Court entertained the petition brought by Bhutto’s wife, and ordered Bhutto’s immediate transfer to Rawalpindi, the military regime was incensed. Using his powers as Chief Martial Law Administrator, General Zia amended the Constitution related to the retirement ages of judges, which led to the immediate termination of the incumbent Chief Justice Yakub Ali’s tenure. In the Nusrat Bhutto case, now decided under Chief Justice Anwar-ul Haq, the petitioner alleged that General Zia’s actions in imposing martial law were treasonous, that the proclamation of martial law was unconstitutional and invalid, and even if these acts were

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76 Id., 314
77 Zia stated: “In the next three months, my total attention will be concentrated on holding the elections and I would not like to dissipate my powers and energies and Chief Martial Law Administrator on anything else.” Id., 329
78 Article 184 delineates the original jurisdiction of the Supreme Court. Article 184(3) states: “Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article.”
79 Nusrat Bhutto v. Chief of Army Staff and the Federation of Pakistan. PLD 1977 S.C. 657
justifiable, Bhutto’s detention was illegal. The military regime argued that General Zia’s actions were justifiable under *Dosso*, given the proclamation of martial law had led to the establishment of a new constitutional order. Alternatively, the regime argued that the General’s actions were justifiable under the doctrine of state necessity. The Court rejected the appeal to *Dosso* and the Kelsenian doctrine of revolutionary legality, since it viewed the intervention of the military as a temporary “constitutional deviation”\(^80\) rather than a revolution.\(^81\) The Court set out to examine the “total milieu” that had led to the intervention of the armed forces, and concluded that while the intervention of the armed forces was extra-constitutional, it was justifiable “on the ground of State necessity or on the principle of *salus populi suprema lex.*”\(^82\) The Court validated the military intervention, and granted legal cover to subsequent actions of the martial law administrator.\(^83\) The petition brought by Nusrat Bhutto challenging former Prime Minister Bhutto’s detention under the martial law was hence dismissed by the Supreme Court.

Relations between the military regime and the deposed Prime Minister further deteriorated in late 1977. A criminal proceeding was initiated against Bhutto, which alleged the murder of Nawab Muhammad Khan on the orders of Bhutto in 1974. In March 1978, the Lahore High Court found Bhutto and four officers of the Federal Security Forces (FSF) guilty of murder, and sentenced all five of them to death.\(^84\) Bhutto’s appeal to the Supreme Court, in which he

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80 Id. at 716
81 In rejecting the revolutionary aspect of the intervention, the Court reasoned that, “the new Legal Order is only for a temporary period, and does not seek to destroy the old Legal Order but merely to hold certain parts thereof in abeyance or to subject it to certain limitations.” *Id.* at 723
83 The Court laid down a set of criteria to judge whether the doctrine of necessity applies. These were: “(a) An imperative and inevitable necessity or exceptional circumstances; (b) No other remedy; (c) The measure taken must be proportionate to the necessity; and (d) It must be of a temporary character limited to the duration of the exceptional circumstances.” While the Court determined that military’s actions met the first criteria, it did not discuss the other three criteria, and concluded that the martial law was justified by the requirements of necessity. See Mahmoud, “Praetorianism and Common Law in Post-Colonial Settings,” 1277
84 Khan, *Constitutional and Political History of Pakistan*, 341
argued he had received an unfair trial at the High Court, was rejected, and he was executed in April 1979 in Rawalpindi. While General Zia had promised to hold elections within three months of deposing Bhutto in July 1977, the martial law continued till December 1985. Zia kept a watchful eye over the judiciary, especially after the Lahore High Court accepted a petition against the banning of political parties under Martial Law Regulation No. 48. Sensing that the High Court would hold the regulation unconstitutional, the regime promulgated a constitutional amendment in May 1980, which restricted the jurisdiction of courts in conducting judicial review of martial law regulations. The Chief Justice of the Lahore High Court, Maulvi Mushtaq, was punished by the regime for his activism in accepting the petition against the regime. He was forcibly removed from his position as Chief Justice, and made an acting judge of the Supreme Court.

The next year, in March 1981, Zia instituted the Provisional Constitutional Order (PCO), which effectively became the constitution of Pakistan. Select articles of the 1973 Constitution, related to matters of everyday governance, were adopted by the PCO, while the rest of the Constitution was held in abeyance. While the PCO removed the jurisdiction of the courts to conduct judicial review of action of martial law authorities, the regime was not content and wanted to fully neutralize the judiciary. Judges of the superior courts now had to take fresh oath under the PCO, and it would be the regime’s discretion to whom it would give the opportunity to take the oath. A few judges of the Supreme Court refuse to take the oath, while others were left out. Notably, Justice Dorab Patel refused to take the oath, even though he would likely have become Chief Justice for nearly a decade. The four High Courts were similarly excised of judges who did not have pro-regime leanings. The assault on the judiciary ensured

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85 Id., 346
86 Id., 359
87 Khan argues goal was to subject the judiciary to “humiliation.” Id., 367
88 Id., 368
that even with the lifting of martial law, the Court exercised restraint during the remaining Zia years.

**Necessity III: General Musharraf’s military takeover justified**

General Zia’s death in an airplane crash in August 1988 ushered what is commonly known as the ‘decade of democracy’ in Pakistan. In the November 1988 elections, which were held on a party basis after a hiatus of more than a decade, the Pakistan People’s Party (PPP) emerged as the largest party. Former Prime Minister Zulfiquar Bhutto’s daughter, Benazir Bhutto, became prime minister. In the ensuing decade of civilian governance in Pakistan, national elections were held on four occasions, and none of the elected governments were able to complete their mandated five-year terms. At the national level, the reins of the government alternated between parties or coalitions led by Bhutto and Nawaz Sharif. The first three of the four breakdowns were caused by conflicts between the prime minister and the civilian president, who had been empowered by the eighth amendment to the constitution in 1985 to dissolve the national assembly. The military’s role was marginal in these three premature dissolutions, except that the power to dismiss the assemblies had originally been constitutionally instituted under Zia’s military regime.

The Supreme Court was marginally more independent during the decade of civilian governance compared with the previous decade under the military regime. However, the Court was only occasionally effective in checking the power of political elites when constitutional boundaries were transgressed or when powerholders engaged in large-scale corruption. One

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89 Under the Zia regime, the Eighth Amendment introduced article 58.2(b) into the Constitution. The article stated: “Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion…(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.” Cited in Shahid Burki, *Historical Dictionary of Pakistan* (Rowman & Littlefield, 74).
notable exception, discussed below, is when the Supreme Court restored assemblies of the Sharif-led government in 1993, which had been dissolved by President Ishaq Khan under Article 58(2)(b) of the Constitution. Though the assemblies were restored following this order, the judgment turned out to be of little practical significance since the president’s and the prime minister’s rivalry eventually led to the resignation of both, as well as the dissolution of the National Assembly within two months of the Court’s decision. Both Bhutto and Sharif, in this period, had little tolerance for an independent court and made active attempts to neutralize the Court’s power and prestige. In her second term, Bhutto began a campaign to reshuffle and pack the higher courts. Judges were removed, transferred to other courts, and replaced with ad hoc appointments in an effort to make the judiciary submissive to the government. When the judiciary resisted these attempts, Bhutto openly criticized the courts in the media and in the parliament. Prime Minister Sharif went even further in his confrontation with the judiciary. As the rivalry between Sharif and Chief Justice Sajjad Ali Shah escalated, workers from the prime minister’s PML-N party stormed the Supreme Court in November 1997 while the court was hearing a contempt case against the prime minister. The mob led by members of Sharif’s party leaders, which also included members of the parliament, shouted slogans against the judges and damaged furniture inside the courtroom. In the 1990s, civilian leadership hence continued on the path of their authoritarian predecessors in terms of viewing contemptuously the independence of the judiciary, and in making active attempts to subdue the power of the superior courts.

Relations between Prime Minister Sharif and the military deteriorated in 1999, and while the Chief of Army Staff General Musharraf was visiting Sri Lanka on an official trip, Sharif

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90 Muhammad Nawaz Sharif v Federation of Pakistan, PLD 1993 S.C. 473
91 Khan, Constitutional and Political History of Pakistan, 449
92 Amir Mir, “Bitter Memories of 1997 Contempt Case against Sharif (The News International; January 19, 2012). Mir notes that the mob was led by Sharif’s political secretary, and that a member of the national assembly at the time from Sharif’s party broke Jinnah’s painting in the courtroom.
attempted to replace him with General Zia ud Din, junior to several serving generals. The Sharif
government also attempted to prevent Musharraf’s airplane from landing in Pakistan, and to
divert it to India or the Gulf States. However, the army top command refused to go along with
Sharif on this plan, and when Musharraf landed in Pakistan, the army had already taken over
control of the government buildings and media outlets. On October 13, 1999 Musharraf informed
the nation in a televised address that the Sharif government had been deposed by the military,
and the next day a state of emergency was proclaimed through which Musharraf assumed the
position of Chief Executive.

After the promulgation of emergency, the military regime initially did not encroach upon
the independence of the judiciary. On the question of oath-taking, it was initially decided through
the Oath of Office Order 1999 that judges would take the oath specified in the Constitution.
However, after the regime sensed that the Supreme Court would likely accept petitions filed
under Article 184(3) by the deposed PML-N government challenging the military’s intervention,
a new Oath of Office (Judges) Order was promulgated in January 2000. Under the new Order,
judges, including incumbents, were required to take oath under the Proclamation of Emergency
and the Provisional Constitutional Order (PCO) of 1999. Judges who refused to take the oath
within a specified time period, or those to whom the regime did not extend the opportunity to
take the oath, would no longer hold office. Nearly half of the judges of the Supreme Court,
including Chief Justice Saeeduzzaman Siddiqui refused to take oath under the PCO, and
resigned. The reconstituted Supreme Court, under the leadership of Chief Justice Irshad Khan,
heard the petitions challenging the constitutionality of the 1999 intervention by the armed forces
in the Zafar Ali Shah v. General Pervez Musharraf case.\(^93\) Invoking precedence, now well

established in the Court’s jurisprudence following earlier constitutional breakdowns, the military takeover was justified under the doctrine of state necessity by the Supreme Court. The Court, relying on the *Nusrat Bhutto* case, held:\textsuperscript{94}

On 12\textsuperscript{th} October, 1999 a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra-Constitutional measure became inevitable, which is hereby validated on the basis of the doctrine of State necessity and the principle of *salus populi suprema lex* as embodied in the Begum Nusrat Bhutto’s case. The doctrine of state necessity is… accepted by eminent international jurists including Hugo Grotius, Chitty and De Smith and some superior Courts from foreign jurisdictions to fill a political vacuum and bridge the gap.

The Court hence held that General Musharraf had, despite taking extra-constitutional steps, validly deposed the elected government in the interest of the state and citizens. The Court gave the military regime a three-year deadline to accomplish certain objectives that Musharraf had listed in his October 17, 1999 address, including the holding of general elections and returning power to elected assemblies.

\textbf{“Salus populi suprema lex”?}\textsuperscript{95} \textbf{The Supreme Court’s Pre-2005 Jurisprudence}

In the preceding section, the most consequential cases decided by the Supreme Court since independence until the turn of the century were discussed. All of these cases came to the Court after the constitutional machinery had broken down following extra-constitutional interventions by civilian or military elites. In each of the cases discussed, the Court legitimized extra-constitutional usurpation of power by unelected elites. While the Court momentarily relied on the novel theory of revolutionary legality in *Dosso*, in other cases discussed, the jurisprudential move involved reliance on the doctrine of state necessity, first invoked by Chief Justice Munir in the \textit{Governor General Reference} advisory opinion of 1955.

\footnote{\textit{Id.}}

\footnote{“The good of the people is the supreme law.” See Susan Ratcliffe, \textit{Concise Oxford Dictionary of Quotations} (Oxford University Press 2011, 102). Cited in Supreme Court judgments validating usurpations of power.}
From a survey of cases involving constitutional breakdowns, one may be tempted to conclude that Pakistan’s Supreme Court’s core function had been to legitimate de facto usurpations of power, in particular by the military. In other words, the Court’s jurisprudence could be seen through the framework of periodic attempts of validating praetorian tendencies in the country’s politics.96 Such characterization of the Court’s jurisprudence spanning decades is perhaps similar to American legal scholars’ characterization of various eras of the US Supreme Court’s jurisprudence, as discussed in chapter 1. If one were to similarly formulate a construct to characterize the jurisprudence of the Pakistan Court before 2005, one might call the period as the “era of the necessity doctrine.” However, arguably, the Court’s jurisprudence on significant constitutional questions involving executive authority was less cohesive and consistent than was the US Supreme Court’s on socio-economic regulation during the *Lochner* era. While the Court certainly validated usurpations of power by the military immediately following constitutional breakdowns, it is difficult to postulate that the Court was ideologically disposed toward favoring praetorian tendencies throughout the period.

A more accurate assessment of the Court’s jurisprudence would take into account attempts by the Court to protect fundamental rights and to check unbridled executive power. There are a few notable instances in the Court’s history, in which it attempted to change course from validating the actions of the powerful to upholding the rule of law.97 In *Maudoodi v Government of West Pakistan*,98 for instance, the Court invalidated the government’s attempt to

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96 Mahmud suggests this about the Court’s jurisprudence in cases involving constitutional breakdowns. He writes, “These judicial responses, while doctrinally inconsistent, typically validate the extra-constitutional assumption of power and hold the legislative power of extra-constitutional regimes as unfettered. The result is gradual institutionalization of praetorian rule and blockage of all avenues towards representative democratic governance.” See Mahmud, *Praetorianism and Common Law*, 1304

97 An early attempt at upholding fundamental rights was under the leadership of Chief Justice Cornelius in the 1960s. See Khan, Constitutional and Political History of Pakistan, 194-196

98 *Abul Ala Maudoodi v. Government of West Pakistan*, PLD 1964 S.C. 673
outlaw an opposition party, and upheld the constitutional right to freedom of association. In the *Asma Jilani* case\(^99\) decided in 1972, the Court declared General Yahya Khan’s assumption of executive powers through martial law illegal. However, this case lacked practical significance, since it was decided after the Yahya regime had already fallen.\(^100\) Near the end of Zia’s era, in the *Benazir Bhutto* case,\(^101\) the Court invalidated provisions of the Political Parties Act of 1962, using which General Zia had hoped to conduct the upcoming elections on a non-party basis.

Finally, in the decade of democratic rule in the 1990s, the Court gained some prominence though the *Nawaz Sharif v. Federation of Pakistan* case\(^102\) by mediating elite conflict in favor of the elected government which had been dismissed by the President. In the *Al-Jehad Trust* case,\(^103\) also from the 1990s, the Court upheld the principle of the independence of judiciary, preventing the government from using certain appointment procedures to install loyal judges to superior courts.

Intermittent attempts by judges to uphold the rule of law complicate the characterization of the judiciary as a cohesive actor supporting strong executive authority and praetorianism. Some commentators have noted this, and have characterized Pakistan’s judicial history as ‘chequered.’\(^104\) While a nuanced analysis certainly reveals both ‘rule of law’ and ‘rule by law’ tendencies, it is true that the former was much more prevalent and consequential in the Court’s history than the latter. While the Court did decide a few cases against power elites, these either lacked practical significance or were singular attempts that did not change the course of the

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101 *Benazir Bhutto v. Federation of Pakistan*, PLD 1988 S.C. 416
103 *Al-Jehad Trust v Federation of Pakistan*, PLD 1996 S.C. 324
Court’s jurisprudence. For example, the *Asma Jilani* case, while laudable in its rejection of General Yahya’s military takeover, was decided by the Court after Yahya was already out of power. And, having thus declared usurpation of power by General Yahya illegal, the Court reverted to upholding extra-constitutional actions by the military a half decade later in the *Nusrat Bhutto* case of 1977. Similarly, while the Court decided against the executive’s action of banning an opposition party in the *Maududi* case in 1964, it upheld the dissolution of the National Awami Party under the PPP government in 1975.105

A nuanced analysis of the Court’s history reveals that while the Court upheld usurpations of power by unelected elites following constitutional breakdowns, it was not consistently an institution that supported the interests of incumbent powerholders. The Court was unlike judicial institutions set up under what Arjomand has called ‘ideological constitutions,’106 such as in Turkey in Iran, where the Court often takes an unabashed position of supporting the power of a constituency of unelected elites and the political philosophy espoused by it. In Pakistan, by contrast, the Court was not ideologically aligned with praetorianism consistently, and did not function as a reliable arm of the executive. It is certainly the case, as several scholars have noted, that the Court had several options other than to validate extra-constitutional usurpations of power, even if the judges felt ruling against powerful military rulers was not practically feasible. For instance, the Court could have invoked the political question doctrine when asked to rule upon the legality of the new regime.107 On occasion, the Court also went out of the way to justify extra-constitutional actions, such as in *Dosso*, even though the case could have been decided on narrow grounds without judging the validity of the political transition. And yet, even though it

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105 The Court agreed with the government that NAP was “operating in a manner prejudicial to the sovereignty and integrity of Pakistan.” See Newberg, Judging the State, 148-9
107 See Mahmud, “Praetorianism,” 1295; Newberg, *Judging the State*
lent its support to the extra-constitutional transition, the Court was never a reliable ally for the usurpers. Instead, both civilian and military elites constantly thought of the Court as an irksome entity that they needed to somehow subdue. Even Justice Munir, who engaged in complex legal sophistry to support the first two usurpations of power, spoke of the “mental anguish”\textsuperscript{108} that he had to endure while deciding the judgments. Justice Cornelius, who dissented in these judgments, was an early example of the tendency in the judiciary that was opposed to validating extra-constitutional actions of power elites.\textsuperscript{109} Still, up till 2005, this tendency remained quiescent, and attempts by judges to uphold the rule of law against powerful incumbents met with little success. Even though the Court had some power and prominence, which made it a source of contention for power elites, it was never enough for the judges to directly threaten the power of the incumbents.

\textbf{II. The Turning Point: Constitutional Petition No. 21 of 2007}

After validating Musharraf’s extra-constitutional actions in overthrowing the Sharif government in the \textit{Zafar Ali Shah} case, the Supreme Court remained deferential toward the executive for a few years. During this period, particularly under the leadership of Chief Justices Irshad Khan\textsuperscript{110} and Sheikh Riaz, the Court endorsed the military regime’s efforts to consolidate its grip over the country’s political institutions. With the imminent expiration of the three-year deadline under the

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\textsuperscript{108} “The mental anguish caused to the judges by these cases”, he said (with excusable exaggeration) was “beyond description . . . no judiciary elsewhere in the world had to pass through what may be described as a judicial torture”. If the court had found against the Governor-General, he was "quite sure that there would have been chaos in the country" and a revolutionary situation would have been precipitated. In any case, who could say that "the coercive power of the State was with the court and not with the Governor-General ?" Who could enforce a decision adverse to the Governor-General? "At moments like these public law is not to be found in the books; it lies elsewhere, viz, in the events that have happened". Cited in Smith, “Constitutional Lawyers,” 98
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\textsuperscript{109} For more details on the life and jurisprudence of Justice Cornelius, see Ralph Braibanti, \textit{Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches} (Oxford University Press; 1999)
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\textsuperscript{110} After retiring from his position as Chief Justice, Irshad Khan was appointed Chief Election Commissioner, and in that position supervised the controversial 2002 presidential referendum.
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Zafar Ali Shah case to return the country to democratic rule, General Musharraf decided to hold a referendum to continue his rule.\textsuperscript{111} A petition was filed in the Supreme Court challenging the constitutionality of the referendum. In \textit{Hussain Ahmed v. Pervez Musharraf},\textsuperscript{112} the Court skirted the issue of the legality of the referendum, holding in its short order on April 27, 2002, that the questions presented were premature, and that they would be decided at a later time by an appropriate forum. In the referendum, held three days later on April 30, 2002, General Musharraf was reported to have received a ‘yes’ vote by about 98 percent of the voters to elect him as president for a five-year term.\textsuperscript{113} After the results of the referendum were announced, the Supreme Court issued a detailed judgment of the \textit{Hussain Ahmed} case, which differed from its holding in the short order. In the detailed judgment, the Court validated the referendum, holding that an appeal to the sovereign, the people, could not be thought of as being unconstitutional. Later in 2002, Musharraf promulgated the controversial Legal Framework Order (LFO), which sharply augmented his powers as the head of state through making changes to the Constitution. Notably, Musharraf revived the powers, earlier removed from the Constitution under the 13\textsuperscript{th} Amendment, to dissolve the national assembly. In a subsequent amendment to the LFO, Musharraf increased the retirement ages of Supreme Court judges from 65 to 68, which was meant to prolong the tenure of pro-Musharraf judges currently in office. Despite the controversial procedure followed to amend the constitution through the LFO, which was contrary

\textsuperscript{111} Musharraf’s predecessors, Generals Ayub and Zia, had also held referendums in 1960 and 1984 to assume the office of President of Pakistan. See Khan 495. Musharraf recounts his decision to hold a referendum in the following manner in his autobiography: “I decided that we should hold a national referendum on my office. I knew it would result in a sizeable vote in my favor, and I could then transfer that demonstrated popularity to the embryonic PML(Q) by voicing my support for the party.” See Pervez Musharraf, \textit{In the Line of Fire: A Memoir} (Simon & Schuster 2006)

\textsuperscript{112} PLD 2002 S.C. 853

\textsuperscript{113} BBC World South Asia, “Q&A: Pakistan Referendum.” (May 2, 2002). The question presented to the citizens in the 2002 referendum was: "For the survival of the local government system, establishment of democracy, continuity of reforms, end to sectarianism and extremism, and to fulfill the vision of Quaid-e-Azam, would you like to elect President General Pervez Musharraf as President of Pakistan for five years?" Quoted in Musharraf, \textit{In the Line of Fire: A Memoir}
to Court’s own pronouncement in the *Watan Party v. Chief Executive* case,\(^\text{114}\) Chief Justice Sheikh Riaz and certain other judges availed themselves of the extension. However, subsequent negotiations between the government and opposition parties led to reversals on some clauses of the LFO, such that with the passage of the Seventeenth Amendment in December 2003, the retirement age provision was overridden, and the Chief Justice unceremoniously retired.

By 2004, the military regime had consolidated its grip over the political institutions in Pakistan. A regime-engineered party, Pakistan Muslim League (Q), had won the 2002 general elections, and Musharraf had landed himself into a five-year term as president through the national referendum of 2002. The leaders of the two most popular opposition parties, PPP’s Bhutto and PML(N)’s Sharif, were in exile. Following the pattern of earlier military regimes in the country, the judiciary remained, for some time, quiescent under conditions of consolidated authoritarianism. Commentators writing in 2004-05 note the dismal state of judicial institutions in terms of their inability to uphold the rule of law against a powerful military regime.\(^\text{115}\) Yet, even though analysts noted the deep subservience of the judiciary at the time, in 2005, the Court started to exercise limited activism against the regime. The Court, under the leadership of the new Chief Justice Iftikhar Chaudhry, accepted and adjudicated a few petitions against the interests of the regime. Notable among these were the Missing Persons cases and the Pakistan

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\(^{114}\) The Court held: “The elected parliament is in immediate sight and obviously the parliament and not this Court is the appropriate forum to consider all these amendments. We may further observe that the procedure to amend the Constitution as enshrined in Article 239, Part XI remains unaltered. The Parliament retains the same power to amend the Constitution as it did before the promulgation of the Legal Framework Ordinance.” See *Watan Party v. The Chief Executive / President of Pakistan*, PLD 2003 S.C. 74.

\(^{115}\) A 2004 International Crisis report of Pakistan’s judiciary notes: “The Musharraf government has deepened the judiciary’s subservient position among national institutions, ensured that politics trumps the rule of law, and weakened the foundations for democratic rule.” See International Crisis Group, “Building Judicial Independent in Pakistan” (Asia Report No. 86; 9 Nov 2004); Khan similarly noted in 2005: “The civilian institutions like the parliament, judiciary and bureaucracy have been sidelined and made subservient to the will of the military establishment... The judiciary in Pakistan has suffered the most during this period. Its role has been reduced to support of Musharraf regime without any regard to Constitutional dictates and the law laid down by the Supreme Court in earlier cases.” See Khan, *Constitutional and Political History*, 507
Steel Mills case. The Missing Persons cases involved investigation into forced disappearances under the Musharraf regime of around 600 individuals under the pretext of their involvement in terrorist activities following the onset of the ‘war on terror.’ Petitioners, families of disappeared persons, alleged that the regime had been imprisoned without due process, and that they were political opponents of the regime rather than terrorists.\textsuperscript{116} The Steel Mills case involved a challenge to the sale of the largest public sector enterprise in Pakistan, the Pakistan Steel Mills, by the government to favored buyers at an unreasonably low price. The Supreme Court held the process of privatization of the state monopoly reflected “indecent haste” by the Privatization Commission, and annulled the sale purchase agreement.\textsuperscript{117}

While these two cases from the 2005-06 are certainly indicative of an effort on part of the Court to regain its independence, they did not threaten the core interests of the regime. In fact, the activism of this period was not unlike attempts by judges in earlier military regimes to uphold the rule of law. For example, in 1979, soon after the Supreme Court had validated General Zia’s military regime in the \textit{Nusrat Bhutto} case of 1977, the Lahore High Court accepted a petition by the leader of the political party Pakistan Tehreek-i Istiklal, challenging the dissolution of the party. When the regime sensed the court might actually rule in favor of the petitioner, regulations were passed limiting the jurisdiction of courts. The Chief Justice of the Lahore High Court, Maulvi Mushtaq, was removed from his position, and his office at the court was locked up by

\textsuperscript{117} \textit{Watan Party v. Federation of Pakistan} (PLD 2006 S.C. 697; Constitutional Petition No. 9 of 2006). The Court noted: “While exercising the power of judicial review, it is not the function of this Court, ordinarily, to interfere in the policy making domain of the Executive which in the instant case is relatable to the privatization of State owned projects as it has its own merits reflected in the economic indicators. However, the process of privatization of Pakistan Steel Mills Corporation stands vitiated by acts of omission and commission on the part of certain State functionaries reflecting violation of mandatory provisions of law and the rules framed thereunder which adversely affected the decisions qua prequalification of a member of the successful consortium (Mr. Arif Habib), valuation of the project and the final terms offered to the successful consortium which were not in accord with the initial public offering given through advertisement.”
military personnel. Similarly, several judges courageously resigned rather than take oath under General Zia’s and General Musharraf’s Provisions Constitutional Orders of 1981 and 1999. While in no sense threatening to undermine the consolidated regime, a few of the cases from 2005-06 certainly irked top officials in the Musharraf regime. Not unlike previous occasions, the regime decided to simply remove the chief justice from office in order to ensure that the remaining justices would remain pliant.

In March 2007, the Chief Justice was invited to the Army House in Rawalpindi for a meeting with President and General Musharraf. Musharraf, dressed in military gear, confronted the Chief Justice about a complaint he had received from a judge of the Peshawar High Court. The Chief Justice denied the allegations contained in the complaint, whereupon the President cited other complaints against the justice, and advised his staff to call “other people” into the room. The others included the Prime Minister, the President’s Chief of Staff, and the directors of the three most powerful intelligence agencies in the country. In their presence, Musharraf read out several allegations against the Chief Justice, which the latter denied. After about half an hour, the President and Prime Minister left, while the directors of the intelligence agencies, who were serving generals, pressured the Chief Justice to resign. When he refused, the judge was detained in the Army House for several hours, and was not even allowed access to his personal staff or to contact his family. When allowed to leave, he discovered the country’s flag had been removed from his official vehicle, and his driver had been instructed to drive him home rather than to the Supreme Court. The Chief Justice’s staff informed him that while he had been detained by the military, Justice Javed Iqbal had taken oath as the Acting Chief Justice of Pakistan. While the Chief Justice had been detained, General Musharraf filed a reference against the Chief Justice

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118 Khan, Constitutional and Political History of Pakistan, 360
119 The events of the meeting are discussed in the Supreme Court judgment on Constitutional Petition No. 21 of 2007, and are based on a affidavit submitted by the Chief Justice to the Court.
under Article 209(5) of the Constitution, inviting the Supreme Judicial Council to inquire into allegations of misconduct against the Chief Justice. Another order was passed by the Supreme Judicial Council the same day, which along with the reference, prevent the Chief Justice from taking any official action as top judge or even as a justice of the Supreme Court. A few days later, the President, under Article 2(1) of the Judges (Compulsory Leave) Order of 1970, sent the Chief Justice on “compulsory leave” until the inquiry under the reference was being made by the Supreme Judicial Council.

The suspended Chief Justice filed a petition under Article 184(3) of the Constitution in the Supreme Court of Pakistan, challenging the legality of the presidential reference against him as well as the competency of the Supreme Judicial Council to inquire into the matter. The Supreme Court stayed the proceedings of the Council in May 2007, and declared that “[i]n view of the unprecedented important constitutional and legal issues, let the matter be placed before the Full Court.” On July 20, 2007, by a majority of 10 to 3, the Supreme Court set aside the Presidential reference filed by Musharraf on March 9, 2007, and held that the petitioner Chief Justice of Pakistan, “shall be deemed to be holding the said office and shall always be deemed to have been so holding the same.” In addition, the Court unanimously declared unconstitutional the Judges (Compulsory Leave) Order of 1970, using which Musharraf had sent the Chief Justice on “compulsory leave.” Finally, the Court unanimously declared illegal the appointment of an Acting Chief Justice while Justice Chaudhry had been detained by the military on March 09, 2007. Soon after the announcement of the decision, the Chief Justice resumed work after a hiatus of 134 days. The Prime Minister, who had abetted Musharraf at the Army House, issued a

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120 Order of the Court dated May 07, 2007. Cited in Supreme Court judgment on Constitutional Petition No. 21 of 2007, 259-260. The Order further notes the reasons why not all judges on the Court could sit on the bench hearing the case.
121 Short Order of Supreme Court in Constitutional Petition No. 21 of 2007 (Issued July 20, 2007)
statement regarding the government’s acceptance of the Court’s ruling. Prime Minister Aziz stated, “I would like to emphasize that we must all accept the ruling with grace and dignity… this is not the time to claim victory or defeat. The Constitution has prevailed and must prevail at all times.”

Several commentators have noted the distinction of the Court’s ruling in the restoration of Chief Justice (Constitutional Petition 21 of 2007) case in comparison with the Court’s earlier jurisprudence.123 A newspaper report in a leading national daily called it “a defining moment in the country’s otherwise chequered history” and noted that it was the “first time in the country’s history that the Supreme Court has ruled against a sitting military ruler.”124 Munir Malik, one of the Chief Justice’s lawyers, and later Attorney General of Pakistan, wrote that with this judgment, “[t]he Supreme Court had indeed crossed the Rubicon” and had initiated “a glorious chapter in the chequered history of our country and that we have now seen the birth of a new Supreme Court that has shown great vision and courage in laying the foundation of an independent judiciary.”125 Notably, Chief Justice Iftikhar Chaudhry himself congratulated his colleagues on the bench and noted the significance of this decision in initiating a new phase in the Court’s jurisprudence, even though he participated in the case as petitioner rather than as judge. In the foreword to the 2009-10 Supreme Court Annual Report, Justice Chaudhry wrote: “I am proud to say that my brother judges have re-written the judicial and political history of the country when they delivered the landmark judgment of 31st July 2009 wherein the judiciary has

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122 BBC News, “Pakistan’s top judge reinstated,” (Friday, 20 July, 2007)
123 See Kersi Shroff and Krishan Nehra, “Suspension and Reinstatement of the Chief Justice of Pakistan: From Judicial Crisis to Restoring Judicial Independence” (Law Library of Congress; August 2007) (arguing that “Judicial independence has remained an unattained constitutional standard in Pakistan, but the reinstatement of the Chief Justice could enable an emboldened Supreme Court to enter into a new era of respectability.”);
125 Malik, The Pakistan Lawyers’ Movement, 193-194
been clearly and unequivocally restrained not to endorse any constitutional deviations in the future.”

Though the Court had passed a few unfavorable rulings against the executive in the past, the ruling in Constitution Petition 21 of 2007 was distinctive for two reasons. First, it was not a ruling that merely caused irritation to the regime, or one that reversed one of its favored policy objectives. The ruling was highly consequential politically, and presented a strong challenge to the consolidated power of the regime. After the announcement of the judgment, a foreign news report described the Court’s ruling as, “a major blow to Musharraf’s standing and probably the biggest challenge to his dominance since he seized power in a coup in 1999.”

Second, in reinstating the Chief Justice, the Supreme Court judges and the larger legal community were self-consciously aware of the singularity of the ruling in the country’s history, a position that judges and lawyers repeatedly articulated to emphasize the new empowerment of the Court.

Buoyed by its historic judgment, which the regime had no option but to accept in the short run, the self-assured second Chaudhry Court decided to up the ante in challenging the regime. For the first time in the judicial history of the country, the Court accepted petitions directly threatening the core interests of the regime, to the extent that unfavorable rulings in the cases would actually pose an existential threat to the regime. Two consequential cases from the period demonstrate the heightened empowerment of the judiciary, and its capacity to challenge the powerful Musharraf regime. First, on 23 August 2007, about a month after the Chief Justice had been reinstated, the Supreme Court passed a ruling allowing exiled former Prime Minister Nawaz Sharif to return to Pakistan. Sharif had filed a petition in the Supreme Court challenging

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126 Chief Justice Iftikhar Chaudhry, “Foreword,” in *Supreme Court of Pakistan Annual Report* April 2009-March 2010, 1. He further wrote, “Last two years in our history have changed something forever. For once we have proven Keith B. Callard, an American professor, wrong, when he said, ‘No one is willing to die for the preservation of the Constitution in Pakistan.’

what he described as his forced exile by the Musharraf’s regime after the 1999 coup. The Supreme Court held that Sharif and his brother, who had also been exiled, have an “inalienable right to enter and remain in the country as citizens of Pakistan.”128 The government had argued that, following the 1999 coup, Sharif had been released from prison and allowed to travel abroad on the condition that he would not return to Pakistan for ten years. The Court held that such an agreement holds no constitutional legitimacy, and hence the exiled brothers could return to Pakistan.129 The judgment was highly unfavorable for the regime, and one commentator described it as “a decision that remakes the nation’s political landscape and deals a major blow to President Pervez Musharraf as he struggles to maintain power.”130 The ruling was particularly troubling for Musharraf because it could complicate the upcoming presidential elections, in which he hoped to be elected for another five-year term. While PPP’s Bhutto and President Musharraf had reached an agreement, Sharif was potentially Musharraf’s most important political opponent during this period.

The second important case of this period was even more threatening for the regime. With Musharraf seeking reelection as president for a second term in October 2007, members of the bar decided to persuade a retired Supreme Court judge, Justice Wajiuddin Ahmed, to contest the presidential elections. Ahmed had resigned rather than taken oath on Musharraf Provisional Constitutional Order (PCO) in 1999, even though he would likely have become Chief Justice if he had remained on the Court. Filing the retired judge’s candidacy was part of legal strategy, aimed at posing a legal challenge to Musharraf’s ability to contest presidential elections while in military uniform. After acceptance of his nomination papers, Wajiuddin Ahmed filed a petition

128 The Guardian, “Pakistan Court rules former PM can return from exile” (23 August, 2007)
130 The Washington Post, “Pakistani Court Authorizes Return of Musharraf Rival” (August 24, 2007)
under Article 184(3) of the Constitution, challenging Musharraf’s candidacy as president on a number of grounds, including the latter’s holding of dual office. Although the petitioner requested for the constitution of full court, a number of judges, including the Chief Justice, recused themselves. While the petitioner requested the Court to stay the election until the matter had been resolved, the Court decided that the election would go ahead according to the Election Commission schedule, but the result could only be announced following the Court’s final decision. While the court proceeding continued, Musharraf claimed unofficial victory in the elections held on October 6, 2007, but the government was barred by the Court’s order to make an official announcement. Meanwhile, the eleven-member bench heard the petitioner’s and the Attorney General’s arguments over the next few weeks, as rumors began to circulate about the possibility of the imposition of emergency. While the Attorney General denied such reports in the Court on November 2, 2007, Musharraf, sensing an unfavorable judgment regarding his eligibility to contest the elections, declared a state of emergency on November 3, 2007. Immediately following the President’s announcement, Chief Justice Chaudhry instituted a seven-member bench of the Court, which declared the imposition of emergency illegal and restrained the executive and the armed forces from carrying out illegal orders under the

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131 A few of the judges had already ruled in an earlier petition that General Musharraf was ineligible to contest presidential election, and hence recused themselves. Chief Justice Chaudhry, given his direct confrontation with General Musharraf, recused himself on act of judicial propriety. See Malik, *The Pakistan Lawyers’ Movement*, 227
132 The order of the Court was highly frustrating for the government. Najam Sethi, a political commentator and editor of *Daily Times*, noted that the “government must be very frustrated and angered” about the judgment. See *The Guardian*, “Court blocks Musharraf’s path to re-election as Pakistani president” (5 October, 2007).
133 In the Supreme Court judgment in the *Sind High Court Bar Association v. Federation of Pakistan* case (PLD 2009 S.C. 879), the event is described as follows in Chief Justice Chaudhry’s opinion: “However, [Musharraf’s] November 2007 action was a singular in nature, in that the onslaught was on judiciary alone. All other institutions were intact. The independence of judiciary was given a serious blow. In order to save the judiciary from being destroyed, for the first time in the history of this Country, a seven member bench of this Court headed by the de jure Chief Justice of Pakistan passed an order, inter-alia, restraining the President and Prime Minister of Pakistan from undertaking any such action, which was contrary to the Independence of Judiciary. So also the Judges of this Court and that of the High Courts including Chief Justice(s) were required not to take oath under the Provisional Constitution Order or any other extra-Constitutional step and on the same day viz 3.11.2007, the order was served on the members of superior judiciary through the respective Registrars of the Courts by way of Fax. It was also sent to all the relevant Executive functionaries.”
emergency.  

However, the 111th Brigade of the Pakistan Army stormed the Supreme Court building, and after removing several judges including the Chief Justice from the building, kept them under house arrest. As a result of the imposition of emergency and the promulgation of a Provisional Constitutional Order (PCO), as many as 61 judges of the superior judiciary of Pakistan, including 13 of 18 Supreme Court judges, were removed from office. An Oath of Office (Judges) Order 2007 had been passed by Musharraf, under which superior court judges were required to take fresh oath under the PCO. Several judges refused to take oath, while others were not given the opportunity to take oath under the PCO. The remaining judges were all Musharraf loyalists, and on November 22, 2007, a bench under the leadership of the new pro-Musharraf Chief Justice Abdul Hameed Dogar rejected the challenges to Musharraf’s eligibility to hold the office of president.

III. Post-2009 Jurisprudence of the Supreme Court of Pakistan

Suspension of more than sixty judges of higher courts, including the Chief Justice of the Supreme Court, through the imposition of emergency was a desperate move by Musharraf to save his regime. As discussed in chapter 4, political events in 2007 had undermined the military regime, and Musharraf’s attempts at salvaging the situation through imposition of emergency

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136 The emergency proclamation was explicit about the threat faced by the executive from the judiciary. It stated, in relevant part: “Whereas some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the government and the nation's resolve diluting the efficacy of its actions to control this menace; Whereas there has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth, in particular.” See BBC News, “Text of Pakistan emergency declaration,” (November 3, 2007)
137 Sind High Court Bar Association v. Federation of Pakistan, PLD 2009 SC 879
only made matters worse. Musharraf resigned from his position of army chief in November 2007, and took oath as civilian president for a five-year term. However, with the return of political rivals Bhutto and Sharif and dismal performance by the pro-Musharraf PML-Q in the 2008 elections, Musharraf resigned from presidency in August 2008. In September 2008, PPP’s Asif Zardari, whose party formed the government at the center, took oath as civilian president. However, like Musharraf, Zardari also refused to reinstate the deposed judges of the superior courts. Lawyers’ protests, which had continued since the suspension of the judges, culminated into a long march in Islamabad in March 2009, demanding the reinstatement of the deposed judges. The bar-led long march, which was also supported by opposition parties and civil society groups, was one of the largest protest events in the country’s history. Even though the government was determined to prevent the long march from succeeding, including by blocking the highways to prevent the protestors from reaching Islamabad, the demonstrations swelled to a level such that toppling of the government became a possibility if the demand was not met. Under pressure of the massive street protest, Zardari yielded, and reinstated the deposed judges, including Chief Justice Chaudhry, on March 16, 2009.

The Third Chaudhry Court (March 2009 to December 2013) quickly reversed the quiescence into which the Court had fallen into during the sixteen-month hiatus in which the judges had been deposed. The political context had changed remarkably since the time the Second Chaudhry Court had been reinstated in July 2007. Instead of political party leaders Bhutto and Sharif, it was now Musharraf who was living abroad in self-exile. Political power was now concentrated with the PPP, which controlled both the national assembly and the presidency. In addition, the military, having ruled the country for nearly a decade, still retained the capacity to exert its influence in Pakistan’s fledgling democracy. In this new political
environment, the Supreme Court attained institutional strength stronger than ever before in its history, and challenged power excesses by political elites of various stripes, including incumbents.

The purpose of this chapter is to explore the transformation of the Supreme Court, and to build an argument to show that the Court become significantly more powerful after 2007. Specifically, the Second Chaudhry Court (July – November 2007) was stronger than the Court has ever been in the country’s judicial history, and the Third Chaudhry Court (March 2009 – December 2013) was even more effective and powerful. How can we be sure that the Court had indeed undergone a transformation, from being a Court that either legitimized usurpations of power or attempted to check the power of political elites but often failed, to one that has frequently succeeded in checking power abuses by incumbent elites? Below, I offer four pieces of evidence, which demonstrate the significantly increased power of the Court.

First, survey evidence indicates that citizens, and especially the legal community, perceived the Supreme Court to be a more powerful institution post-2007 than it was in the past. In a nationally representative survey conducted in January 2012, 76 percent of respondents professed to know enough about the Court to have an opinion about the Court’s jurisprudence, with 62 percent expressing a positive opinion. Interestingly, 14 percent noted that the Court was “overstepping its mandate,” which, as I explain below, is consistent with the view that the Court had become a very powerful institution. In a survey of lawyers I conducted among members of the Islamabad and Lahore bar, an overwhelming 98 percent of the respondents interviewed indicated that the Court has become stronger post-2009 than ever before in its

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139 Gilani Research Foundation, “Opinion Poll from Gallup Poll: Actions of Pakistan Supreme Court” (Press Release; January 12, 2012). The question posed to the citizens was: “Some people think that Supreme Court is taking action by over stepping its mandate and it should not do this. In your opinion, is the Supreme Court taking actions that are in its mandate or is it overstepping its mandate?”
history.\textsuperscript{140} Further, a survey of citizens in Islamabad and Lahore revealed that 88 percent of the respondents perceived the Court to be a more powerful institution post-2009 than in earlier periods.\textsuperscript{141} I substantiated these survey results through in-depth interviews with members of the bar, who discussed the Court’s post-2009 jurisprudence as evidence of judicial empowerment in Pakistan. Several of these cases, implicating various constituencies of powerholders in the country, are discussed below in this section.

Second, various commentators have noted the significantly increased power of the Supreme Court after the Chief Justice’s reinstatement in July 2007, and the restoration of deposed judges in March 2009. A report published by the International Commission of Jurists (ICJ) in 2013 noted that in recent years that Supreme Court of Pakistan had been transformed into “a robust institution capable of exercising its power independently and impartially, safeguarding the Constitution and acting as a check on the power of other institutions of the state.”\textsuperscript{142} The report further noted: “In the years following...2009, the Supreme Court pioneered a new era of independence of judiciary in Pakistan. Led by Chief Justice Chaudhry, the Supreme Court took steps to use its independence to promote rule of law, address corruption and restore respect for the Constitution.”\textsuperscript{143} A commentator writing in foreign press about Pakistan’s politics in 2015 expressed the view that Pakistan’s judiciary “has hounded” the military in recent years.\textsuperscript{144} This is a remarkable transformation, given the Court had historically been highly pliant

\textsuperscript{140} Survey of 45 lawyers in Lahore and 35 lawyers in Islamabad in September-December 2013, and May-July 2014.
\textsuperscript{141} I conducted 50 short interviews with citizens at public places in Lahore and Islamabad in September-December 2013, and June-July 2014.
\textsuperscript{142} International Commission of Jurists, “Authority without accountability: the search for justice in Pakistan” (October 2013). Though the report notes some concerns in the Court’s jurisprudence, such as inconsistency and opacity, it consistently stated that the Court had become significantly more empowered since 2009. For instance, the report noted that: “ICJ commends the Supreme Court for its efforts to uphold human rights and provide remedy and redress for some of those whose rights have been violated in Pakistan.” Ibid, 12
\textsuperscript{143} Id., 36
\textsuperscript{144} Declan Walsh, “New Courts Offer Pakistan’s Generals the Power They Used to Seize” (New York Times; January 10, 2015)
in front of the country’s strong military. A scholar examining recent political events in Pakistan argued that 2005-07 marked an end of the historical collaboration between the judiciary and the military, and noted: “The outcome of these events has been an unprecedented rise in the political and judicial power of the superior judiciary in Pakistan. It has been the most comprehensive empowerment of a judiciary in the recent history of constitutional systems.” While most commentators have commended the recent empowerment of the judiciary in Pakistan, a few have written about the Court overstepping its mandate and interfering with the actions of the legislature and the executive. While I discuss this criticism briefly in the conclusion of this study, the most important thing to note about it is that it proves even more strongly the starting point of my thesis: the court is now more powerful than it was in its history. Only a highly empowered court can be capable of overstepping its mandate. And, as noted in chapter 1, given there are only a handful of other effective constitutional courts in the developing world, the more consequential point regarding the empowerment of Pakistan’s court is just that: how was it able to transform from an ineffective Court that validated extra-constitutional usurpations of power, to one that was effective in checking executive power, even if, on occasion, this involved overstepping its jurisdiction.

Third, the Supreme Court itself has frequently noted the fundamental transformation in its jurisprudence. With the highly charged political events of 2007-09, several of which involved direct confrontation between members of the judiciary and the executive, the Court appears to be

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145 Tasneem Kausar, “Judicialization of politics and governance in Pakistan: Constitutional and political challenges and the role of the Chaudhry Court,” in Ashutosh Misra and Michael Clarke (eds) Pakistan’s Stability Paradox: Domestic, regional and international dimensions (Routledge; 2012, 28)

146 See for instance Osama Siddique, “The Judicialization of Politics in Pakistan: The Supreme Court after the lawyers’ movement,” in Mark Tushnet and Madhav Khosla (eds), Unstable Constitutionalism: Law and Politics in South Asia (Cambridge University Press, 2015); Saroop Ijaz, “The Case for Judicial Minimalism in Pakistan” (Justist – Forum; October 11, 2010); Asma Jehangir, “Another aspect of the judgment” (Dawn, December 19, 2009) (writing about the landmark 2013 Supreme Court judgment annulling National Reconciliation Ordinance, Jehangir expressed the view that the Supreme Court has “disturbed the equilibrium by creating an imbalance in favor of the judiciary.”)
highly self-conscious of its new empowerment, and judges make it a point to emphasize the transformation of the Court’s jurisprudence. In the foreword to the first annual report of the Supreme Court published after the restoration of the judiciary in 2009, Chief Justice Chaudhry wrote: 147

Unfortunately, because of many constitutional deviations in our national history, like other institutions, the judiciary also suffered decline. The judicial institutions could not develop a self-sustaining mechanism and credibility to exercise power of judicial review at the apex level. Their rulings were not consistent and invited mostly adverse comments/reactions from political elites, legal academia and members of the bar.

But that past is now well behind us. The present judiciary has now turned a new leaf after the tumultuous events of March 9, 2007 and beyond. We are trying to undo the past precedents of judicial endorsement of previous authoritarian interventions in the country…We have rather linked our very own survival with the survival of the constitutional dispensation in the country.

Last two years in our national history have changed something forever. For once we have proved Keith B. Callard, an American professor, wrong, when he said: “No one is willing to die for the preservation of the Constitution in Pakistan.” I am proud to say that not only the judiciary and 90,000 plus black coated fraternity, but the entire civil society is ready to sacrifice everything for upholding the Constitution and achieving rule of law.

Other judges on the Court have also noted the shift in the Court’s jurisprudence following the reinstatement of the judiciary in 2009. Justice Jawwad Khawaja, in his concurring note in the Dr Mubashir Hassan v. Federation of Pakistan (2009) case, argued that transformation of the Supreme Court during 2007-09 was as politically significant as the independence of the country in 1947.148

At the very outset it must be said, without sounding extravagant, that the past three years in the history of Pakistan have been momentous, and can be accorded the same historical significance as the events of 1947 when the country was created and those of 1971 when it was dismembered. It is with this sense of the nation’s past that we find ourselves called upon to understand and play the role envisaged for the Supreme Court by the Constitution. The Court has endeavored to uphold the Constitution and has stood up to unconstitutional forces bent upon undermining it. It is in this backdrop that these petitions have been heard and decided…It has now been firmly and unequivocally settled that the Court cannot and should not base its decisions on expediency or on consideration of the consequences which may follow as a result of enforcing the Constitution…I would like to state most emphatically that the path of expediency and subjective notions of ‘State necessity’ are dead and buried.

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148 PLD 2010 S.C. 265 (Justice Jawwad Khawaja, concurring opinion, paragraph 2)
Taking up a series of cases that dealt with highly consequential constitutional issues, the post-2009 judiciary frequently highlighted in its judgments the new institutional power of the Court. In particular, the Court repudiated the law of necessity, which had formed the doctrinal backbone of the Court’s earlier jurisprudence.

Finally, the strongest evidence of the transformation of the Supreme Court comes from the jurisprudence of the Court in the post-2009 period. Following the March 2009 reinstatement of the judiciary, the Court became extremely active, and there have been a large number of causes célèbres in the period. While there was certainly a remarkable shift in substantive aspects of the Court’s jurisprudence, there was also significant change in the procedural aspects of access to the Court and its jurisdiction. Below, I will first describe the transformation in procedure, and then discuss cases from the period which demonstrate the empowerment of the Court.

Under the 1973 Constitution, the Supreme Court of Pakistan has been empowered to exercise jurisdiction in three distinct areas. First, Article 185 grants the Court appellate jurisdiction, allowing it to hear appeals from judgments and orders of High Courts. Second, Article 186 confers advisory jurisdiction, and allows the president to refer a question of law, which is considered to be of public importance, to the Supreme Court for advisory opinion. Finally, and most relevant for the present discussion, Article 184 delineates the Courts’ “original jurisdiction,” which concerns two distinct areas: disputes among governments in the federation and fundamental rights violations.  

Article 184(3) grants the Court to assume jurisdiction over

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149 Article 184 of the Constitution (Original Jurisdiction of Supreme Court) states:

(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.

Explanation.- In this clause, "Governments" means the Federal Government and the Provincial Governments.
matters of public importance involving enforcement of fundamental rights enshrined in the Constitution. Two procedural aspects are noteworthy about Article 184(3). First, since the Court acts on rights issues under its original jurisdiction, the case need not climb the appellate ladder to reach it. Instead, the Court can begin proceedings on a case through direct appeal by a petitioner. Second, the language of the Article has been interpreted by the Court to sidestep even the requirement of a petition. If the Court itself deems a matter of be of significant public importance, and involving fundamental rights enforcement, the Court can exercise its *suo moto* powers, and initiate the proceeding without a formal complaint being filed by a petitioner. This is a unique mechanism of initiating proceedings in a court, and there are very few courts in the world that are able to exercise *suo moto* jurisdiction.\(^{150}\)

Through much of its history, the Supreme Court had narrowly interpreted its powers under Article 184(3), and had functioned more like an appellate court than one empowered to assume original jurisdiction in matters of public interest. In neighboring India, the Supreme Court instituted procedural changes in the 1970s and 1980s, allowing greater access to constitutional justice to dispossessed groups and individuals.\(^{151}\) In particular, this was done by the Supreme Court of India through relaxing the traditional principle of *locus standi*, which allowed only those who directly suffered a legal injury to initiate a proceeding for judicial

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\(^{150}\) The most important other court that has assumed *suo moto* jurisdiction is the Supreme Court of India.

\(^{151}\) See for example, *Fertilizer Corporation Kamagar Union v Union of India*, AIR 1981 SC 344; *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675; *S.P. Gupta v President of India*, AIR 1982 SC 149 (in which the Court took an expansive view of access to the Court, and invited citizens to directly bring their cases to the Supreme Court)
redress. In Pakistan, similarly, the rules for standing were relaxed starting the 1988 *Benazir Bhutto v Federation of Pakistan*\(^ {153}\) case. Several scholars see this, and the 1990 *Darshan Masih v. The State*\(^ {154}\) case, as initiating the era of public interest litigation in Pakistan. In the Benazir Bhutto case, the court dispensed with the requirement that only an aggrieved person can bring an action to the Supreme Court under Article 184(3) of the Constitution. The Court held:\(^ {155}\)

> This rule of standing is an essential outgrowth of Anglo-Saxon jurisprudence in which only the person wronged can initiate proceedings of a judicial nature for redress against the wrong-doer… The rationale of this procedure is to limit it to the parties concerned and to make the rule of law selective to give protection to the affluent or to serve in aid for maintaining the status quo of the vested interests. This is destructive of the rule of law which is so worded in Article 1 of the Constitution as to give protection to all citizens.

While there were a number of important cases adjudicated by the Court in the 1990s and early 2000s which had been brought under Article 184(3), the Court remained wary of heightened direct access through this procedure. For instance, in 1998, in the *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*,\(^ {156}\) the Court held:

> There is no doubt that the Supreme Court cannot, as a matter of course, entertain a Constitutional petition under Article 184(3) of the Constitution and bypass the High Court which has jurisdiction under Article 199 of the Constitution, inter alia, to enforce fundamental rights under clause (2) thereof. Indeed, Supreme Court should be discreet in selecting cases for entertaining under Article 184(3) of the Constitution and only those cases should be entertained which in fact and in law involve questions of fundamental rights… a balanced, considered and indiscriminate policy is to be evolved by the Supreme Court.

Thus, while the Court had by the late 1990s lowered the requirements for standing, it exercised restraint in accepting direct petitions to the Court. This attitude began to shift slightly with the appointment of Justice Chaudhry as Chief Justice in 2005. The Supreme Court’s Human Rights Cell established a procedure to categorize and dispose of the increasing number of petitions.

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153 PLD 1988 S.C. 416
154 See Werner Menski, Ahmad Alam and Mehreen Raza, *Public Interest Litigation in Pakistan* (Pakistan Law House; 2000); Muhammad Amir Munir, “Public Interest Litigation in the Supreme Court of Pakistan” (LLM Thesis, 2007; University of the Punjab, Lahore)
155 PLD 1988 S.C. 416
156 PLD 1998 S.C. 1263
received by the Supreme Court starting 2005. However, it was after the reinstatement of the judiciary in 2009 that the access to the Court through the 184(3) procedure underwent extensive expansion. The rapid expansion of access can be gauged by comparing the number of petitions received by the Supreme Court. In 2004, the Court received 450 petitions requesting relief under the Court’s original jurisdiction. By 2012, there had been a 300-fold increase, with the Court receiving more than 140,000 petitions alleging violations of fundamental rights.\textsuperscript{157} According to the protocols of the Human Rights Cell, most of these petitions are handled by administrative staff at the Cell, while those involving serious rights violations are brought to the attention of the judges. In four years, from 2009 to 2012, the Supreme Court disposed of 161,000 complaints that had been received by the Court invoking its original jurisdiction.\textsuperscript{158}

The importance of expanding access through Article 184(3) is not limited to merely an increase in the number of litigants who can get judicial redress. Shifts in procedure can have important implications for the development of substantive law. Comparative law scholarship has paid relatively little attention on the impact of different procedural regimes for accessing constitutional courts on the substantive development of constitutional law. There is, however, some interesting research on comparative civil procedure that can be helpful in understanding the impact of procedure on the development substantive law. In a significant way, the rise of equity through the establishment of the Court of Chancery in England in the fourteenth and fifteenth century was a response to the crisis of procedural law in common law courts.\textsuperscript{159} The system of originating writs and the single-issue pleading rule in common law courts constituted a procedural regime that prevented the development of certain areas of substantive law. Chancery

\textsuperscript{157} Katharine Houreld, “Pakistan’s top court struggles to deliver justice” (Reuters; September 24, 2012)
\textsuperscript{158} Supreme Court of Pakistan, “Human Rights Cell,” in \textit{Annual Report 2012-2013}, 131
litigation, by contrast, originated with a simple bill or petition, and allowed for multi-issue and multi-party litigation. Several fields of substantive law could not develop in the common law system because adjudication in these areas required multi-party litigation. Hence, the development of such fields as business associations and bankruptcy occurred in equity courts, given its facilitative procedural regime for suits involving multi-party relations. Similarly, in the United States, this project of fusion of law and equity led to development of substantive law.\footnote{Examining the process of fusion the United States, Subrin has argued that equity ‘conquered’ common law, that is, the procedural regime that emerged as a result of fusion borrowed heavily from the procedural devices that had evolved in the Court of Chancery. See Stephen Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective” 135 U. Pa. L. Rev. 909 (1987)} The process of fusion resulted in a procedural regime characterized by, among other aspects, simplified pleading, multi-party and multi-issue practice, and possibility of both money damages and specific relief. The procedural transformation enabled the development of new forms of action, including class actions, which led to development of substantive law in fields such as torts.\footnote{Complex litigation such as mass torts was now possible because of multi-party practice as well as extensive pretrial discovery, procedural devices that had been developed in equity.} In Pakistan, the facilitative procedural shifts relating to the Supreme Court’s jurisdiction and access have similarly led to the development of substantive law in the area of fundamental rights adjudication and mega-corruption cases. For example, in a number of cases decided since 2009, the Court has developed the notion of state functionaries standing in fiduciary relationship with the people, whose actions must reflect complete loyalty to the citizens of the country.\footnote{See \textit{Syed Yousaf Raza Gillani v. Assistant Registrar}, PLD 2012 S.C. 466; \textit{Habibullah Energy Limited v. WAPDA and the Federation of Pakistan}, Civil Appeals No. 149 and 150 of 2010 (see Justice Jawwad Khawaja, concurring opinion)}

Above, I have noted the transformed perception of the effectiveness of the Supreme Court in the minds of citizens, lawyers, and judges. I also described the shifts in procedure relating with jurisdiction and access in the post-2009 period. In the remaining part of this section, I will present direct evidence of the transformation of the Supreme Court through an examination
of several *causes célèbres* decided by the Court. I will then compare the Court’s jurisprudence in this period with that from the pre-2005 period, discussed earlier in this chapter.

Soon after the reinstatement of the judiciary in March 2009, the Supreme Court set about to dismantle the legal infrastructure that Musharraf had constructed during the imposition of emergency rule in November 2007. In *Sind High Court Bar Association v. Federation of Pakistan*, decided in July 2009,\(^{163}\) the Court declared Musharraf a “usurper” and held that various actions taken by him, including the proclamation of the Provisional Constitutional Order of 2007 and the Oath of Office (Judges) Order of 2007, were unconstitutional and *void ab initio*. This case has an important similarity with the 1972 *Asma Jilani* case discussed above, in which the Court had declared General Yahya as usurper. In both cases, the Court’s declaration about the usurpers’ unconstitutional actions was made after the dictator was already out of office. However, in contrast to the *Asma Jilani* case, the *Sind High Court Bar Association* case was not merely a declaratory judgment. Apart from more resolutely condemning extra-constitutional actions by authoritarian elites than in its previous judgments,\(^{164}\) the Court also annulled various institutional and legal remnants from the period of emergency rule. There were two important practical consequences of the judgment. First, since it annulled Musharraf’s emergency proclamation holding it *void ab initio*, all measures taken under it also became void. This opened the way for the Court to hear challenges against the National Reconciliation Ordinance of 2007, discussed below. Second, the judgment reversed a number of measures that had been taken by presidents Musharraf and Zardari to make the judiciary subservient to the executive. The Court

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\(^{163}\) PLD 2009 S.C. 879

\(^{164}\) The Court stated in paragraph 63 of the judgment: “We lay it down firmly that the assumption of power by an authority not mentioned in the Constitution would be unconstitutional, illegal and *void ab initio* and not liable to be recognized by any court, including the Supreme Court. Henceforth, a Judge playing any role in future in the recognition of such assumption of power would be guilty of misconduct within the ambit of Article 209 of the Constitution.” Id.
was especially critical of the five judges of the Supreme Court who took oath after Musharraf proclaimed emergency, disregarding the order of the seven-member bench that had prohibited the judges from doing so. In particular, the Court chastised Chief Justice Abdul Hameed Dogar, who had led the Court during the period of the suspension of the judges. The Court held that Chief Justice Dogar was “never a constitutional Chief Justice of Pakistan.” Further, the Court also stated that Chief Justice Dogar, like Musharraf, was a usurper: “In illegally occupying the office of Chief Justice of Pakistan and taking upon himself the execution of the functions of that office in the presence and availability of its permanent incumbent, knowing fully well that the same had not fallen vacant, Abdul Hameed Dogar, J, became a usurper and he exercised the usurped powers and jurisdiction of the office of Chief Justice.” Further, the Court ordered that the appointments of all serving judges who had been appointed in consultation with Chief Justice Dogar were unconstitutional and void ab initio. Lawyers who had been appointed judges were removed from office, and those promoted to high levels within the judiciary were reverted to the previous positions.

As noted above, the Sind High Court Bar Association judgment cleared the way for the Court for hear challenges against the constitutionality of the controversial National Reconciliation Ordinance (NRO). The NRO, issued as an ordinance by President Musharraf in October 2007, was an amnesty law that was aimed at stalling corruption cases against politicians and bureaucrats in Pakistan. The law was devised with the help of American and British advisers, who had hoped to broker a deal between President Musharraf and PPP’s Benazir Bhutto, with the intent of engineering the latter’s return to Pakistan to contest the 2008 national

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165 The Court noted that Chief Justice Iftikhar Chaudhry remained the de jure Chief Justice during the period starting November 2007 and ending the restoration of the judiciary. The Court stated: “Therefore, it is held and declared that the Chief Justice of Pakistan had continued in office without interruption of a single day until the 17th March, 2009 when he was formally restored to the position he was holding prior to 3rd November, 2007.”
Bhutto had agreed to support Musharraf’s presidency in return for removal of
corruption cases against herself, her husband, and other members of her party. Soon after the
NRO was passed, it was challenged in the Supreme Court, but the decision was still pending
when Musharraf imposed emergency rule and suspended the majority of the Supreme Court
judges in November 2007. Assuming extra-constitutional powers under the PCO, Musharraf
inserted Article 270AAA into the Constitution of Pakistan, which obviated the need for
validation of the NRO and other presidential ordinances by the Parliament, and as a consequence
NRO was given the status of a permanent law. As a result of the NRO, pending cases against
senior PPP and MQM leadership were stalled, and they were either acquitted or discharged.
After cases against PPP president Zardari were dropped, he became eligible to hold public office,
and was elected President of Pakistan in September 2008. After the reinstatement of judges, in
the Court’s judgment in the Sind High Court Bar Association case, Article 270AAA of the
Constitution, through which the NRO had become a permanent law, was removed from the
Constitution. Consequently, the NRO permanency was removed by the Court’s order, and a
timeline was accorded to the parliament to enact the NRO through legislation before it lapsed.
Since the NRO was not enacted by the parliament in the timeframe, the Court began proceedings
to hear challenges against the constitutionality of the Ordinance. In the landmark Dr. Mubashir
Hassan v. Federation of Pakistan, a seventeen-member bench headed by Chief Justice
Chaudhry annulled the NRO, and declared it unconstitutional and void ab initio. The Court
declared that rather than benefitting the country, the NRO benefitted criminals who had used
public office to engage in corrupt practices. Finding that the objectives of the NRO had no nexus
with national reconciliation, the Court held:

166 Jane Perlez, “Pakistan Strikes Down Amnesty for Politicians” (New York Times; December 16, 2009)
167 PLD 2010 SC 265
We are of the opinion that the NRO, 2007 was not promulgated for ‘national reconciliation’ but for achieving the objectives, which absolutely have no nexus with the ‘national reconciliation’ because the nation of Pakistan, as a whole, has not derived any benefit from the same. Contrary to it, it has been promulgated for achieving the individuals’ reconciliation, explained before this Court with the help of admitted evidence.

The Court directed that all legal proceedings that had been stalled under the NRO be revived, and ordered courts to reinitiate proceedings against accused individuals who had been discharged or acquitted.168 The Court particularly condemned the actions of former Attorney General Malik Qayyum, who had withdrawn request for the Government of Pakistan to participate in proceedings against Asif Zardari, now President of Pakistan, in Swiss Courts hearing corruption cases. The Court ordered the Federal Government, which was controlled by Zardari’s party, to initiate claims of the Government of Pakistan to millions of dollars of laundered money in Zardari’s accounts abroad. In addition, several incumbent ministers of the Federal Government were put on the exit control list, and others were asked to appear in court.169

Having annulled the NRO and removed the amnesty granted to incumbent powerholders from corruption cases, the Supreme Court took serious interest in the implementation of its judgment in the Dr. Mubashir Hassan case. In particular, the Court made paragraph 178 of the judgment,170 dealing with money laundering cases against the incumbent President Zardari in Switzerland, the focal point of its implementation efforts. In the paragraph, the Court had

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168 The Court held: “Resultantly, all cases in which the accused persons were either discharged or acquitted under Section 2 of the NRO, 2007 or where proceedings pending against the holders of public office had got terminated in view of Section 7 thereof, a list of which cases has been furnished to this Court and any other such cases/proceedings which may not have been brought to the notice of this Court, shall stand revived and relegated to the status of pre-5th of October, 2007 position.”

169 Al Jazeera, “Court Summons Pakistan Minister” (December 20, 2009)

170 Paragraph 178 of Dr. Mubashir Hassan v. Federation of Pakistan (PLD 2010 S.C. 265) states: “Since the NRO, 2007 stands declared *void ab initio*, therefore, any actions taken or suffered under the said law are also non est in law and since the communications addressed by Malik Muhammad Qayyum to various foreign fora/authorities/courts withdrawing the requests earlier made by the Government of Pakistan for mutual legal assistance; surrendering the status of civil party; abandoning the claims to the allegedly laundered moneys lying in foreign countries including Switzerland, have also been declared by us to be unauthorized and illegal communications and consequently of no legal effect, therefore, it is declared that the initial requests for mutual legal assistance; securing the status of civil party and the claims lodged to the allegedly laundered moneys lying in foreign countries including Switzerland are declared never to have been withdrawn. Therefore the Federal Government and other concerned authorities are ordered to take immediate steps to seek revival of the said requests, claims and status.”
ordered the Federal Government to contact Swiss authorities, and reinitiate requests for mutual assistance and for the Pakistan government to be a civil party in the money laundering cases in Switzerland. However, relevant government officials, all belonging to PPP, refused to take action against the interests of their party chairman, President Zardari. When the Court increased pressure on the government, the Attorney General and Secretary Law resigned from their positions, with the former accusing the Ministry of Law of preventing him in implementing the orders of the Court. After repeated failures of the government, the Supreme Court passed an order in January 2012, giving the government six options with regard to the implementation of paragraph 178 of the NRO case. One of these, option number 2,\footnote{Option 2 of the judgment states: “Proceedings may be initiated against the chief executive of the Federation, i.e. the prime minister, the federal minister for Law, Justice and Human Rights Division and the federal secretary Law, Justice and Human Rights Division for committing contempt of this court by persistently, obstinately and contumaciously resisting, failing or refusing to implement or execute in full the directions issued by this court in its judgment Cr M A 486 of 2010 in Criminal Appeal No 22 of 2002, etc.10 delivered in the case of Dr Mobashir Hassan (supra). It may not be lost sight of that, apart from the other consequences, by virtue of the provisions of clauses (g) and (h) of Article 63(1) read with Article 113 of the Constitution a possible conviction on such a charge may entail a disqualification from being elected or chosen as and from being a member of Majlis-e-Shoora (Parliament) or a provincial assembly for at least a period of five years.” See \textit{Cr. Original Petition No. 6 / 2012 (Order dated 10\textsuperscript{th} January, 2012)}.} was the initiation of contempt proceedings against the Prime Minister, as chief executive, and other senior executive officials for willfully failing to implement the orders of the Supreme Court. Faced with non-compliance, the Court resorted to this option, and initiated contempt proceedings against Prime Minister Yusuf Raza Gilani, issuing him a show cause notice. Dissatisfied with the Prime Ministers reply, in which he challenged the proceedings on ground of the fairness of trial and presidential immunity, a seven-member bench of the Supreme Court headed by Justice Nisar-ul Mulk convicted the Prime Minister of contempt of court in April 2012.\footnote{Cr. Original Petition No. 6 / 2012, \textit{Contempt Proceedings against Syed Yousaf Raza Gilani} (PLD 2012 SC 553)} The Court reasoned that willful flouting of the Court’s orders at the highest levels brings disrepute to the judiciary, and sets an example that would encourage others to disregard judicial authority. The Prime Minister
was imprisoned, symbolically, until the rising of the court, which lasted only about thirty
seconds. With the sentence, Prime Minister Gilani became the first incumbent prime minister
in the country’s history to have been convicted by a court. The judgment created uncertainty as
to whether Prime Minister Gilani remained eligible to hold office, and several opposition
politicians called for his resignation. In June 2012, the Supreme Court removed the uncertainty
by disqualifying Prime Minister Gilani from holding office. Heading the bench hearing the
disqualification case, Chief Justice Chaudhry declared in a packed courtroom: “Yusuf Raza
Gilani stands disqualified as a member of the Majlis-e-Shoora (parliament)... He has also ceased
to be the prime minister of Pakistan and the office of the prime minister stands vacant.”
Shortly thereafter, the Election Commission issued a notification of Gilani’s disqualification as a
parliamentarian, and the former Prime Minister was reported to have vacated his official
residence at night in a vehicle no longer displaying the country’s flag.

The cases discussed above, implicating President Zardari, and ultimately leading to the
disqualification of Prime Minister Gilani, became *causes célèbres* owing to the Court’s resolute
stand against high level corruption by the most powerful incumbent officials. Since both
belonged to the PPP, and since a large number of other government officials from the party were
also implicated in corruption cases, a perception was created about the Court focusing only on
the transgressions of the incumbent party. This view was contradicted by the Court’s judgment
in the *Air Marshal (Retd) Asghar Khan v. General (Retd) Mirza Aslam Beg, Former Chief of
Army Staff* case decided in October 2012, which implicated other important constituencies of
power in the country. Already in the *Sind High Court Bar Association* judgment discussed

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173 The Washington Post, “Prime Minister Yousaf Raza Gilani convicted but not imprisoned by Pakistan court” (April 26, 2012)
174 Reuters, “Pakistan Supreme Court disqualifies prime minister” (June 19, 2012)
175 Dawn, “Yousuf Raza Gilani is sent packing” (June 19, 2012)
176 2012 SCMR 2008
above, the post-2009 Court had strongly condemned the military rule as dishonorable for the people of the country, stating:\textsuperscript{177}

\begin{quote}
[M]ilitary rule, direct or indirect, is to be shunned once and for all. Let it be made clear that it was wrongly justified in the past and it ought not to be justified in future on any ground, principle, doctrine or theory whatsoever. Military rule is against the dignity, honor and glory of the nation that it achieved after great sacrifices 62 years ago; it is against the dignity and honour of the people of Pakistan.
\end{quote}

In the \textit{Asghar Khan} case, the Court took up a challenge to the military’s interference in the democratic process. The case had reached the Supreme Court through a letter written by the petitioner in 1996 to the then-Chief Justice of Pakistan, in which he alleged that senior military officials had distributed funds to favored politicians through a bank in order to support candidates against the PPP. The letter was converted into a petition, and registered as a Human Rights case under the Court’s original jurisdiction.\textsuperscript{178} After many years of postponement, hearings were resumed in February 2012 by a bench headed by Chief Justice Chaudhry. In its historic judgment, the Court declared that the 1990 general elections were marred by corrupt practices, emanating from an illegal ‘election cell’ that had been established in the Presidency. Through the cell, the President, aided by the Chief of Army Staff General Aslam Beg and the Director General of the Inter-Services Intelligence General Asad Durrani, disbursed funds to favored candidates. The Court held that intelligence and security agencies “have no role to play in the political affairs of the country such as formation or destabilization of government.”\textsuperscript{179} Most significantly, the Court directed the Federal Government to take action against the retired generals implicated in the case. The Court stated:\textsuperscript{180}

\begin{flushright}
\textsuperscript{177} PLD 2009 S.C. 879, paragraph 57
\textsuperscript{178} See Supreme Court of Pakistan, “Important Cases Decided by the Supreme Court,” in \textit{Supreme Court of Pakistan Annual Report 2002-03}, 160
\textsuperscript{179} \textit{Air Marshal (Retd) Asghar Khan v. General (Retd) Mirza Aslam Beg, Former Chief of Army Staff, Human Rights Case No. 19 of 1996} (Short Order, October 19, 2012; paragraph 11)
\textsuperscript{180} Id., paragraph 13
\end{flushright}
Their acts have brought a bad name to Pakistan and its Armed Forces as well as secret agencies in the eyes of the nation, therefore, notwithstanding that they may have retired from service, the Federal Government shall take necessary steps under the Constitution and Law against them.

Further, the Court directed the Federal Investigation Agency (FIA) to initiate investigation against the politicians who had received funds illegally from the election cell before the 1990 election. In its detailed judgment, issued in November 2012, the Court presented a list of beneficiaries based on an affidavit by General Durrani. Notably, the list included the name of Nawaz Sharif, president of PML-N, the largest opposition party in parliament at the time.\footnote{The PML-N government elected in the May 2013 elections has shown reluctance in implementing this adverse ruling. However, the Supreme Court continued hearings on review petitions in 2015, pertaining to the implementation of the Court’s orders. See Express Tribune, “Govt faces uphill battle in Asghar Khan case” (February 28, 2015)}

Apart from these and other notable cases in which officials at the highest level were implicated, the post-2009 Court assumed a highly effective posture in two notable areas: mega-corruption scandals and fundamental rights protection. There are a large number of cases in which the post-2009 Supreme Court actively pursued corrupt practices of public officials. For instance, in 2010, taking \textit{suo moto} notice of an article published in a newspaper, the Court initiated proceedings against corruption by the Ministry of Petroleum in awarding a liquefied natural gas (LNG) contract to a foreign firm, which had not been the highest bidder.\footnote{\textit{Suo Moto} case No. 5 of 2010 (PLD 2010 S.C. 731)} In the deal estimated at $28 billion, ignoring the lowest would likely lead to a loss of $1 billion.\footnote{Reuters, “Update 2: Pakistani Supreme Court scraps GDF Suez LNG deal” (April 28, 2010)} Noting that the loss to the public exchequer amounted to “violation of fundamental rights, principle of transparency and equal opportunity,” the Court set aside the decision to award the contract, and directed the government to conduct the transaction in a more transparent manner. In 2012, the Court took \textit{suo moto} notice of a newspaper article of alleged corruption in Rental
Power Plants (RPPs), which had been set up to solve short-term energy crisis in the country. Even though the power projects failed to produce significant electricity, the government continued to make exorbitant payments, with several high-level public officials involved in corruption. Finding evidence of large-scale corruption through the RPPs, the Court declared the project illegal, and held that functionaries in relevant governmental agencies would be liable for civil and criminal proceedings. In January 2013, the Supreme Court, while hearing the RPP case, ordered the arrest of incumbent Prime Minister Raja Pervez Ashraf, who had replaced the Yusuf Gilani after the latter had been disqualified by the Supreme Court. Prime Minister Ashraf had previously been the Minister for Water and Power, and had been involved in the establishment of the RPPs. Other notable cases include *suo moto* notice of corruption in Pakistan Steel Mills Corporation, *suo moto* notice of loss of Rs. 40 billion in purchase of locomotives from a U.S. based company by Ministry of Railways, and annulment of the 20-year lease of the country’s largest coal-based power plant, which had been leased to a private party in a non-transparent manner.

The post-2009 Supreme Court also developed a rich caseload of fundamental rights adjudication. The Human Rights Cell in the Supreme Court, which accepted petitions from citizens under the Court’s Article 183(4) original jurisdiction, became an important channel for judicial redress of rights violation in the country. While the Cell had received around 450

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184 Dawn, “Rental Power Projects declared illegal by SC” (March 30, 2012)
185 *Human Rights Case No. 7734-G / 2009 & 1003-G 2010* (2012 SCMR 773). The Court held (in paragraph 84iii): “The contracts of all the RPPs – solicited and unsolicited, signed off or operational… were entered into in contravention of law/PPRA Rules, which, besides suffering from other irregularities, violated the principle of transparency and fair and open competition, therefore, the same are declared to be non-transparent, illegal and void ab initio. Consequently, the contracts of RPPs are ordered to be rescinded forthwith and all the persons responsible for the same are liable to be dealt with for civil and criminal action in accordance with law.”
186 Dawn, “SC orders arrest of PM Ashraf in RPP case” (January 15, 2013)
187 *Suo Moto Case No. 15/2009* (PLD 2012 S.C. 610)
188 *Suo Moto Case No. 7 of 2011* (2012 SCMR 226)
189 *Habibullah Energy v. WAPDA* (Civil Appeals No. 149 and 150 of 2010)
petitions in 2004, by 2013 it received 250 applications daily from aggrieved citizens. As noted above, more than 160,000 of these petitions were disposed of by the Court between 2009 and 2013.\textsuperscript{190} The most common rights abuses addressed by the Court included police torture, unlawful arrest, kidnappings, non-meritocratic appointments, abduction of women, rape cases, land grabbing, environmental pollution, non-payment of salaries and pension, and corruption.\textsuperscript{191}

Two notable cases from the period illustrate the vigor with which the Court exerted itself in redressing rights violations. In 2011, electronic media broadcast the video of a young unarmed man being shot at close range by Rangers in Karachi. Taking *suo moto* notice under Article 184(3), the Court stated that the video clip had been “watched in Court,” from which the judges *prima facie* established that the Rangers had caught the young man by the hair, shot him at close range, and failed to get him medical attention while he bled to death.\textsuperscript{192} The justices found that there was no reason to suspect that the deceased had been involved in a crime, and that the video clip established that he had been unarmed when apprehended by the Rangers. The Court held that even if the deceased had been involved in a criminal act, law enforcement officials used excessive force. The Court noted that this was a “classic case of highhandedness of the law enforcement agencies and instead of feeling sense of responsibility and uprightness and honesty, they are, even today, concealing the facts while appearing in this Court.”\textsuperscript{193} Unsatisfied with the investigation being carried out under senior police officials, the Court ordered that the Director General of Ranger, a serving general, and the Inspector General of Police, to be removed from their positions within three-days.\textsuperscript{194} In their place, the Court appointed a “reputable” police

\begin{itemize}
  \item \textsuperscript{190} Supreme Court of Pakistan, “Human Rights Cell” in *Supreme Court of Pakistan Annual Report 2012-2013*, 131
  \item \textsuperscript{191} Id
  \item \textsuperscript{192} *Suo Moto Case No. 10 of 2011* (Brutal Killing of a young man by Rangers in Karachi), PLD 2011 S.C. 799
  \item \textsuperscript{193} Ibid, paragraph 12
  \item \textsuperscript{194} Dawn, “SC orders removal of Sindh Rangers chief, IG police” (June 11, 2011)
\end{itemize}
officer to take over charge of the investigations against the officers implicated in the murder of the young man.\textsuperscript{195}

The second notable set of cases taken up by the Court concerned the rights of marginalized group that likely existed at the lowest end of the socio-economic strata. Transgendered individuals, or ‘eunuchs,’\textsuperscript{196} are often given away by parents in lower social strata to communities of such individuals, and end up earning a livelihood by begging, dancing or prostitution. Historically, these individuals faced tremendous difficulty in obtaining national identity cards, which are required for access to state health and educational facilities, as well as for voting. Further, without the identity cards, and given the discrimination faced by them, they had also been denied inheritance rights, or the right to hold property at all. After a police raid on such a community in Taxila in 2009, and subsequent reports of police torture, a human rights lawyer invoked the Supreme Court’s original jurisdiction for judicial redress of the rights of transgendered individuals.\textsuperscript{197} The Supreme Court under Chief Justice Chaudhry took special notice of the denial of fundamental rights to transgendered individuals through Constitutional Petition No. 43 of 2009, and more than twenty hearings were conducted over the next three years to ensure that their rights are protected.\textsuperscript{198} The Court directed the government to grant identity cards in which the individuals would be registered as a third gender, to ensure that they have the right to exercise their vote and have access to public health and educational facilities, and to help in tracing the parentage of the individuals to make sure they receive their share of movable and immovable property in inheritance. The Court declared that “eunuchs” are entitled to be

\textsuperscript{195} Suo Moto Case No. 10 of 2011, paragraph 12
\textsuperscript{196} The Supreme Court proceedings on this case referred to the individuals as ‘eunuchs’.
\textsuperscript{197} The Human Rights Lawyer, Aslam Khaki, Chairman of Islamic Welfare Trust, was later joined by a representative of the transgendered community, Almas Bobby, President Shemale Rights of Pakistan. Ibid.
\textsuperscript{198} Constitutional Petition No. 43 of 2009 (Petition Under Article 184(3) of the Constitution against molestation and humiliation of Eunuch and Restoration of their Fundamental Rights)
respected as equal members of the society, and stated the following in its judgment granting
them full citizenship rights:199

Needless to observe that eunuchs in their own rights are citizens of this country and subject
to the Constitution of the Islamic Republic of Pakistan, 1973, their rights, obligations
including right to life and dignity are equally protected. Thus no discrimination, for any
reason, is possible against them as far as their rights and obligations are concerned. The
Government functionaries both at Federal and Provincial levels are bound to provide them
protection of life and property and secure their dignity as well, as is done in case of other
citizens.

The Court’s active stand on extending citizenship rights had significant impact on legal rights
and social status of the community. Dressed in their bright and flashy dresses, eunuchs attended,
and addressed the judges, in several Supreme Court hearings. According to co-petitioner Almas
Bobby, a leader of the community, rather than beating and harassing them, as the police had
done in the past, they were treated with respect and fear at the police station after the Court’s
intervention.200

The discussion of cases above shows the Supreme Court’s ability to hold powerful elites
accountable and to protect citizens’ constitutional rights. In contrast to the pre-2005 period, the
Court was no longer wavering in its attempts to enforce constitutional norms against a sitting
government. Initially, the Court started off with accepting petitions, and passing highly
unfavorable ruling, against a powerful military regime. In Chapter 5, I explain how the Court’s
actions in this period initiated a movement that led to the collapse of the authoritarian regime in
2007-08. In the next phase, after the transition to democracy, the Court remained active in
checking the abuses of power by the civilian government. Most often this was done under the
Court’s Article 184(3) original jurisdiction, which obviated the need for cases to climb the
appellate ladder. This ensured that issue could be adjudicated by the Supreme Court while the
violation was still fresh or even ongoing.

199 Id, paragraph 2
200 Washington Post, “For transgender Pakistanis, newfound rights” (February 10, 2012)
Conclusion

The comparison of the Court’s jurisprudence in the pre-2005 and the post-2009 periods shows the fundamental transformation in the Court’s effectiveness. The Court’s most consequential cases in the pre-2005 period, discussed above, had served to legitimize usurpations of power by powerful elites, especially military generals. While the Court had intermittently attempted to enforce constitutional rights, such attempts were cut short by powerful actors, both during periods of civilian and military rule. In the post-2009 period, by contrast, the Court became a central actor in the political system, and passed a large number of consequential rulings against incumbent powerholders. Apart from the Court’s stand against the military regime, I have emphasized corruption and fundamental rights cases, in which powerful actors from the ruling elite were implicated. In particular, I emphasized the expansion of the Court’s Article 184(3) original jurisdiction during this period, which led to the generation of a rich caseload, and subsequently to the development of the Court’s jurisprudence in the areas of mega-corruption and fundamental rights adjudication.

In contrast to the pre-2005 period, the Court in the post-2009 period was more consistently effective in terms of holding powerful elites accountable. The Court, in this period, was not merely an instrument at the hands of the political elite wishing to legitimize their extra-constitutional actions. Instead, it carved out an autonomous space for itself, influencing which became increasingly difficult for incumbent powerholders. The Court more resolutely declared that its judgments, which were often detrimental to the interests of very powerful individuals and groups, were based on the Court’s enforcement of constitutional norms rather than on the dictates of necessity or expediency. While a large number of cases implicated the incumbent government between 2009 and 2013, the Court also passed highly unfavorable judgments against
other power constituencies, most notably the military. A Court with a rich caseload, as Pakistan’s Supreme Court during this period, is certainly overburdened, and its adjudication understandably invites criticisms of overreaching and inconsistency. I discuss these criticism in greater detail in the Conclusion chapter, but make a preliminary comment in this regard. As noted earlier, a court that overreaches is certainly an effective Court, in terms of its ability to check the power of the executive. Throughout the Court’s history, commentators have decried the inability of the Court to reach out and hold the power elite accountable. What is remarkable about the transformation of the Court is that within a span of half a decade, it developed an unquestionable ability to make powerholders accountable to the law. A court capable of removing from office an incumbent prime minister for failure to pursue corruption charges against an incumbent president, and which subsequently orders the arrest of the successor prime minister, is certainly reaching far, but also building the perception that no one is above the law in the political system.
From a relatively ineffective and peripheral actor in Pakistan’s politics in the early 2000s, the Supreme Court emerged at the end of the decade as an effective institution occupying a central position in the constitutional politics of the country. The main intervening event during this period that supported the rise of an effective court was the lawyers’ movement for the restoration of the judiciary. The focus of this chapter is on the formation and development of the legal profession in Pakistan, and in particular, on explaining the origins of its mobilization potential. I begin the chapter with an exploration of the ‘displacement problem’ related to the establishment of the legal professions in South Asia. I explain how the indigenous profession was displaced, and a new profession established \emph{de novo} by the British without native involvement. Through a historical analysis of the institutional development of the profession, I argue that the profession became indigenized through lawyers’ fortuitous role in public life in colonial India, in particular through their leading role in the decolonization movement. Given this role of confronting a powerful imperial regime which controlled the military and police apparatus in the subcontinent, the profession, I argue, developed a strong history of involvement in public affairs, an anti-authoritarian orientation disposed toward greater political rights, and an embeddedness in society and politics.

While there existed a legal profession in India before the arrival of the British, the modern legal profession, as it exists in India and Pakistan today, is not derived from it. The Mughal judicial system, and the legal profession associated with it, was completely displaced,
and a new legal system was established in its place by the British. The British had begun establishing courts in India even during the period of Company rule, nearly two centuries before India formally became a part of the British empire. For much of this period, until the latter part of the nineteenth century, the legal profession in India, associated with the British Mayor’s courts and Supreme Courts, remained purely English. The few Indian lawyers, or vakils, who practiced in separately organized lower courts during this period did not have high incomes or respectability in society.

And yet, soon after the inclusion of Indians in the profession at the higher levels starting with the establishment of High Courts in the latter half of the nineteenth century, lawyering became one of the most prestigious and prominent professions in India. In this section, I explain this remarkable transformation: from the complete erasure of the indigenous legal profession and its replacement by a foreign inspired and dominated profession, to its rapid indigenization and embeddedness in the early half of the twentieth century. I argue that this process was catalyzed by the public orientation of the profession, especially the involvement of lawyers in the decolonization movement, which was, as I explain, a historically fortuitous occurrence based on the nature of the colonial rule. After the failure of the Indian revolt in 1857, the military was taken under the control of the British, who, over time, developed strong institutions of governance over several parts of India. In this context, armed resistance against the colonial power was an impossibility, and the political space opened for lawyers, who could use institutional channels to engage in constitutional agitation against the British.

I define legal mobilization as the publically-faced activities of the legal profession. This includes activities through which the legal community actively seeks to influence the larger public sphere. For example, routine meetings of bar associations, in which the narrow corporatist
interests of the profession are discussed, are excluded. However, even bar association elections, if they involve contestation on issues relevant to the public, are included. In addition, public-facing declarations on political issues during routine bar meetings are included in the concept. Further, certain publically-oriented activities of the bench can also be characterized as legal mobilization, if such activities seek to influence the larger public sphere. For instance, as noted in Chapter 6, the exercise of *suo moto* jurisdiction, inviting journalists to attend court sessions, and publishing official Urdu translations of court judgments, were all attempts by the Supreme Court of Pakistan to mobilize the law in the public sphere.

The exploration of the case study of Pakistan is a model-building exercise, in an attempt to answer the following questions: what enables lawyers to engage in contentious mobilization against the state, and under what conditions is such mobilization effective. In this chapter, I explore the relatively recent formation of the profession in the sub-continent, and attempt to trace the origins of its mobilization potential. In section I, I describe the nature of the pre-colonial legal profession in India. In section II, I show how the British established a new legal system in India, including a new legal profession that was initially dominated by English lawyers. In part III, I describe the process which led to the dominance of lawyers over public life in the subcontinent in the early half of the twentieth century, especially with reference to the role played by lawyers in the nationalist movement. In section IV, I focus on the political activities of the Lahore High Court Bar Association (LHCBA), the major association inherited by present-day Pakistan. I demonstrate through historical examples that the orientation developed during the formative period of the movement impacted the post-independence activities of the profession. Throughout the latter half of the twentieth century, members of the LHCBA remained active in
public life, and mobilized against both dictators and civilian elites on consequential political and constitutional issues.

I. The Legal Profession in Pre-Colonial India

Whether a legal profession existed in India before the arrival of the British is a matter of scholarly debate.\textsuperscript{201} Often, the successful resolution of such questions is hindered by the unavailability of historical record or a differential availability of facts to scholars. But, even where commentators agree on the available facts, there can be disagreement about the nature of a historical phenomenon. On the question of lawyering in pre-colonial India, the resolution of the issue one way or the other revolves around two sets of assumptions. First, it will depend on what one considers to be essential to the definition of the ‘legal profession’ or to ‘lawyering.’ Second, based on an assessment of the facts, whether one believes that whatever legal activity did exist at the time could have morphed into a more developed system of lawyering even without colonial involvement. Below, I first consider the definitional problem and then proceed to analyze the nature of the lawyering in pre-colonial India.

There can be a number of features that can be included in the concept of ‘legal profession’: representation of a client in a legal matter for fees, regulation of representation by a court or the state, licensing of practitioners, certification by an educational institution, and organization into a corporate body.\textsuperscript{202} In discussing the question of the existence of a ‘legal


\textsuperscript{202} For an account of the development of the legal profession in England and the Unites States, and how these aspects historically came to be associated with the practice of law in the common law tradition, see John Langbein, Renee Lerner, and Bruce Smith, \textit{History of the Common Law: The Development of Anglo-American Legal Institutions} (New York: Aspen Publishers, 2009). Their account shows that developments in the profession were
profession’ in pre-colonial India, I assume what is essential to the concept of lawyering is representation of a client in a legal case for fees.\textsuperscript{203} Further, to the extent we find such representation was also regulated by the state, there should remain little doubt that we are indeed observing an instance of lawyering at work.

Do we then find instances of representation of clients for fees in Mughal India? The answer depends on where within the governance structure of Mughal India we look. As discussed in the previous chapter, the Mughals installed an effective administrative and judicial system to govern an extensive empire, which, under Akbar (1556-1605) had probably been the most powerful empire in the world.\textsuperscript{204} To govern the vast empire stretched across the subcontinent, the Mughals instituted a tiered structure of government with four levels: the central government, provinces (\textit{subahs}), districts (\textit{sarkars}), \textit{parganas}, and the villages.\textsuperscript{205} Even though officials appointed by the central government existed at all tiers, the administration of justice by the Mughal state was sparse at the lower levels.\textsuperscript{206} At the \textit{pargana} level and below, it appears that traditional dispute resolution methods (such as the \textit{panchayat}) and customary law were much more significant than the Mughal legal system. Since there were no courts of law at the local level, the question of the existence of lawyering at the rural level does not arise.

\textsuperscript{203} I argue that this is what is essential to the profession. Considering the history of development of the profession, other aspects of professionalization may have emerged elsewhere owing to fortuitous circumstances. For instance, professional law schools emerged earlier in the United States than in England, even though there were Inns of Courts in the former. See Langbein, John, Renee Lerner and Bruce Smith. 2009. \textit{History of the Common Law}. Wolters Kluwer Law & Business

\textsuperscript{204} See Atul Kohli, \textit{State Directed Development: Political Power and Industrialization in the Global Periphery} (Cambridge University Press, 2004), 223

\textsuperscript{205} Muhammad Basheer Ahmad, \textit{The Administration of Justice in Medieval India: A study in outline of the judicial system under the Sultans and the Badshahs of Dehli based mainly upon cases decided by medieval courts in India between 1206-1750 A.D.} (The Aligarh Historical Research Institute, 1941).

\textsuperscript{206} Philip Calkins, “A Note on Lawyers in Muslim India,” in \textit{Law and Society Review, Special Issue Devoted to Lawyers in Developing Societies with Particular Reference to India} (Vol. 3, No. 2/3; Nov 1968 – Feb 1969), 406
At the upper levels of the system, we find a well functioning legal system comprised of *qazi* courts. It is at this level that we find the existence of lawyering in the persons of *vakils*, who assisted clients in various legal matters. There were two broad categories of professionals known as *vakils*, who specialized in different kinds of legal practices. The first category includes individuals who specialized in the art of negotiation as well as those that assisted their clients in gathering information. While these *vakils* were representatives of their clients, they did not plead cases before a court of law on behalf of the client. Instead, they engaged in activities including negotiating deals, such as to obtain trading privileges. Such *vakils* were often employed by the landed elite, prominent traders, and nobles to attend the court of the governor of the province to both collect information and represent the interests of their clients. The British East India Company was represented through such a *vakil* at Murshidabad in negotiating its trading interest in Bengal. His task was to negotiate the tribute that the Mughal government required the Company to pay, and to assess the value of presents that would have to be paid to government officials to facilitate their trading activity. In addition, the *vakil* in this case was expected to assist the Company’s representative in case of a dispute with the government, including by presenting the case before the office of the governor. This kind of *vakil*, who was not primarily a courtroom lawyer, is similar to the modern transactional lawyer who specializes in structuring transactions on behalf of clients rather than in pleading cases before tribunals. However, just as in the contemporary context, the role of such lawyers cannot be diminished just on the basis of their disconnect from the courtroom.

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207 Ibid., 404-405
208 Other transactions in which vakils assisted in negotiation include “a reduction of the revenue demand, a military alliance, or a favorable decision in a civil or criminal court of law.” Ibid., 405
209 Ibid., 405. Further Ahmad notes that the East India Company was also represented by lawyers before the Emperor’s Court. See Ahmad, *Administration of Justice*, 190
The second kind of *vakil* in the Mughal period performed functions of legal representation in the *qazi* courts. While there were fewer such *vakils*, there were certainly enough for the state to regulate their duties in two important codes of this period: *Fiqh-e-Firoz Shahi* and *Fatawa-e-Alamgiri*.\(^{210}\) *Vakils* had a right of audience at the *qazi* courts, and the client was permitted by the Firoz Shahi code to withdraw the power of representation given to the attorney. While it is difficult to estimate the number of *vakils* in India in the Mughal period, there seemed to have been sufficient numbers to catch the eye of a mid-17\(^{th}\) French traveler, Francois Bernier, who wrote, “They have fewer lawyers, and fewer lawsuits, and those few are more speedily decided.”\(^{211}\) There is also a record of a number of cases that were argued before the court by *vakils* in the Mughal period.\(^{212}\)

*Vakils* were also employed by the Mughal government during the reign of Shah Jahan (1628-1658) and Aurangzeb (1658-1707) as representatives before the court in civil cases against the state. During Aurangzeb’s reign, these government advocates, known as *Vakil-e-Sarkar* or *Vakil-e-Sharai* were instituted in every district, and were appointed by either the provincial Chief Qazi or occasionally by the Chief Justice. These *vakils* were sometimes assigned an additional duty to assist indigent clients, who found it difficult to fight a legal battle against more powerful adversaries.\(^{213}\)

From the account above, it is sufficiently clear that the legal profession existed in pre-colonial India. While there were no bar associations, licensing regimes, or professional schools,
the essential feature of lawyering, the representation of clients in legal matters for fees, certainly existed. A further question, which I do not purport to fully address here, is whether there was sufficient legal activity in pre-colonial India to permit the development of a more sophisticated legal profession. Assuming further modernization of the economy and deeper state penetration in the periphery, it is at the very least imaginable that the profession would have become more specialized and organized even without colonial intervention.

II. The De Novo Establishment of the Legal Profession in Colonial India

While there existed a legal profession in Mughal India, the profession as it exists in modern South Asia cannot be traced to the pre-colonial practice of law. Soon after the arrival of the British in the subcontinent, and nearly two centuries before assuming formal control of the territories of the East India Company in 1858, the British government had already set up courts in India. The process of legal development during this period was characterized by the de novo establishment of a new legal system in India by the British. Initially, the British developed the system in the few areas under its control in the eighteenth century. Ultimately, in the nineteenth century, the institutional apparatus of the pre-colonial system was disbanded and replaced with the colonial judicial system.

The peculiarities of legal development in this period, as well as of the method of imperial takeover, led to a near complete disconnect between the pre-colonial and the modern legal

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214 This, of course, is dependent on a larger inquiry into whether the Mughal India could have morphed from an agrarian bureaucracy to an industrialized economy without colonial intervention. Kohli argues that it is difficult to sustain the proposition the Mughal India was on the verge of an Industrial revolution. This, however, is consistent with the possibility that the Indian economy could have modernized over time, even without the colonial interlude. See Kohli, State Directed Development, 224

215 Indeed, Kohli notes that prior to the British assuming formal control, the East India Company had laid the “essentials of empire over the subcontinent: centralized authority, backed by organized armed forced and a civil service.” See Kohli, State Directed Development, 227
profession in the subcontinent. The British experience in India can be roughly divided into three periods: the mercantile period (1612-1757); the Company Raj (1757-1858); and, British Raj (1858-1947). The origins of the profession lie in the mercantile period, during which the British established courts in three ‘presidency towns’: Bombay, Madras and Calcutta. Several factors relating to the particular institutional context meant that the profession began as purely English, and the bar and bench at the higher levels remained English for more than a century until the establishment of the High Courts in 1862. While there were Indian vakils who practiced in the lower mofussil courts in territories outside the presidency towns, as discussed below, there was little contact between the profession in the towns and the periphery. The ultimate shape and culture of the profession was much more defined by the bar and bench at the higher levels, to which Indians were gradually inducted starting the late nineteenth century. The establishment of the legal profession in colonial India can be divided into three periods, which are discussed briefly below.

The origins of the legal profession as it currently exists in the subcontinent can be traced to the establishment in Bombay of the first British court in India in 1672. Governor Gerald Aungier appointed George Wilcox as the Attorney General, and it appears that a significant number of cases involved inheritance matters. As the Bombay court started work, there were four lawyers associated with the court who were of Portuguese origin. Before the arrival of the British, the area had been under Portuguese rule for more than a century, and the four lawyers were trained in Portuguese civil law. In addition, there seems to have been some concern about “a plague of speculative solicitors” who professed knowledge of the law, and to contain which, a request was made to the East India Company by the Governor for the appointment of a legally

trained Judge Advocate. The Company’s directors, however, believed that a growth in the number of lawyers and lawsuits in the colonies would lead to a “stirring up of strife and contention.” So strong was the concern about lawyering leading to disorder that the Company directed the Bombay Council to encourage litigants to prepare their cases without attorneys, and to try to limit admission to attorneys to the practice of law in the British court by first vetting their character and reputation. Meanwhile, under the administration of the Company, courts were also set up in Madras and Calcutta during this early period.

An important event in the early stages of the development legal profession was the establishment of Mayor’s courts through the Royal Charter of 1726. Through the Charter, courts were established in the three presidencies, which brought uniformity to the judicial system being developed in the regions. These crown courts in Bombay, Calcutta, and Madras were primarily for cases involving European litigants. However, their jurisdiction could be invoked for Indians if both parties agreed. The Mayor’s courts were staffed by the mayor and nine aldermen, who had little by way of legal training and were appointed for short terms. Often, the lawyers who practiced before the bench seemed to be confess greater legal knowledge than the judges. Hence, even with the establishment of these Courts, no impulse was felt by the Company for encouraging the further growth and development of the legal profession.

217 Schmittherner, “Legal Profession in India,” 339
218 P.B. Vachha, Famous Judges, Lawyers, and Cases of Bombay (New Delhi: Universal Law Publishing, 1962), 8. It is noteworthy, as Schmitterhener points out, that the perception of lawyering as leading to strife and contention is related to the “disreputable state of the bench and bar in England during the years of the Restoration.” See Schmittherner, Legal Profession in India, 339
219 Roy, Tirthankar. “Law and Economic Change in India, 1600-1900,” in Debin Ma and Jan Luiten van Zanden (eds), Law and Long-Term Economic Change: A Eurasian Perspective (Stanford University Press, 2011), 128
220 The Council in Madras, in arguing for the desirability of staffing the Mayor’s courts with legally trained judges, explained the following to the Directors of the Company, “As the colony increased with the increase of commerce and of territory, Causes multiplied and became more complex. The judges now felt the want of experience, and even of time sufficient to go through their duties. New points constantly arose which required legal as well as mercantile knowledge: men who professed or pretended to this knowledge were therefore introduced as Attorneys, and gradually obtained considerable influence in Courts where the judges pretended to no legal skill.” Fort St. George to the Company (P. to Eng., vol. xxxii, 15th April, 1791), quoted in Henry Love, Vestiges of Old Madras 1640-1800 (Indian Record Series), 427
It was during the second phase of the development of the colonial legal system in India, which started with the establishment of the Supreme Courts, that the English legal profession began to flourish in British India. The first Supreme Court was set up in Calcutta through the Royal Charter of 1774. This was followed by the establishments of the Supreme Court in Madras in 1801 and in Bombay in 1823. These courts had wider jurisdiction than the Mayor’s courts in both civil and criminal law matters.221 It was after the establishment of these courts that the first English barristers came to India. Initially, the barristers came to India on judicial appointments rather than to practice as lawyers. However, within a few decades, lawyering had become a highly lucrative profession, attracting a number of barristers from England to set up practice in the three presidency towns. Interestingly, the fees charged by advocates in India were even higher than those earned by lawyers in England at the time. Reports from the period suggest attorneys’ fees ranging from two to seven times higher than those earned in England.222 When the bench tried to limit the high fees charged by the lawyers, the bar mobilized to protect their income.223 Hence, one of the first instances of protest by the bar in India was motivated more by pecuniary considerations than by a concern for the rule of law. Lawyers, of course, could charge the high fees because they had clients who were capable of paying such fees. In this period, the most lucrative clients for the senior members of the bar were traders and moneylenders. The factory towns were brimming with mercantile activity and investment, and traders, in particular,

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221 Tirthankar notes that the establishment of Supreme Courts was an important step in the adjudication of contract law cases in colonial India. He notes that section 13 of the charter “introduced the term contract in Indian statutes in an explicitly commercial context.” See Tirthanker, “Law and Economic Change in India,” 138

222 An 1823 report noted that fees in Bombay were seven times higher than in England. Similarly, the Indian Law Commissioner’s report of 1844 noted, “the rate of bar fees being two, three-five times what it is in England.” See Schmittherner, “Legal Profession in India,” 346

223 Ibid., 347
made great wealth. While disputes presented an opportunity for lawyers to capture some of the wealth created in these factory towns, their incomes were less than those of traders.\textsuperscript{224}

During this period, which lasted until the setting up of High Courts in the mid-nineteenth century, the legal profession was wholly English. The only Indians associated with the Supreme Courts during this period were a handful of solicitors in Calcutta, and the Hindu pandits and Muslim qazis who provided assistance to the court in matters of religious law. The profession, as in England, was divided into barristers and solicitors, with only the former engaged in pleading cases before the court. Young lawyers who wished to practice in India joined the law offices of a senior lawyer, and normally worked for a few years before receiving a recommendation to practice. In order to be admitted to practice, the recommendation of a judge or a high official was required. At this stage, the profession was as yet unregulated, since the charters that established the courts mainly dealt with the affairs of the judiciary.

\footnote{224}{Ibid.}

\footnote{225}{Schmittherner, \textit{Legal Profession in India}, 349}

While Indians were not part of the higher judicial apparatus at the Supreme Court level, they were not completely excluded from the British legal system. Starting 1772, the British set up \textit{mofussil} courts in areas outside the three presidency towns.\textsuperscript{225} At the lower levels of this system of courts, the judges and lawyers were both Indians. However, the judges of the apex court, known as the \textit{Sudder} court, were recruited from the British civil service. Initially, lawyers at the \textit{Sudder} court level were Indian. However, legislation in 1846 allowed barristers to practice in these courts, which further expanded the opportunities for high incomes for the English lawyers. In contrast to the \textit{vakils} who practiced in Mughal courts, the practice of \textit{vakils} in \textit{mofussil} courts was highly regulated through a series of legislation. The prestige of the profession at this level was quite low. One commentator describes the general perception of
lawyers at this level: “The... whole public looked down upon [pleaders] as pests, but they were constantly employed because they were the only available guides in the new legal labyrinth.”

Some leaders of the time raised concern that vakils assisted their clients in stirring frivolous litigation as tools of intimidation. Hence, for native lawyers during this period, the legal profession in India was quite unlike the highly respectable and lucrative profession practiced by British barristers. While certainly a source of income, practicing as a vakil at one of the mofussil courts was hardly a sign of respectability or a means of entry into public life.

While English attorneys had built up quite successful practices in India by the mid-nineteenth century, it is difficult to claim that the Indian legal profession had yet been established. Only at the lower levels of the legal system did Indians have a significant presence, and the profession at the top remained purely English. The major turning point with regard to Indian participation in the system came after the end of Company rule in 1858, when India formally became a part of the British Empire. Soon after assuming direct control, the British government set up a new system of High Courts, which unified the two separate systems of Supreme and suudder courts that the British had set up in the territories administered by the East India Company.

The most notable aspect of this unification with regard to the development of the legal profession in India was that the Indian vakils were allowed to practice in the High Court system. As expected, the inclusion of Indian lawyers in the unified system caused some disconcert among English barristers, who had hitherto enjoyed a monopoly at the Supreme Court level. While they tried to resist equality with Indian attorneys, there were staunch advocates of

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226 Percival Spear, *Twilight of Mughals*, 95, quoted in Schmittherner, “Legal Profession in India,” 353
227 Vacchha, *Famous Judges, Lawyers, and Cases of Bombay*, 43
228 Schmittherner, “Legal Profession in India,” 356
equalizing the opportunity to practice the law. One of them was Judge Trevelyan of the High Court of Calcutta, who firmly believed that the further development of the profession would be possible through encouraging competition, and non-meritocratic exclusion would lead to ‘class antipathies.’ He thought that the leading English attorneys resisting an inclusive policy were misguided, since they would still be able to retain the highest paying clients in India. At the same time, he was an advocate for the further development of the ‘native Bar,’ which he believed would develop in the model established by the English barristers.  

The opportunity to practice law alongside English lawyers in the new system was of tremendous importance in the development of the Indian bar. Since the institutional apparatus had already been established without their participation in the Supreme Courts, Indian *vakils* had to learn not only substantive aspects of the law, but also the conduct of legal practice in the courts and the traditions of the English bar. High Courts were set up sequentially in various parts of British India. The first three were set up in 1862 to replace the Supreme Courts in the presidency towns: Calcutta, Bombay and Madras. The system was then replicated by the establishment of High Courts in Allahabad in 1886, in Patna in 1916, and in Lahore in 1919.

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229 Judge Trevelyan advocated for the meritocratic inclusion of Indians as follows: “At present barristers, attorneys and vakils plead before the Sadr Court while barristers have exclusive audience before the Supreme Court.... It would be hard to deprive the natives of the privilege they have long enjoyed of employing a cheap and rapidly improving, though still generally less efficient description of the agency; and I am confident that English barristers do not require exclusive privileges to enable them to maintain their position. They are employed now by all who can afford it and will continue to be so. The same objections exist to this limitation as to that proposed in reference to the eligibility for the bench. We cannot afford the weakness consequent upon social heart burnings. We want, for the improvement of all, the wholesome influence of competition. A native Bar will gradually be formed, but it will be following the lead and imitating the example of our English barristers.” B.S. Baliga, Studies in Madras Administration 346 (1960), quoted in Schmittherner, “Legal Profession in India,” 356

230 Professional affinity often trumped the English-Indian divide, and several Indian lawyers expressed appreciation for their English mentors. Vachha states in his history of the Bombay bar: “Even while the Government of India was imperialistic and irresponsible, the British legal tradition, which came to India with the British lawyers and judges, introduced the great democratic principle of the Rule of Law, which tended to limit and control measures and methods of the executive… It must be admitted that the development of law and the establishment of high standards of professional conduct in the High Court, in the first instance, have been to a large extent due to the example of British barristers who… brought with them to India what was most desirable in the practice and traditions of the English bar.” Vachha, *Famous Judges, Lawyers, and Cases of Bombay*, 357
After the establishment of the High Courts, the profession grew rapidly. By the early twentieth century, law became the most prominent profession in India. In fact, in 1916-17 there were more students in law schools in India than students in all other professions combined (see table 3.1). This trend continued till the 1930s, when the combined growth in other professions superseded the growth in the legal profession. The remarkable growth of the profession can be explained by the volume of legal work and the high prestige of the profession in Indian society. Several scholars have studied the ‘success’ of British courts in India, in terms of the high volume of litigation.231 In 1881, when only three high courts had been established, there were already 1.6 million civil suits in the India.232 Over the next two decades, by 1901, the number of suits exceed two million. An attorney could make a successful living by practicing in one of the High Court systems. In the late nineteenth and early twentieth century, when a salary of a hundred rupees per month was sufficient for a person to be considered rich, lawyers earned several hundred or even thousands of rupees a month. One lawyer from the period notes that the first fee he earned was for Rs. 300, and that a lawyer could be retained for fifty rupees on average for a civil suit.233 At the top of the profession, lawyers such as Motilal Nehru, earned in the thousands of rupees while in his thirties and in hundreds of thousands of rupees in his forties.234 In addition to being a lucrative profession, lawyering also brought with it the opportunity to engage with public life in India. As explained below, after the setting up of the High Courts, and of the inclusion of vakils

232 Schmittherner, “Legal Profession in India,” 357
233 Ibid., 370
234 One of the most successful lawyers of the period was Chittaranjan Das, who at the height of his career in 1920, is reported to have earned Rs.50,000 per month. In 1921, Das gave up his legal career to become a leader of the non-cooperation movement initiated by Gandhi. Ibid.
at the higher level of the legal system, lawyering became the most prestigious profession in India, comparable only to the Indian civil service.

Table 3.1
Students in professions in India 1911-1940

<table>
<thead>
<tr>
<th>Year</th>
<th>Law Students</th>
<th>Students of Other Professions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1911-12</td>
<td>3,036</td>
<td>3,135</td>
</tr>
<tr>
<td>1916-17</td>
<td>5,426</td>
<td>4,595</td>
</tr>
<tr>
<td>1921-22</td>
<td>5,234</td>
<td>6,755</td>
</tr>
<tr>
<td>1931-32</td>
<td>7,151</td>
<td>7,954</td>
</tr>
<tr>
<td>1939-40</td>
<td>6,749</td>
<td>10,378</td>
</tr>
</tbody>
</table>

III. ‘Vakil-Raj’: Law and Public Life in Colonial India

We have seen that the establishment of the legal profession in India was not an indigenous phenomenon. The legal system which had existed in India under the Mughals and the Delhi sultans was displaced under the British, and a new system of courts was established starting the seventeenth century. The legal profession began to grow around the new British courts, and for about two centuries, remained purely English. And, yet, within decades of the establishment of High Courts, which allowed for Indian lawyers to practice alongside English lawyers, the legal profession had become the largest and most prominent profession in colonial India. Already in the early part of the twentieth century, British administrators and their loyal princes began to raise alarm at what was called ‘Vakil-Raj’ or the ‘rule of the lawyers,’ which they thought could undermine the power of the British government.

235 Source: Schmittherner, “Legal Profession in India,” 372
This transformation, of a externally instituted profession that did not even permit the entry of natives, to the largest and most respectable one in India, is a remarkable historical phenomenon. One explanation for the prominence of the profession is certainly the litigiousness in the Indian society, which created an opportunity for the growth of the profession. However, it was not sheer numbers that led to the indigenization of the profession in India. The legal profession, I argue, became embedded and flourished because of the prominent role lawyers played in public life in British India.

The tradition of active involvement in public life by Indian lawyers was set by the first generation of Indian lawyers who practiced at the High Courts. Prominent among these were barristers who, after completing their legal training in England, had returned to India to practice law. The first few barristers who went to England were supported by the Parsi philanthropist Sir Rustomji Jijebhoy, who presciently believed that lawyers would assume positions of leadership in Indian society. Among the five men he sponsored were Womesh Bonnerji, who became the first president of the Indian National Congress in 1885, and Pherozeshah Mehta, who served as the sixth president of the Congress. Another early example is Badruddin Tyabji, who completed his bar-at-law and returned to India in 1867. Tyabji led an active public life and participated in several political and social movements of his time, later becoming the third president of the Indian National Congress in 1887.

There were two important factors that predisposed lawyers to participation in public life in British India. First, the method of British imperial governance in India was direct, bureaucratic, and rules-oriented. Once the British had successfully put down the ‘mutiny’ of 1857, and assumed direct control of the subcontinent, a sophisticated institutional setup was

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236 Schmitterner, “Legal Profession in India,” 365
237 Vacchha, *Famous Judges, Lawyers, and Cases of Bombay*, 85
established to govern India. While there were instances of extra-legal action such as the Jalalianwala Bagh massacre of 1919, in which British General Dyer ordered the army to open fire on a crowd of nonviolent protestors killing nearly a thousand people, the general approach to governance was institutional and legalistic. Hence, contentious politics often revolved around various acts or bills passed by the British which affected the interests of the Indians as a whole, or of groups within the population.\footnote{Politics revolved around various conferences, legislations, and commissions. For example, the Rowlatt Act of 1919 (Anarchical and Revolutionary Crimes Act, 1919) was a highly resented and unpopular legislation passed by the imperial government, authorizing the imprisonment of suspected terrorists without trial.} Lawyers were ideally placed to navigate through constitutional and parliamentary procedure, given both their legal training and command over the English language.

The second factor which disposed lawyers to public engagement was that they had biographical availability\footnote{The concept of biographical availability is defined and explored more fully in section III of this chapter. Briefly, it means freedom for various types of constraints which allow an individual to participate in social movements.} in comparison with certain other professions. The most important comparison is with the civil service, which was a highly prestigious profession in India, and one which would also seem to lead to an active interest in public life. Government service, however, was full-time employment, and did not permit the kind of flexibility that was needed if one wanted to simultaneously engage in public life. Further, as time went on, engaging in public life increasingly meant espousing nationalism and challenging the British government, which would have had adverse consequences for professional growth of bureaucrats. Lawyers, on the other hand, were employed in the private sector and depended on their clients rather than the government for their income. Challenging the government would not automatically affect their career negatively, as long as they were able to maintain a client base. Further, lawyers also had the flexibility to design their lifestyle according to their particular interests. For example, Pherozeshah Mehta, one of leading lawyers in Bombay in the late nineteenth century and sixth
president of the Congress, lived an aristocratic lifestyle, usually starting his work day at 3pm. Such lifestyle was not possible for government employees, including civil servants and judges, who had to live a more routinized life which was less compatible with concurrent engagement in public life.

From the late nineteenth century onwards, lawyers dominated public life in British India. In the earlier phases, lawyers spearheaded voluntary activities through associations and institutions dedicated to education and other philanthropic objectives. In addition, lawyers actively joined the provincial legislative councils set up by the government, and engaged in the constitutional politics affecting the interests of the subject population. At the earlier stages, as noted earlier, there was still faith in the political leadership about the representation of Indian interests within the British governance system.

As the Indian bar became larger and more powerful, lawyers began engaging in constitutional agitation which was aimed at the unpopular policies of the British government. As early as 1912, the Lieutenant General of Bengal Sir Andrew Fraser wrote of “Vakil-Raj” or the ‘rule of the lawyers’ which he saw as potentially undermining the power and legitimacy of British rule in India. Fraser wrote:

> Throughout the country there is a growing distrust in what is called Vakil-Raj (the rule of lawyers). This power of the Bar is regarded by people generally as a power which undermines the prestige and diminishes the beneficence of British rule. Loyal men fear it; and many, who, without being very enthusiastically loyal, have a stake in the country, resent it exceedingly.”

Vachha writes of Mehta’s lifestyle: “At heart he was an aristocrat; and his ways and habits were aristocratic. He generally got up from bed towards noon; and was as meticulous in his toilet as a Prime Donna on the eve of a command performance. Active working-day for him commenced after 3 p.m. and continued far into the night, sometimes till midnight.”

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241 Andrew Fraser, Among Indian Rajahs and Ryots: A Civil Servant’s Recollections and Impressions of Thirty-Seven Years of Work and Sport in the Central Provinces and Bengal (London: Seeley & Co., 1911), 57
Further, writing of the influence lawyers have in local legislative councils, Fraser quoted the a conversation he had with the wealthiest and most influential pro-British Rajah of Bengal, Maharajah of Darbhanga, as saying,

> It is your policy which is to blame for the unwillingness of the Zamindars to take their place and state their opinions publically. You have thrown all the power into the hands of the pleaders. They rule the courts; they have all the power of the local bodies; and they have a practical monopoly of the Legislative Councils. We cannot oppose them.²⁴²

Fraser saw as dangerous the increasing separation of the executive and judiciary within the Raj, which he thought would further empower the lawyers. Echoing Fraser’s view on this issue, Sir A. T. Arundell argued that separation of the executive and judiciary would only lead to a strengthening of “native vakils scattered throughout the country who are the prime movers in political agitation and who welcome any change that furthers the interests of themselves and their class.”²⁴³

As the twentieth century drew along, the profession’s prominence in public life became even stronger. Lawyers were now at the forefront of the Indian nationalist struggle. As noted earlier, the first few men who led the Indian National Congress, including Banerjee, Tyabji, and Mehta were all lawyers. In his account of politics during this period, Cross notes, “a preponderating proportion of the delegates of the Indian National Congress have always been lawyers, for instance, at least twenty-two of those who attended the First Congress were of that profession.”²⁴⁴ This trend continued the period of the nationalist independence movement, with Mahatma Gandhi, Motilal Nehru, Jawaharlal Nehru, Vallabhai Patel and others leading the Congress in the decolonization struggle. Lawyers were also at the forefront in the Muslim League, including Muhammad Ali Jinnah, Muhammad Iqbal and Muhammad Shafi, who all

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²⁴² Ibid., 58
²⁴³ Quoted in Schmittherner, “Legal Profession in India,” 378
²⁴⁴ Cecil Cross, The Development of Self-government in India, 1858-1914 (University of Chicago Press, 1922), 141
served as presidents of the League. As the independence movement picked momentum, several lawyers dedicated themselves fully to public life. Gandhi was highly respected by members of the profession, and a large number of them responded to his call of giving up legal practice and dedicating themselves fully to public life. Given his commitment to non-cooperation, he argued in 1922, “I still feel that practicing lawyers cannot lead. They cannot but weaken a movement which demands complete, almost reckless, sacrifice. The whole cause can be lost if top men weaken at a supreme crisis.”

To ease the transition, Gandhi encouraged the setting up of funds to support lawyers who had joined the Satyagraha Sabha movement following the passing of the Rowlatt Act of 1919. Starting the 1920s, as the independence movement picked momentum, the lawyers leading the political campaign dedicated themselves fully to public life, and no longer had concurrent legal practices.

IV. Mobilizing the Profession: Political Activities of the Lahore High Court Bar

Soon after the establishment of the High Courts which allowed Indian participation in the legal profession, the Indian bar developed an orientation toward public life. In the section above, two phases of lawyers’ involvement in public life in colonial India were discussed. At first, lawyers tended to engage in practice and political activity concurrently. As the decolonization movement

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245 M. K. Gandhi, *The Law and the Lawyers* (Ahmedabad: Navajivan Publishing House 1962), 136. Regarding the involvement of practicing lawyers in the Congress, Gandhi wrote, “Letters continue to pour in regarding practising lawyers holding offices in Congress Committees. Ever since my arrival in Bengal, the question has been still more pressingly put to me. An ex-student from Dhubri writes to ask whether I expect the movement to succeed under the leadership of practising lawyers. I cannot conceive the possibility of the movement, which is one of self-sacrifice, succeeding if it is led by lawyers who do not believe in self-sacrifice. I have not hesitated to advise that electors rather than be ably led by such lawyers should be content to be more humbly guided. I can certainly imagine a brave and believing weaver or cobbler more effectively leading than a timid and sceptical lawyer. Success depends upon bravery, sacrifice, truth, love and faith; not on legal acumen, calculation, diplomacy, hate and unbelief.”

246 Ibid., 135-137
picked up pace, several prominent lawyers chose full time politics, and took up leadership positions in political parties. However, the political mobilization that became associated with lawyering also became a part of the profession itself during this period. Along with mobilizing the masses through political parties, lawyers also began engaging in contentious politics through bar associations. A large number of the activities of the bar organizations certainly focused on the narrow corporate interests of the members. However, there was significant mobilization through the bar during colonial period that focused on political issues beyond the immediate interests of the profession.

In this section, I take the example of the lawyers association at Lahore, which was established in the late nineteenth century. While the bars associated with the other five high courts in India were also very active, I focus here on the Lahore bar because it is the only one that Pakistan inherited from the British period. More importantly, it is the bar that played the most prominent role in the lawyers’ movement which led to the expansion of judicial power in Pakistan, as explained below in chapter 4. Hence, an examination of the historical role of this bar is important in understanding the development of the mobilization potential of the profession in Pakistan.

According to a history of the Lahore bar written by Rustam Sidhwa, a former judge of the Lahore High Court, the first evidence of the existence of a bar at Lahore is from 1882.²⁴⁷ A special meeting of the bar was convened to devise ways to curtail touting.²⁴⁸ Further, in 1883, a

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²⁴⁸ Touts were middle-men who helped connect clients to lawyers, and charged a fee from the latter for the service. They bar was concerned about unethical practices associated with touting. For example, Sidhwa notes that when a British lawyer returned home for summer recess, touts diverted his clients elsewhere by spreading the rumor that the lawyer had retired. Sidhwa notes the following about touting in the territories of Punjab, “Who is a tout and what is he? He is a person who acts as a sort of a broker or some form of agent to bring client and counsel together. For his services, he charges a fee from the counsel, which in some cases runs 50% of that charged and received by him. He has no loyalty or bonds with any one legal practitioner; he sells his client to the highest bidder. Since he is a rustic
letter was written to by Barrister CH Spitta to the Registrar of the Chief Court of Punjab, which noted that work had started work on establishing a Bar Library. After this year, there is no further record of the bar’s activities for nearly a decade. The next piece of evidence of the bar’s functioning is a letter addressed to lawyers, which is the first available record of an official correspondence from the bar association. The early years focused on such activities as building the bar association rooms, the bar library, regulating membership, and routing out touting. The power of the Indian bar associations increased significantly after the passing of the Indian Bar Council Act of 1926, which granted greater autonomy from the judiciary for regulation of the profession. In 1930s, the Lahore bar began developing an orientation toward engaging in political issues. At first, the bar’s actions were symbolic, and involved mainly passing resolutions during general meetings. Gradually, however, the bar began taking more active steps, such as setting up committees of lawyers to defend political prisoners.

In the years leading up to independence, one of the main areas of focus for the Lahore bar was political prisoners. While political parties had certainly mobilized on this issue, the bar also took strong actions to condemn the government’s actions and to aid the prisoners. For instance, in 1932, after the government suspended constitutional guarantees and there were a number of politically-motivated arrests, the General House of the bar stated on record its “sense of consternation and dismay on the virtual suspension of all Constitutional guarantees through recourse to Ordinance and otherwise as evidenced by the arrests of an alarmingly large number of citizens.” Further, the General House noted that, “unless the rule by Ordinances or Orders of the Executive [were] forthwith replaced by the rule of law, the peace and tranquility of the

and an ill-read man, his ways and methods are unscrupulous. He had many sub-agent working under him and apart from finding possible litigants at source, he will pirate those who are looking or intended for particular legal practitioners of their own choice.” Ibid., 213

249 Schmittherner, “Legal Profession in India,” 360

250 See Sidhwa, *The Lahore High Court*, 182
country [would] be gravely imperiled.” A few days later, a committee was appointed to assist the political prisoners in the legal proceedings against them.\textsuperscript{251} The issue of political prisoners came up several times during these years, when the independence movement was at its peak. Annex 3.1 notes a few of the instances in which the bar mobilized to assist the prisoners against the British government.

Post-independence, the public orientation of the bar remained strong. Sidhwa notes that as the country alternated between military dictatorship and civilian rule, lawyers played an active role in “keeping a vigil on Government action bordering on excesses.”\textsuperscript{252} There are numerous bar-led episodes of contention against the government, which started soon in the post-independence period. Annex 3.1 includes a brief description of a number of such instances of mobilization by the Lahore bar. Soon after independence, the bar mobilized directly for judicial empowerment by mobilizing for the inclusion constitutional review powers for the judiciary in the new constitution, including the power to adjudicate human rights violations. The 1956 constitutional granted this jurisdiction to the courts in such matters. After martial law was declared in 1958, lawyers mobilized in support of restoring the judiciability of constitutional rights and judicial review of legislative acts. Later in the 1960s, lawyers publically criticized the regime for police repression, after the police fired on, and arrested, anti-regime protestors which included students. The bar also called for the removal of General Yahya Khan after the war of secession broke out in East Pakistan, and following his resignation demanded that he and his collaborators be condemned as traitors and punished. During the period of civilian rule starting the 1970s, following the arrest of outspoken lawyers by Prime Minister Bhutto’s government, lawyers observed a boycott of courts in which bar associations across the country participated.

\textsuperscript{251} The committee comprised of JN Agarwal, Mehr Chand Mahajan, and Malik Barkat Ali, Ibid., 184
\textsuperscript{252} Ibid., 183
The bar also disapproved of results of the 1977 elections, and called for the establishment of a judicial commission for investigation of rigging. When several anti-government protestors against the rigged elections were arrested and killed, the bar took out a procession, and cancelled the membership of those lawyers who had taken oath in the assemblies formed as a result of the elections. Contentious mobilization continued during the period of General Zia’s military rule in the 1980s, including the organization of national conventions for the revival of democracy and constitutional rights. During this period, owing to the banning of political activities through parties, members of the bar were at the forefront of the Movement for the Restoration of Democracy, which directly challenged Zia-ul Haq’s military regime.\textsuperscript{253} Agitation continued in the 1990s during the decade of democracy, including against the Bhutto government for failing to implement a 1996 Supreme Court judgment enhancing judicial autonomy, and against the Sharif government’s attack on the Supreme Court in 1997. Finally, as discussion in chapters 4 and 6, the bar mobilized in the early years of Musharraf’s rule against such actions as the issuance of the Legal Framework Ordinance and the 2002 presidential referendum.

Conclusion

Given its origins, the prospects for a strong legal profession in post-colonial South Asia, as in other parts of the postcolonial world, would appear bleak. The indigenous legal profession was displaced in colonial India, and an English bar established \textit{de novo}, which excluded native lawyers for more than a century. And yet, as the post-independence mobilization of lawyers demonstrates, the profession has a high mobilization potential, in being able to engage in high risk activism even against a repressive military regime. It is noteworthy that in the episodes of

\textsuperscript{253} Muneer Malik, \textit{The Pakistan Lawyers’ Movement} (Pakistan Law House, 2008), 2
contention described in section IV, the bar employed a varied repertoire of contention in mobilizing against the government. While a large number of resolutions were passed by the General House of the bar, more direct action was also taken on several occasions. Hence, even before the lawyers’ movement of 2007-09, the bar organized street protests, boycott of courts, and suspended membership of lawyers who sided with the government on issues that the bar had taken an anti-government position. The origins of this mobilization potential, as described above, lay in the development of the profession during the early half of the twentieth century, in which lawyers dominated public life, and led the mobilization for a project as grand as ousting a resourceful colonial power.
### Legal Mobilization By the Lahore High Court Bar Association, 1930-2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Issue</th>
<th>Public facing action by LHCBA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1930</td>
<td>Police repression on non-violent protestors</td>
<td>Resolution passed, and bar’s Executive Committee issues report on matter</td>
</tr>
<tr>
<td>1930</td>
<td>Political prisoners</td>
<td>LHCBA appoints committee to defend political prisoners</td>
</tr>
<tr>
<td>1931</td>
<td>Amnesty for political prisoners delayed by government</td>
<td>General meeting of bar called to discuss the matter, and General House calls on Governor-General to release prisoners</td>
</tr>
<tr>
<td>1932</td>
<td>Suspension of constitutional guarantees by government. Arrest of large number of citizens</td>
<td>Committee set up to arrange for legal assistance for political prisoners facing trial</td>
</tr>
<tr>
<td>1933</td>
<td>Death of political prisoners in Andaman Islands</td>
<td>General House meets and urges government to hold open enquiry into causes of death of political prisoners</td>
</tr>
<tr>
<td>1940</td>
<td>Unrepresented political prisoners</td>
<td>Committee of nine appointed to arrange for representation for the prisoners at trial</td>
</tr>
<tr>
<td>1945</td>
<td>Some members of Indian National Army faced trial for allegedly waging war against the British</td>
<td>Executive Committee met to consider the issue, and appointed a panel of six lawyers to help the prisoners.</td>
</tr>
<tr>
<td>1952</td>
<td>Power of courts in new constitution</td>
<td>LHCBA passed resolution to urge government to ensure High Courts vested with power to issue writs (e.g. habeas corpus, mandamus etc). Copies of resolution also sent to constituent assembly. The powers were granted in 1954 Act.</td>
</tr>
<tr>
<td>1955</td>
<td>Power to adjudicate human rights violations</td>
<td>Along with other bars, LHCBA urged government to vest expansive power in courts to adjudicate rights violations. 1956 constitution conferred jurisdiction on courts to issue writs and direction in these matters.</td>
</tr>
<tr>
<td>1955</td>
<td>Electoral process</td>
<td>Subsequent to formation of Election Commission, General Meeting appointed committee which submitted recommendations to Commission for holding free and fair elections.</td>
</tr>
<tr>
<td>1957</td>
<td>Constitutional structure</td>
<td>Bar set up committee, and passed resolution</td>
</tr>
</tbody>
</table>

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254 Compiled from sources including Sidhwa, *The Lahore High Court*; Malik, *The Pakistan Lawyers’ Movement*; Khan, *Constitutional and Political History of Pakistan*; the Lahore High Court Bar Association website; and newspapers including Dawn, The News, and The Nation.
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>Martial law regime restricts powers of courts</td>
<td>Bar urged government to restore justiciability of fundamental rights and judicial review of legislative acts.</td>
</tr>
<tr>
<td>1963</td>
<td>Sectarian conflict in Lahore</td>
<td>Finding the government response inadequate, the bar called on the government to appoint ‘high powered tribunal’ to investigate the causes and suggest policies to eradicate such conflict.</td>
</tr>
<tr>
<td>1966</td>
<td>Repression of protesting students</td>
<td>Following Taskhent Declaration signed by President Ayub, students protested in Lahore. Police fired on protestors, and arrested many. LHCBA publically condemned police repression, called for release of arrested students, and compensation for families.</td>
</tr>
<tr>
<td>1967</td>
<td>Arrest of protesting lawyers</td>
<td>A number of lawyers protesting against the Tashkent Declaration were arrested. Government publically condemned during bar meeting.</td>
</tr>
<tr>
<td>1968</td>
<td>Celebrations by martial law regime</td>
<td>Bar publically criticized the holding of celebrations of ‘Decade of Progress in Law’ by the government, and declared that members of higher judiciary ought not to participate if they wish to uphold the independence of the judiciary.</td>
</tr>
<tr>
<td>1969</td>
<td>Political disturbance</td>
<td>Bar urged Round Table Conference to hold direct elections and establish federal parliamentary government. Bar urges government to initiate land reforms, and abolish feudalism. Politicians inciting the public to violence publically condemned by the bar.</td>
</tr>
<tr>
<td>1971</td>
<td>War of secession</td>
<td>After war broke out in East Pakistan, bar mobilized demanding the resignation of President Yahya Khan and for formation of a national government. After Yahya Khan resignation, bar publically called for punishing him and his collaborators as traitors.</td>
</tr>
<tr>
<td>1972</td>
<td>Government repression of lawyers</td>
<td>The new Bhutto government arrested outspoken lawyers who criticized its actions. Further, protesting students were beaten and their clothes stripped off by police. LHCBA arranged a protest march, which was attacked by government friendly mobsters, injuring ten lawyers. A special meeting was held, in which it was decided that lawyers would boycott courts until the provincial governor resigns. When nine lawyers failed to observe the boycott, their membership was cancelled, and the next day a general boycott was observed by bar associations across the country.</td>
</tr>
</tbody>
</table>
| 1977 | Rigged elections                                                       | LHCBA’s General House disapproved the results of the 1977 general elections, proposed the establishment
of a judicial commission to investigate malpractice, and called for the resignation of the Election Commissioner. It also condemned banning of public meetings and processions by the government.

<table>
<thead>
<tr>
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<th>Event</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>Police repression</td>
<td>Protestors against rigged elections were arrested and killed. Bar condemned government actions, and took out a procession of lawyers which was attacked by the police. Memberships of those lawyers who had taken oath in new assemblies were cancelled.</td>
</tr>
<tr>
<td>1980</td>
<td>Repression of protestors</td>
<td>Resolution passed by bar condemning killing of anti-martial law protestors, including students, by the regime. The bar called for ban on political parties to be lifted and immediate return to civilian rule.</td>
</tr>
<tr>
<td>1980</td>
<td>Amendment of constitution by martial law regime</td>
<td>LHCBA strongly protested against the proposed amendment to Article 199 of the Constitution delineating the jurisdiction of the High Court. A numbers of lawyers also went on strike.</td>
</tr>
<tr>
<td>1984-85</td>
<td>Army atrocities</td>
<td>LHCBA strong condemned killing and uprooting of students and other protestors being victimized by the army. The Executive Committee publically called for the restoration of democracy.</td>
</tr>
<tr>
<td>1986</td>
<td>Presidential referendum</td>
<td>LHCBA urged lawyers, as well as citizens generally, to boycott referendum held by martial law regime under Zia-ul Haq.</td>
</tr>
<tr>
<td>1996</td>
<td>Judicial Independence</td>
<td>When Prime Minister Benazir Bhutto openly criticized and tried to prevent implementation of the 'Judges Judgment' of the Supreme Court which enhanced judicial independence, the bar passed resolutions supporting the judgment and took a leading role in mobilizing for its implementation.</td>
</tr>
<tr>
<td>1997</td>
<td>Attack on Supreme Court</td>
<td>Lawyers condemned the attack on Supreme Court by workers of PML-N, which was in power at the Center. After the Prime Minister criticized the Chief Justice, he was found in contempt. In response, party workers stormed the Supreme Court and damaged the furniture.</td>
</tr>
<tr>
<td>2003</td>
<td>Constitutional amendments by military dictator</td>
<td>Lawyers protested against the Legal Framework Ordinance (LFO), through which the military sought to make changes in the country’s constitution.</td>
</tr>
</tbody>
</table>
In Chapter 2, I discussed the transformation of the Supreme Court from a constitutionally empowered yet politically peripheral actor in the pre-2005 period to a highly independent and effective institution after its restoration in 2009. In this chapter, I discuss the intervening events that led to the empowerment of the judiciary. The transformation began with activism within the court, and escalated with high intensity legal mobilization on the streets by lawyers throughout the country. The Pakistani bar, as described in chapter 3, had a history of anti-government mobilization, starting from the colonial period leading up to Musharraf’s takeover. The suspension of the Chief Justice in 2007 presented a political opportunity for a pro-judiciary social movement to emerge, which mobilized for a two-year period, leading to the restoration of a highly empowered judiciary and to a democratic transition in Pakistan.

In this chapter, I begin with an exploration of the origins of the movement, and discuss major events during the two-year period of mobilization.\textsuperscript{255} I then use protest event analysis to analyze the mechanics of the movement, including the frequency and geography of events, repertoire of contention, involvement of political parties, and the government’s response. Next, I attempt to understand the effectiveness of legal mobilization by comparing the lawyers’ movement in Pakistan with two other movements initiated by professional groups: the 1994 Egyptian lawyers’ movement and the 2011-2012 doctors’ movement in Pakistan. In section II, I

\textsuperscript{255} Some parts of this chapter have previously been published in the following: Daud Munir, “From Judicial Autonomy to Regime Transformation: The Role of the Lawyers’ Movement in Pakistan,” in Terrence Halliday, Lucien Karpik and Malcolm Feeley (eds), \textit{Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex} (Cambridge University Press; 2012)
discuss the mobilization potential of lawyers in comparison with other professional groups, arguing that the legal profession has a unique potential for engaging in contentious mobilization. Comparing the lawyers’ movement with the doctors’ movement in Pakistan, I argue that the legal profession is endowed with a resource profile which gives it a significantly higher mobilization potential than comparable professions. In section III, I explore the conditions under which legal mobilization is successful. Building on the historical analysis of the formation of the profession in South Asia in chapter 3, I argue that embeddedness in society and politics is an important asset for successful mobilization. Further, based on a comparison of the Pakistan lawyers’ movement with the 1994 Egyptian lawyers’ movement, I argue that autonomy from both the state and political society is essential for effective legal mobilization.

I. The Lawyers’ Movement in Pakistan

After nearly a decade of civilian governance in Pakistan, the military, led by Chief of Army Staff General Pervez Musharraf, overthrew the government of Prime Minister Nawaz Sharif on 12 October, 1999 in a bloodless coup d’état. Soon thereafter, a state of emergency was declared, and the new military regime issued a Provisional Constitutional Order (PCO). While a few judges of the Supreme Court refused to take oath under the PCO, the bench validated the coup, but gave a timeline for the military to return the country to civilian governance. In 2002, Musharraf held a controversial referendum on the question of his continued presidency, with official results showing that 97% of voters deciding in his favor.\textsuperscript{256} Thereafter, a pro-regime political party, the

\textsuperscript{256} The turnout was around 43.9 million, or 56\%, and 42.8 million of these voted “yes.” Opposition parties and human rights groups rejected the referendum on account of being both illegal and rigged. See BBC News, “Musharraf wins huge backing.” 1 May, 2002
Pakistan Muslim League Q, was cobbled together under the influence of the regime, which won 126 out of 342 seats in the 2002 general elections.

By 2007, the Musharraf regime seemed to have consolidated its grip over power in Pakistan. There were no signs of disunity within the military regime, as senior serving and retired military officials were happily ensconced as heads of key governmental institutions and business enterprises. Nawaz Sharif and Benazir Bhutto, leaders of the two largest political parties, were in exile and the parliament was controlled by regime-friendly parties. On the economic front, the country had experienced an average GDP growth rate of seven percent during the last four years. And, if foreign aid can be taken as an indicator of support from influential allies, the Musharraf regime received around ten billion dollars from the United States for its support in the War on Terror.257

In such an environment of consolidated authoritarianism, it was only the judiciary that seemed to be causing some annoyance to the executive. The Supreme Court, under the leadership of Chief Justice Iftikhar Chaudhry, had passed a number of rulings against the arbitrary use of power by the executive.258 The most important of these was the Missing Persons Case, which implicated Musharraf’s security and intelligence apparatus in forced disappearances of political adversaries and dissidents. Sensing the inconvenience involved in dealing with an activist court, Musharraf invited the Chief Justice to the military headquarters on March 9, 2007. Dressed in military uniform, and assisted by the Prime Minister and intelligence chiefs, he pressurized the Chief Justice to resign. In a daring and unprecedented step in the judicial history of the country, the Chief Justice refused to resign. Musharraf was infuriated. He forcibly detained the Chief

258 Apart from the Missing Persons Case, these included the privatization of Pakistan Steel Mills, and corruption cases in price control of sugar and oil.
Justice for several hours and suspended him through a Presidential reference with immediate effect. Meanwhile, an acting chief justice was sworn in.

After the suspension of the Chief Justice, bar associations in several parts of the country began protesting against Musharraf’s extralegal action. Three days after the suspension a precipitating event galvanized the incipient lawyers’ movement. As the deposed Chief Justice left his residence to face the Supreme Court bench hearing his case, a police car was waiting to take him to court. Chaudhry, however, refused to travel in the police car since he had received no formal order of detention. Since his own cars had been forklifted by the police, he attempted to walk to the court. At this point, the security forces manhandled him, dragging him by his hair and pulling him into the police car. This act was captured on film by the press, and widely circulated in Pakistani newspapers and displayed on news channels. As I learnt during interviews with several lawyers in Pakistan, the mistreatment of one of the most important symbols of the legal profession in the country motivated even apathetic lawyers to participate in the movement, leading to an eruption of protest throughout the country.

Hence began the lawyers’ movement for the reinstatement of the Chief Justice. Lawyers throughout the country boycotted courts and protested against the regime. The Chief Justice travelled around the country, addressing bar associations in order to motivate the lawyers. The media played a critical role by giving live coverage to the events and by debating the legality of Musharraf’s action. In July 2007, in the context of public opinion strongly mobilized in favor of the deposed Chaudhry, the Supreme Court passed a landmark judgment annulling the presidential reference and restoring the Chief Justice. Chaudhry resumed office in a court whose

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259 Muneer Malik, The Pakistan Lawyers’ Movement, 55
260 Interview with Justice Azmat Saeed, judge of Lahore High Court, 2008; Interview with Ahmer Bilal Soofi, Advocate Supreme Court of Pakistan, 2008
jurisprudence had fundamentally altered from legitimating de facto authority to upholding the rule of law and constitutionalism. Hence, the Chief Justice – restored on the platform of countrywide popular mobilization – felt emboldened enough to take up the case of Musharraf’s eligibility to get reelected as president while in military uniform.

Sensing an imminent decision against the constitutionality of his reelection, Musharraf imposed emergency rule in November 2007. This allowed him to suspend sixty judges of the higher courts in Pakistan, including Chief Justice Chaudhry. While the emergency decree began with a mention heightened terrorism in the country as justification for suspending constitutionally guaranteed fundamental rights, much of it focused on the activities of the judicial branch, which, it argued, was preventing the government from effectively running the country. The proclamation stated,

> Whereas some judges by overstepping the limits of judicial authority have taken over the executive and legislative functions…the humiliating treatment meted out to government officials by some members of the judiciary on a routine basis during court proceedings has demoralised the civil bureaucracy and senior government functionaries, to avoid being harassed, prefer inaction…I hereby order and proclaim that the constitution of the Islamic Republic of Pakistan shall remain in abeyance.  

Following the imposition of emergency rule, Musharraf’s security apparatus launched an offensive against Pakistan’s civil society. The legal community in particular came under attack.

Senior leaders of the lawyers’ movement were arrested soon after the promulgation of emergency rule, and deposed judges were kept under house arrest. Further, as reported by Human Rights Watch, lawyers throughout the country were “unceremoniously beaten, tear-gassed, bundled up into police vans, and locked up in police stations or jails in their thousands.”

Though brutally repressed by the regime, the lawyers’ movement continued to press the government for the restoration of the judiciary during 2008. As I show in the next section, lawyers continued mobilizing in the streets and boycotting court proceedings. In July 2008, the lawyers’ movement organized the first long march. Around 50,000 protestors from around the country converged to the capital to demand the restoration of deposed judges.\footnote{The Nation (Pakistan), “Marchers Overwhelm Islamabad.” (June 13, 2008)} Although initially planned, the central committee of the movement decided not to stage a sit-in, rendering the long march inconclusive. This led to a brief deflation in protest activity. However, the movement soon recovered. Given the erosion of his power during the last year, and facing especially a galvanized civil society, President Musharraf resigned in August 2008. A few weeks later, Asif Zardari was elected as President, after promising to restore the deposed judges. However, several months into his presidency, Zardari not only refused to reinstate the judges, but also appointed his party members as judges in higher courts.

The lawyers’ movement had not abated with the end of Musharraf’s rule. The lawyers now mobilized against the civilian president, and pressurized his government to fulfill the promises the PPP had made to reinstate the judiciary. In March 2009, the movement culminated in the historic second long march, in which opposition parties officially joined. This time, before the hundreds of thousands of protestors reached the capital, the Prime Minister announced the restoration of the deposed judges. Justice Chaudhry was reinstated for a second time as Chief Justice of Pakistan on March 22, 2009. As the following newspaper account shows, the lawyers’ movement officially ended with the reinstatement of judges:

After lawyers hard struggle of two long years the normalcy returned to the countrywide courts including the city as no boycott of courts and weekly rallies took place… It was completely a different day on Thursday as no one was stopping anyone from going to courtrooms to proceed their cases… Neither the lawyers leadership was seen busy in going from court to court to persuade judges and lawyers not to attend the cases…nor black-coats were wearing black
The Lawyers’ Movement 2007-09: An Event Analysis

As can be inferred from the discussion in the previous section, the initiation and endpoint of the lawyers’ movement in Pakistan can be temporally specified with certainty. The movement began with the suspension of the Chief Justice in March 2007 and ended with his second reinstatement in March 2009. This precision is the result of the single-issue nature of the movement. While the movement inadvertently played a critical role in spurring a transition to democracy in Pakistan, the principal aim of the movement was the reinstatement of deposed judges. Given contentious activity by lawyers fits neatly between the two temporal endpoints, event analysis is an ideal technique for understanding the nature and extent of the lawyers’ movement.

My event analysis of the Pakistan lawyers’ movement was based on coverage of protest events in The Nation, a widely circulated Pakistani English language newspaper.\textsuperscript{265} I defined a protest event for my analysis as a collective contentious action by lawyers in which they demanded the restoration of judiciary in Pakistan. Since the events I coded had to be collective, initiatives by individual lawyers were excluded. Further, lawyers’ actions had to be contentious, which I defined as being anti-government in orientation. Routine meetings of bar associations and pro-regime rallies were hence excluded. Since The Nation is a national-level newspaper, it only systematically reported events in the largest cities in Pakistan. Given this, I restricted my analysis to seven large cities in Pakistan where the movement was most active. Hence, a

\begin{footnotesize}
\begin{tabular}{ll}
\textsuperscript{264} & The Nation (Pakistan), “1\textsuperscript{st} Thursday sans lawyers protest rally.” (March 19, 2009) \\
\textsuperscript{265} & The Nation archives are available online through Lexis Nexis. Using the Lexis Nexis search function, I searched for all articles in The Nation which mentioned the term ‘lawyers’ from March 2007 through March 2009, and narrowed the search to those articles categorized by Lexis Nexis under the subject of ‘protests and demonstrations’. In order to ascertain that relevant articles were included in the results through this specific search criteria, I checked the results against all articles containing the word ‘lawyers’ for a randomly chosen month. \\
\end{tabular}
\end{footnotesize}
limitation of the event analysis is that it considerably underestimates the actual extent and geographical spread of the movement in Pakistan, since town-level bar associations were very active in the movement. For example, the bar associations of Gujranwala, Sahiwal, Khanewal, Attock, Dera Ismail Khan, Manshera, Haripur, Kohat, and Chakwal played an active role in the movement. However, much useful information can still be obtained about the movement by focusing in the largest protest events, which were likely more threatening for the regime. Apart from lack of information about town-level protest events, a further limitation of the analysis was assessing the size of protest events in the cities. Estimates of numbers of participants were given for less than ten percent of the cases. Where the information was presented, the report usually indicated participation by ‘hundreds’ or ‘thousands’ of lawyers.

Using the operationalization of protest events discussed above, an analysis of The Nation yielded 291 protest events associated with the lawyers’ movement from March 2007 to March 2009. There seems to be considerable variation in the frequency of protests over the two years.

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268 Using reports of protest events in The Nation, I constructed a database consisting of the following specific variables:

a. Number of Protest Events: A day was coded as having ‘1’ protest event if there was an event in one of seven large cities on that day. If there were protests in more than one city, the relevant number was coded. To illustrate, if there was a rally in Lahore on a given day it was coded as having ‘1’ protest event. If there was a rally and a hunger strike in Lahore, and a sit-in and a boycott of courts in Karachi, the day was coded as having ‘2’ protests (one for Lahore and the other for Karachi). If there were countrywide events, the day was coded as having 7 protest events.

b. Location: The city in which the event took place was coded. The study focuses on Lahore, Islamabad, Karachi, Rawalpindi, Multan, Quetta and Peshawar only.

c. Nature of Participants: It was noted whether the newspaper report mentions only lawyers as participants, or lawyers along with political party workers.

d. Type of Protest: The most salient forms of contentious action during the movement comprised rallies, boycotts of court proceedings, hunger strikes and sit-ins. I coded for these four types, but also noted if the lawyers initiated an act of violence at any event. A particular contentious event could include several forms
March 2007, when the movement began, registered the greatest number of protest events (A, figure 4.1). This is even though the movement began in the middle of the month, after the Chief Justice was suspended. One might have expected that it would take some time for the lawyers’ associations to formulate their strategy and to initiate mobilization. However, it is probable that the manhandling of the Chief Justice by security personnel acted as a catalyst for early mobilization.269

Protest events declined after March 2007, until they dropped to zero in August 2007 (B, figure 4.1). This was because the Chief Justice was reinstated by the Supreme Court in July 2007. With the major demand of the movement fulfilled, the movement deescalated between July and October 2007. However, protests peaked again in November 2007 (C, figure 4.1) with the imposition of the state of emergency, which led to the suspension of 60 judges of the higher courts of Pakistan, including the Chief Justice. The next peak was in February 2008 (D, figure 4.1), at the time of the general elections in Pakistan. This can be explained by a change in the target of mobilization, from the military to political parties. Protest activity declined slightly thereafter, rising again in June 2008 during the first long march organized by the lawyers (E, figure 4.1). The next peak in protest was in November 2008 (F, figure 4.1), which marked the anniversary of the imposition of emergency rule in Pakistan. Finally, there was escalation in protest in March 2009, when the second long march led to the reinstatement of the judiciary (G, figure 4.1).

269 Interview with Justice Azmat Saeed, judge of Lahore High Court, 2008; Interview with Ahmer Bilal Soofi, Advocate Supreme Court of Pakistan, 2008
Geography of Protest

As explained above, given the nature of the source, I restricted my analysis only to seven large cities in Pakistan. It is important to note, however, that local bar councils in dozens of towns throughout Pakistan actively participated in the movement. However, since the larger protests occurred in the urban centers, the analysis is still useful in understanding the most significant protest events of the movement. According to my data, Lahore registered the highest protest activity during the two years (see figure 4.2). Lahore is the second largest city in Pakistan with a population of approximately 10 million. The Lahore High Court Bar Association (LHCBA), as discussed in chapter 3, has historically been a highly active judicial support network even before the movement began. Soon after the movement started, the LHCBA leadership decided to host a weekly rally and boycott of courts on Thursdays, which continued till the end of the movement.
Karachi recorded the second highest protest activity. Even though it is the largest city in Pakistan with a large bar association, the relatively high protest is still surprising. The incumbent party (MQM) was opposed to the movement’s goals, and made it costly for the lawyers to protest. Acts of violence orchestrated by the ruling party resulted in about 50 casualties, and gunshots were fired at the residence of the President of the Supreme Court Bar Association. Islamabad and Rawalpindi rank third and fourth respectively. Since the Supreme Court of Pakistan is located in the capital, it may seem surprising that there was relatively lower protest here than in Lahore and Karachi. However, Islamabad is a much smaller city, with fewer lawyers. At the same time, it is important to note that the two largest protest events – the long marches – were held in the capital.

Involvement of Political Parties

In coding for the involvement of political parties, I assumed that the reporter covering the event would be interested in noting whether political party workers were present at the event. With the return of civilian governance in Pakistan, it seems fair to assume that the literate citizenry would be interested in knowing the activities and agendas of the parties. Indeed, Pakistani media was

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270 The Nation (Pakistan), “Lawyers to join strike today.” (May 13, 2007)
deeply involved with covering party politics during this period. Hence, I believe the involvement of political parties in the lawyers’ movement can be studied by looking at journalists’ coverage of these events. The results are shown in figure 4.3. As shown, political parties did not participate in the majority of the events. The involvement of parties is notably low in the formative stages of the movement. Indeed, it was only following February 2008 that party workers showed up in significant numbers at lawyers’ movement events. Political party involvement peaked in March 2009, when a significant number of opposition parties mobilized in support of the lawyers’ struggle for the restoration of judiciary.

![Figure 4.3: Participation of Political Parties in the Lawyers' Movement](image)

*Repertoire of Contention, Police Intervention, and Counter-Movements*

The main forms of protest were rallies (60%) and boycott of court proceedings (30%). At a few instances, hunger strikes (7%) and sit-ins (3%) were also used to voice contention. The articles
examined gave few details about the number of participants in rallies or how many lawyers
decided to boycott courts. I recorded no protest event in which lawyers initiated an act of
violence.

The police intervened in 59 out of the 291 protest events (20%). The most common
methods of intervention were baton charging, arrests, and use of tear gas. In a few protests, the
police also used rubber bullets and water cannons to disperse crowds. Data on the number of
persons injured or arrested was not presented systematically. The most brutal repression occurred
during the emergency rule imposed by Musharraf in November 2007. Thousands of lawyers
were arrested or illegally detained. Many hundreds were also beaten up and tear gassed. Leaders
of the movement were house-arrested or jailed. While in prison, a few were denied healthcare
facilities.  

Apart from using force, the government also employed a number of other tactics to quell
the opposition. The most important of these was a huge pro-regime rally organized in May 2007
in Islamabad, which was attended by thousands of people. In addition, pro-regime posters and
banners were installed on major avenues in Islamabad and a housing scheme was launched for
regime-friendly lawyers in Sindh. The government also organized smaller pro-regime rallies
by ‘fake’ lawyers, according to news reports. During the 2009 long march, dozens of trucking
containers were placed on major highways to prevent protestors from reaching the capital.

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272 Human Rights Watch, “Destroying Legality.”
273 The Nation (Pakistan), “Housing Society, fund for lawyers.” (March 17, 2007)
275 The Nation (Pakistan), “Long march blocked.” (March 12, 2009)
II. Legal Mobilization in Comparative Perspective

Lawyers are middle-class professionals whose earning potential and social status is on average not markedly different than that of other professionals such as doctors, accountants, bankers, and architects. The central argument of this study is that legal mobilization, which I have defined as the publically-oriented activities of the legal profession, can have such political ramifications as empowering judiciaries and triggering democratic transitions. The ability of lawyers to influence politics does of course vary across time and space. The legal profession does not have a public orientation in all countries, and only under certain conditions is legal mobilization effective in empowering courts and encouraging democratization. Before examining these conditions, it is worth looking into whether there is something unique about legal mobilization compared with the social and political activities of other professions.

The capacity of middle-class professionals to influence such large scale political changes seems, at first, to be a tall order. If earning potential can be taken as an indication of the status of professionals in society, lawyers are comparable to several other organized professions. As the table below shows for three countries, lawyers’ incomes, on average, are not significantly different than those of doctors. While lawyers do not fare much better in terms of incomes, there is also nothing distinctive about them in the manner in which they are organized. A number of the other professions, including doctors, engineers, accountants, and teachers are also organized in the form of associations aimed at protecting their corporate interests.
Table 4.2
Average annual salaries of doctors and lawyers, 2014

<table>
<thead>
<tr>
<th></th>
<th>Doctors</th>
<th>Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pakistan</td>
<td>$17,700</td>
<td>$15,200</td>
</tr>
<tr>
<td>USA</td>
<td>$187,200</td>
<td>$131,990</td>
</tr>
<tr>
<td>UK</td>
<td>$105,490</td>
<td>$111,510</td>
</tr>
</tbody>
</table>

In this section, I present the argument that lawyers have significantly different mobilization potential compared with other professions, notwithstanding their similar earning potential and organization into corporate bodies. I based my argument on the resource mobilization theory in social movement literature, which focuses on resources to explain the development of social movements. Resource mobilization theory was originally presented as a corrective to the relative deprivation thesis, which focused on grievances arising from structural strains to explain the origins and development of social movements. According to scholars working within the resource mobilization paradigm, a critical problem with the relative deprivation school was that while there was enough discontent in every society to provide an impetus for mobilization, social movements arose only under some circumstances. These scholars focus instead on the resource endowments of social movement organizations, including

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276 No systematic data is available for professionals’ salaries in Pakistan. Estimates are based on interviews with lawyers and doctors in Lahore and Islamabad. Salaries are likely to be lower for professionals in rural areas. Salary estimates have been converted from rupees to dollars, at an exchange rate of $1 to Rs. 101.58.

277 U.S. salary figures are from the May 2014 National Occupational Employment and Wage Estimates calculated by the Bureau of Labor Statistics, United States Department of Labor, and reported in Business Insider, “The 25 Highest Paying Jobs in America.” November 24, 2014. The figure for doctors is for “physicians and surgeons (all other),” since a few categories of medical professionals earn well above or below this average.

278 U.K Salary figures are from the Annual Survey of Hours and Earnings compiled by the Office of National Statistics, and reported on the website of This Is Money, “Best paid UK jobs in 2014.” December 12, 2014. Salary was reported in pounds, and was converted to dollars at the exchange rate of 1.52 pounds to a dollar.


both tangible and intangible resources.\footnote{Tangible assets include money, communications and other facilities. Intangible assets include skills and other ‘human assets’ (e.g. legal skills). See J. Craig Jenkins, “Resource Mobilization Theory and the Study of Social Movement,” in \textit{Annual Review of Sociology}, Vol 9 (1983), 533} Using the resource mobilization framework, I compare the resources available to professions in terms of their ability to engage in contentious mobilization against the government. I argue that the legal profession has access to unique resources, and also has certain unique constraints, that provide it with a higher mobilization potential compared with other professions.

I build my argument based on a comparison of the Pakistan lawyers’ movement with a year-long doctors’ movement, which was a protest movement organized by Pakistani doctors in 2011-12, sharing many similarities with the lawyers’ movement. While this comparison does not directly address the mobilizing potential of other professions, it is useful for two reasons. First, the insights that emerge from the comparison are also applicable to several other professions. Second, of the other professions, it appears that the medical profession shares some features with the legal profession that would also give it a high mobilizing potential. In terms of the size of the profession for instance, both doctors and lawyers are large professions compared with architects and pilots. Further, whereas most professional groups are urban-based, lawyers and doctors are more widely dispersed geographically. Given this, an organized anti-government movement by these professionals would likely be more effective, since it would be more difficult for the government to repress.

Another important reason for comparing doctors and lawyers has to do specifically with the relationship between professionals and their clients. Whereas a large number of professionals – including lawyers, doctors, engineers, economists, journalists – are embedded in society through local-level organizations, not all share the same relationship with ordinary citizens.
Professions, in this regard, are of two ideal types. The first are of the non-interactive type, in which clients do not get to interact with those they are serving. Examples include pilots and journalists, who almost never personally interact with their ‘clients,’ that is, to those to whom they are providing the service. The second type of professionals have a direct face-to-face interaction with their clients. This distinction became apparent during interviews with non-lawyers about their perception of the lawyers’ movement in Pakistan. The interviewees almost always referred to lawyers they personally knew in making claims about the movement. The lawyers’ struggle was hence not only an abstraction in their minds, but made more tangible through personal relationships they had with lawyers. This kind of dynamic is impossible to imagine for the non-interactive professions. Indeed, I would argue that such intimacy between ordinary citizens and professionals exists only for two professions: lawyers and doctors.

Ordinary citizens often visit lawyers and doctors for their personal concerns, but not economists, engineers, pilots, or journalists. But it is not merely about having personal connections with professionals. More importantly, it is about the nature of the interaction. People trust lawyers and doctors with their most well guarded secrets, which is not the sort of connection they have with other professionals. Why would this intimacy be relevant for mobilizing potential? It is relevant, I believe, because in mobilizing against the government, professionals implicitly rely on the support of the broader citizenry. The citizens, I argue, can provide this support since lawyers doctors figure concretely in their lives. The work of such professionals is meaningful to ordinary citizens, since they have relied on their expertise for their most pressing problems through direct face-to-face interactions.
The doctors’ movement in Pakistan began in April 2011, and lasted until the Lahore High Court intervened to ban doctors’ strikes in July 2012. The doctors’ demand was for an new service structure for the medical profession, and for the improvement of healthcare facilities in public hospitals. Mobilization by the doctors was not continuous throughout this period. There were about four spikes in protest during the period, with the largest one spanning about three weeks in the summer of 2012. The doctors’ protest was a politically charged event, given the near complete shutdown of the public healthcare system in the most densely populated areas in the country. Estimates of the deaths caused by medical negligence related to the boycott of the hospitals by doctors ranges from several dozens\textsuperscript{282} to around 300.\textsuperscript{283} During the height of the protest only 370 of the 7000 doctors in the city of Lahore showed up for work at the public hospitals. For the most part the doctors boycotted outpatient services only, while the emergency wards were excluded from the strike. However, there were a number of media reports which revealed that the emergency services were also boycotted by the doctors during periods of standoff with the government.\textsuperscript{284}

There are a number of similarities between the lawyers’ and the doctors’ movements in Pakistan, which make them suitable cases for comparison for the purpose of generating theoretical implications about the differential mobilization potential of the two professions. First, both movements were organized through professional associations. The doctors’ protest was organized by the Young Doctors Association (YDA), which is based in Lahore.\textsuperscript{285} Though the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{282} Asian Scientist, “Young Pakistani Doctors Strike in Lahore Against Working Conditions.” July 18, 2012
\item \textsuperscript{283} Nation, “The Noble Profession.” April 13, 2011
\item \textsuperscript{284} In one case, for instance, the father of a one-and-a-half-year old patient registered a First Information Report (FIR) for criminal negligence against doctors who he claimed had removed the drip from his son to join the doctors’ strike. The News, “11 dead as Young Doctors Association strike continues.” July 3, 2012
\item \textsuperscript{285} Express Tribune, “Doctors’ Strike: 22 patients die across Punjab.” April 2, 2011
\end{itemize}
\end{footnotesize}
majority of protest events were held in Punjab, the most populous province with nearly sixty percent of the population, medical associations from other cities also boycotted public hospitals in solidarity with the YDA. This is similar to the lawyers’ movement, in which Lahore was the main locus of the protest events. Second, both movements were anti-government in orientation. The doctors’ mobilization was explicitly targeted at the Punjab government, and specifically at the Chief Minister Shahbaz Sharif.\textsuperscript{286} The lawyers’ movement, as noted earlier, was decidedly anti-government, targeted first at President (and General) Musharraf and later at President Zardari. Third, the repertoire of contention employed by the two movements was similar. Similar to lawyers’ boycott of courts, doctors boycotted hospitals and engaged in street protest and hunger strikes. In July 2012, only 5 percent of doctors attended their duties at the government hospitals.\textsuperscript{287} Fourth, the two movements occurred just three years apart, and the same government structure existed at the end of the lawyers’ movement as did during the doctors’ movement. As noted in the next chapter, one of the most important consideration for successful civil society mobilization is freedom of media, so that protest events can be covered live without government intervention. Since the liberalization of media had already occurred in the country, the two movements occurred in a similar environment with regard to the ability of media outlets to cover the events. Finally, the government response was comparable in both cases. The doctors’ protest, like the lawyers’ movement, was highly repressed by the government. Around 400 doctors were arrested in the summer of 2012, some of them during a police raid of the General Body meeting of the YDA, in which prominent leaders of the movement were taken into policy custody.\textsuperscript{288} Out of fear of arrest and surprise police raids, a number of doctors remained in hiding during the period. The government also threatened to terminate the employment of a large

\textsuperscript{286} Ibid.

\textsuperscript{287} Asian Scientist, “Young Pakistani Doctors Strike in Lahore Against Working Conditions.” July 18, 2012

\textsuperscript{288} Ibid.
number of doctors, and to bar them from practicing in public or private hospitals. Further, the government filled in the deserted hospitals with military doctors in order to make the protesting doctors’ yield, and also recruited several hundred new doctors bypassing some of the criteria for employment.

While there were a number of structural similarities between the two movements, the outcomes were markedly different. The lawyers’ movement, as noted earlier, succeeded in its goal of restoring to their positions the terminated judges in the high courts of the country. By contrast, the doctors’ movement ended unsuccessfully in July 2012, when the judiciary intervened to prevent further strikes by the doctors. Three years later, and even after the court directed the government to find a solution to the problem, the doctors’ demands had not been met by the government and the doctors continued to record their protest sporadically.

Why, then, did the lawyers’ protest succeed, while the doctors’ following a similar repertoire of contention were not been able to succeed? In fact, prima facie, it would appear that the demands of the doctors would be more readily acceptable to the government, than the demands of the lawyers. The former mobilized for increased salaries and improvement of healthcare facilities, while the latter wanted to reinstate activist judges who might have challenged the government’s authority. In analyzing the different outcomes, one can present two different kinds of explanations. The first looks into whether the movements had comparable quantity of resources and faced a comparable political context. For instance, one could argue that the Lahore High Court Bar was larger or had more discretionary funds compared with the YDA, which created differential mobilization potential. Implicit within this explanation is the idea that

290 The Nation, “Patients suffer as young doctors strike lingers on.” July 8, 2012
292 The Nation, “Young Doctors on Demonstration.” April 1, 2015
had the YDA had a greater quantity of resources, the doctors’ might have been able to succeed as well. The second kind of explanation takes seriously the different resource profiles of the professions. It is not so much the quantity of various resources, such as an endowment fund which can support boycotting professionals, that matters. Instead, because fundamental differences in the nature of the professions, there is a difference in the quality of resources and constraints, which yields differential mobilization potentials. Below, three such differences in the resource profiles of doctors and lawyers are explored, which have been inferred from a study of the two movements by these professionals in Pakistan. Based on this analysis, I argue that lawyers have a significantly higher mobilization potential compared with doctors, as well as other comparable professions.

_Urgency and biographical availability_

One of the most fundamental differences between the lawyers’ and doctors’ movements was of the perception of protest events in the public sphere. Whereas the lawyers’ struggle met with ubiquitous praise throughout the society, the doctors were strongly condemned for neglecting their duties. A surprising finding that emerged from a short survey of members of the bar in Lahore and Islamabad was that 88% of lawyers who had participated in the movement reported that their clients overwhelmingly supported their involvement in the lawyers’ movement.²⁹³ This is even though the lawyers’ involvement in the movement for the restoration of deposed judges slowed down the work related to the clients’ cases. During the movement, lawyers were held out as heroes in the society. 97% of lawyers surveyed reported that they were lauded by their friends and relatives for participating in the movement. Interestingly, even 80% of lawyers who did not

participate directly in the movement, reported an increased level of respectability for their work by their friends and clients. One lawyer I interviewed reported that his physician refused to charge him fees for a medical checkup out of respect for his participation in the movement. Another mentioned that a colleague of his who had been stopped for a traffic violation on his way to a protest event was let go with a warning by a traffic policeman, after the latter learnt about his profession.\footnote{Interviews with members of Islamabad bar.}

Doctors received a very different kind of response from the public after they boycotted the public hospitals in Punjab. Media reports continuously highlighted the suffering of the patients, and their anger directed at both the doctors and the government for the shutdown of the hospitals. From a content-analysis of randomly selected newspaper reports which expressed some opinion of the movement, I found that nearly 70 percent found the doctors’ boycott objectionable.\footnote{I randomly selected 30 newspaper articles from Dawn, The Nation, The News, and Express Tribune, Daily Times, which expressed or cited some opinion of the doctors’ protest, and found that 21 of these negatively portrayed the movement.} Further, prominent civil society organizations and leaders condemned the doctors’ movement, even though it was aimed at the improvement of the healthcare system. For instance, the Human Rights Commission of Pakistan (HRCP), a leading human rights civil society organization, had strongly supported the lawyers’ movement in Pakistan.\footnote{The Nation, “HRCP assures support to lawyers’ movement.” June 07, 2008} However, the HRCP issued a strong statement of disapproval for the doctors’ protest, and argued that “doctors were disrespecting their life-saving vows” by boycotting their duties.\footnote{The News, “11 dead as Young Doctors Association strike continues.” July 03, 2012. The HRCP simultaneously blamed the government for resorting to “coercive tactics,” and suggested that their was indeed merit in the protestors’ demands.} Abdul Sattar Edhi, a prominent and well-respected philanthropist who runs an extensive network of healthcare facilities throughout the country, condemned the protest arguing that it “was against the ethics of
the medical profession." Finally, the doctors I interviewed suggested that several of their colleagues who had participated in the movement faced criticism from their friends and relatives about the strike.  

The difference in public opinion of the two movements is striking. Whereas the lawyers were lauded for neglecting their duties, the doctors were severely condemned for it. An analysis of the two movements reveals that the difference has to do with the nature of the two professions with regard to the urgency of the services provided. The nature of medical services is such that even a slight delay in treatment or diagnosis can have life-threatening consequences for the patients. While there are certainly time-sensitive matters in law,  

legal matters are normally less urgent than are medical problems, even if they are often no less consequential for the clients. Furthermore, it is it is important to note that lawyers’ boycott did not usually lead to adverse consequences for clients. Most lawyers I interviewed noted that procedures existed to ‘buy time’ without adversely affecting their clients interests. Further, since the court system remained shut down owing to the boycotts, there were no hearings, and the adversaries could not gain an advantage over their clients. By contrast, there was no possibility for doctors to postpone diagnosis or treatment without potentially causing irreparable harm to their patients.

In social movement literature, scholars have examined the concept of ‘biographical availability’ to understand differential participation of activists in various social movements. McAdam, in his study of participation in the 1964 Mississippi Freedom Summer project, defines biographical availability as “the absence of personal constraints that may increase the costs and risks of movement participation, such as full-time employment, marriage and family

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298 Ibid
299 Interviews with doctors in Lahore (summer 2014)
300 Examples including commencing an action before the statute of limitations runs out in civil cases and criminal law matters which can lead to incarceration or capital punishment.
responsibilities.” McAdam finds that the “sum of personal constraints” does not predict participation in the campaign. However, he finds that age has a significant impact on participation, with younger activists less likely to participate than older ones. Nepstad and Smith, who examine the campaign mobilized by Nicaragua Exchange to resists US intervention in Nicaragua in 1983-87, find that occupational commitments did not stand in the way of individuals engaging in high-risk activism. While these studies examine personal constraints of activists to understand differential movement participation by individuals, my focus is on the biographical constraints that are associated with working in particular profession. Based on a comparison of the lawyers’ and doctors’ movements, I argue that, on average, the biographical availability of lawyers for engaging publically oriented activities is much higher than of medical professionals. Within the professions, following McAdam and Nepstad and Smith, one would expect similar levels of constraints for doctors and lawyers based on age and marital status. However, across professions, it appears that lawyers’ ability to neglect their duties to engage in activities not directly related to their client’s well-being is higher than doctors’.

Capital Mobility

Professions vary in terms of the transferability of skills internationally. Some skills, like the practice of law and religious preaching, are locally-relevant and are not easily transferable abroad. Others, such as medicine, engineering, and accounting, are more transferrable. Bates, in discussing political reform in Africa, argues that lawyers and church leaders played an important role.
role in democratic transitions because, unlike members of other professions, they cannot easily migrate to other countries. With imperfectly transferrable skills, these professions are locked into the domestic context, and hence experience a higher ‘impulse to reform.’

A comparison of the lawyers’ and doctors’ movements in Pakistan lends support to the capital mobility thesis with regard to professional skills. Lawyers trained in Pakistan rarely migrate to other countries. Of the members of the Lahore and Islamabad bar I surveyed, only 12% reported ever considering migrating abroad. While a number of lawyers pursue postgraduate law degrees and certifications in other common law jurisdictions, most notably in the United Kingdom and the Unites States, the majority return to practice law in Pakistan. This is not always by choice. On a separate question, approximately 38% lawyers reported that if they could get a legal job abroad, they would certainly pursue the opportunity. However, through interviews, I found that the main obstacle was bar admissions in foreign jurisdictions, which are not usually open to foreigners. By contrast, doctors’ immigration is remarkably high in Pakistan. A 2006 study on the medical profession in Pakistan reports that of 5400 physicians trained in the country each year, 1150 (more than 20%) emigrate. More recent studies of medical students’ career goals found that 60% of students at medical colleges in Karachi and Lahore intended to pursue opportunities abroad upon graduating. In the United States, doctors

of Pakistani origin even have an association of their own, the Association of Physicians of Pakistani Descent of North America, which has more than 17,000 members.\textsuperscript{308}

The possibility of exit likely had an impact on the mobilization potential of doctors and lawyers. To begin with, a significant proportion of young doctors leave the country, making them unavailable for participation in the movement. It is likely that, given they chose the exit option, a large number of those would be highly motivated to mobilize for changing the system. Further, of those that remained, immigration remained a real possibility, altering the doctors’ decision-making calculus for engaging in high-risk activism. Through in-depth interviews, I discovered that several colleagues of the interviewees agreed with the need for a transformation in the healthcare system, but did not participate in the movement because of their intention to emigrate. Lawyers, by contrast, were less conscious of their lack of exit options than doctors were of their opportunities abroad. None of the lawyers I interviewed mentioned lack of exit as an argument to participate in the lawyers’ movement. However, when specifically asked, 85\% of lawyers argued that the improvement of the legal system would benefit them professionally, and 68\% mentioned it would indirectly benefit their children who would grow up in the country.

\textit{Habitus and Osmosis}

Some social scientists who study the legal profession have suggested that there is something unique about the culture and practices of this profession, which structures its relationship with society and politics. Bourdieu conceptualizes the profession in terms of what he calls a ‘juridical field,’ which includes unique activities, customs, sets of practices, and linguistic strategies.

employed by members of the profession. The legal profession, for Bourdieu, has its own *habitus*, which is defined as a patterned method of thinking and acting arising from being part of the juridical field. This defines not only the internal workings and politics of the profession, but also, by granting it relative autonomy from other fields, has a strong influence on the way the profession relates to society. There is a hence a ‘force of law’ exerted externally, which is based on an internal set of practices, protocols, and language. Bourdieu suggests that the force of law is not simply derived from the state’s authority, but owing to its autonomy of the profession, often operates antagonistically in relation to the power of the state. Halliday, Karpik and Feeley have suggested that the legal profession has a ‘political orientation,’ which has motivated lawyers to fight for political liberalism in western Europe and North America over the last two centuries, and more recently in the post-colonial world. The implicit idea is that there is something about ‘what’ lawyers do that prepare them for activism against an illiberal state. The very nature of their profession involves them in a discourse about what is right and wrong, in particular, at a constitutional level.

This conception seems intuitive. Legal work is inherently political in that it is based on constitutional or statutory material, which derives its authority from the state. A physician’s work, by contrast, derives from medical knowledge that has little direct relationship with state authority. Further, lawyers engage in a set of practices which seem transferrable to the political realm. Litigation is based on contestation and argumentation in an adversarial context. Even in transactional law, lawyers represent the interests of clients against competing interests of other

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parties. While doctors are certainly embedded in an institutional context, the essence of their work in terms of addressing bodily malfunction, is non-political.

Through interviews with professionals and citizens, I found support for the proposition that the content and practices of a profession influence its mobilization potential. All of the doctors I interviewed felt that there was something wrong and unethical about doctors abandoning their patients, and suggested that most of their colleagues who participated felt similar unease. My survey of lawyers, however, revealed a very different perspective. Only 6% of the lawyers surveyed thought it was against the ethics of the profession to abandon casework and mobilize against the state. Several members of the bar that I interviewed mentioned that their day to day work involves similar contestation, though at a less intense level. Interestingly, my interviews with citizens revealed that different expectations about the political role of the two professions. While 84% of those I surveyed supported mobilization by lawyers, only 12% thought it was appropriate for doctors to engage in protest.\footnote{I conducted 50 short interviews with citizens at public places in Lahore and Islamabad in September-December 2013, and June-July 2014.}

One further distinction between the legal field and other professions has to do with the relationship with the state. At its topmost edges, the legal profession blends from the private realm into the sphere of the state itself. At this level, there is osmosis from the profession into the state, such that leading lawyers are appointed to become judges.\footnote{This is usually the case in common law systems. In civil law systems, derived from Roman law, there is often a separate career track for the judiciary. See Langbein, Lerner, and Smith, History of the Common Law, 158} Several lawyers I interviewed spoke of this connection with the judicial branch, and saw the profession as constituting an entire branch of the government. One lawyer went further and suggested that since lawyers are ‘officers of the court,’ they are part of the ‘political structure’ of the country, and hence must
mobilize to protect it.\textsuperscript{313} Other professions, such as medicine, accounting, journalism, etc. remain within the private realm. Senior doctors, for instance, do not rise to positions where they begin to exercise state authority in a separate branch of the state. This structural relationship with the state, which other professions lack, likely enhances the mobilization potential of the legal profession compared with other professions.

\textbf{III. The Effectiveness of Legal Mobilization}

We have seen that the legal profession has a specific resource endowment, as well as a set of constraints, that enable it to engage in contentious mobilization. My core argument, based on an empirical study of the lawyers’ movement in Pakistan, is that contentious mobilization by lawyers in support of the rule of law can lead to judicial effectiveness. However, while the legal profession exists in all countries, legal mobilization varies considerably across time and space. Lawyers in some countries have a strong political orientation, and are important actors in the public sphere. In others, lawyers are quiescent, and are primarily occupied with aiding their clients in dispute resolution, rather than in anti-government mobilization. From an observation of this variation, the following questions emerge: under what conditions do lawyers mobilize in support of the rule of law, and under what conditions does lawyers’ mobilization succeed in pressuring the government to alter its policies?

In addressing the question of the success of social movements, some scholars have presented a generic list of factors which help social movements succeed.\textsuperscript{314} The problem with this approach, as noted above in the comparison of the medical and legal professions, is that not

\textsuperscript{313} Interview with member of Lahore High Court bar, July 2014
\textsuperscript{314} See for example W.A. Gamson, \textit{The Strategy of Protest} (Dorsey, 1975).
all social movement organizations are similarly situated in society. Further, the order of importance of the factors that aid mobilization may vary for different kinds of organizations.

With regard to the mobilization potential of the legal profession, two important factors can be inferred from a study of the successful mobilization of lawyers in Pakistan during the 2007-09 lawyers’ movement. First, successful mobilization depends on the embeddedness of the legal profession in society and politics. Second, the profession has to be autonomous, not only from the state, but also from political society. Before explaining these two factors, it is worth noting that there are certain basic conditions that aid mobilization. These include the size of the profession and the structure of the profession, in terms of the linkages between various bar associations throughout the country. A larger profession is likely to have greater mobilization potential, and a federated structure, as existed in Pakistan, is also likely to help in mobilization. Repressing a movement with a large number of participants spread across the country can be more difficult for the government than to subdue a localized protest with few participants.

The first factor that is of importance in successful mobilization is embeddedness of the legal profession in society and politics. While embeddedness is also important to consider in western countries where the legal profession has developed over several centuries, it takes on special emphasis in post-colonial legal systems, which had to contend with what I call the ‘displacement problem.’ In nearly all post-colonial countries, which includes most of East Asia, South Asia, Africa and the Middle East, indigenous legal systems were displaced during the colonial encounter, and were replaced with new externally-inspired systems. In some cases, the colonial power itself installed the new system, while in other cases there was active borrowing

\[\text{\footnotesize\cite{315}}\text{\footnotesize For example, McCarthy and Zald argue that a federated social movement organization has a higher mobilization potential than an isolated one. See McCarthy and Zald, “Resource Mobilization and Social Movements,” 1227}\]
by modernizing elites. Interestingly, it was not only the judicial system, but also the legal profession itself that was established *de novo* under colonial influence, with little continuity with the pre-colonial profession. A displacement problem thus arises, given these legal professions were established by self-interested foreign powers, have generally had less than a century to develop, and were formed after the erasure of the indigenous tradition. The issue is how such a profession can develop linkages with the society, and become prominent and powerful enough to be able to play a significant political role.

The displacement problem and its consequences for embeddedness of the profession can become clearer with comparison to the development of the legal profession in the Europe and North America. As early as the 1220s, we have evidence of sarjeants being engaged by litigants for pleading their cases. By the fifteenth century, there is evidence of a sarjeants’ order in existence, which controlled admission and even had its own costume.\(^{316}\) In fact, Halliday and Karpik argue that the establishment of an autonomous bar preceded the formation of a modern state in English in the sixteenth and seventeenth centuries, and hence became “a pillar of English constitutionalism.”\(^{317}\) Given this uninterrupted development over the centuries, in the eighteenth and nineteenth century, even before the profession was established *de novo* in the colonial world, radical barristers in England mobilized for rights and against government corruption through courts. In France, similarly, in the eighteenth century, lawyers supported the empowerment of the *parlements* against the power of the King and the royal court, including through disrupting the working of the judicial system by engaging in strikes.\(^{318}\) Another example is from Germany,
where already in the 1830s, lawyers had launched a campaign for a ‘free bar’ in support of the autonomy of law.\textsuperscript{319}

Contrast this with the development of the profession in the post-colonial world. In the sub-continent, where the profession was established earlier compared with other parts of the colonized world, natives were only allowed membership in the profession established by the English in the latter half of the nineteenth century. One would not expect a legal profession established under such circumstances, and so recently, to be powerful enough to play an important role in influencing politics in the post-colonial context. As social movement scholars McCarthy and Zald point out, older and more established organizations are more likely to succeed at mobilization than new organization.\textsuperscript{320} They note that new organizations still have to develop ties in society, develop professional sophistication, and learn about the various roles to be played in the particular social context. Further, and more relevant for the present discussion, a “history of accomplishment”\textsuperscript{321} can be an asset, and as Gamson notes, an old organization with such a history is likely to have a higher legitimacy.\textsuperscript{322}

Though relatively new, and with origins in the colonial period, we find that the legal profession in India and Pakistan is embedded, such that over a relatively short period of time, it was able to develop societal linkages as well as a strong political orientation. As explained in chapter 3, owing to fortuitous circumstances, lawyering became the most prominent profession in India, in particular owing to the leading role of lawyers in the decolonization movement. Law also became the primary preparation for those who wanted to enter a career in politics. This

\textsuperscript{319} Halliday and Karpik, “Political Lawyering.” 11675
\textsuperscript{320} John McCarthy and Mayer Zald, “Resource Mobilization and Social Movements: A Partial Theory.’ In American Journal of Sociology, Vol. 82, No. 6 (May 1977), 1233
\textsuperscript{321} Ibid.
\textsuperscript{322} W.A. Gamson, The Strategy of Protest (Dorsey, 1975)
connection with political life, I argue, catalyzed the indigenization of the profession in the subcontinent, which solved the displacement problem and led to the formation of a bar that became firmly embedded in society and politics.

The second factor that is important for the mobilization potential of the bar is the autonomy of the profession from the state and political society. Below, I present a comparison of lawyers’ movements in Egypt and Pakistan, to build a theory of why autonomy is important for successful mobilization through the bar. I begin with a description of the Egyptian lawyers’ movement, and then proceed to present an explanation for the different outcomes of the two movements.

**The 1994 Egyptian Lawyers’ Movement**

The Egyptian lawyers’ movement precipitated after news of 30-year old lawyer Abdel Harith Madani’s death in police custody became public in May 1994. Madani was arrested from his office by Egyptian security personnel on 26 April 1994 and was subsequently detained at an unknown location. Ten days after his arrest, Madani’s family was contacted by the police, who informed them that he had died from an asthma attack, and that they could collect his body for the funeral. Police personnel were present at Madani’s burial, and the site remained under surveillance after the burial.

According to the government, Madani’s death occurred from natural causes. The official version of the events leading to Madani’s death, which was published in the government-run *Al-Masower* in May 1994, stated that police searching Madani’s office on the orders of the State
Security Prosecutor had found incriminating evidence before taking him into custody. Subsequently, the police took him to his residence in order to search for further evidence against him. On the way to his second residence, Madani became unwell, suffered from breathing problems and began losing consciousness, whereupon he was taken to the prisoner’s ward at the University Mynial Hospital. The doctors tried to resuscitate Madani, but their attempts failed, and he died a few hours after being brought to the hospital. The newspaper also cited supporting statements from the doctors who claimed to have first received Madani and to have examined his body after he had died. A spokesman for the Ministry of Interior stated the following about Madani’s death, “What do you expect the Government to say? He died God’s death. We never violate human rights.”

There were a number of reasons for Madani’s family, the Egyptian bar, and the Egyptian Organization for Human Rights (EOHR) to doubt the official version. First, Madani had no medical history of suffering from asthma or other similar conditions. Second, according to the official version, he had died within a day of his arrest, but the news of his death was made public eight days later. In addition, the Attorney General refused to make public the autopsy report, and refused the family’s and the bar’s requests for a second autopsy. In fact, Madani’s grave remained under police surveillance to prevent the gathering of any contradictory evidence. Some who had seen the body before burial, including an official coroner, stated that they saw puncture marks, blue bruises, and ankle marks indicative of being hung upside-down. Finally,

324 Ibid., 74
since 1993, fourteen men had already died under police custody, which lawyers suspected resulted from torture.

While denying that Madani had been tortured to death, the government maintained that he had been arrested because of his involvement in terrorist activities. The Minister of Interior claimed that Madani acted as a liaison between prisoners he provided legal counsel to and extremist cells associated with Gama al-Islamiya. Madani’s family, the EOHR, and the bar, on the other hand, maintained that Madani was a human rights lawyer, whose interaction with political prisoners was limited to providing legal counsel to defendants who had been arrested by the Egyptian state on suspicion of involvement in terrorist activities. Madani had been a member of the EOHR, and had frequently interacted with international human rights organizations, which had also cited his opinion on human rights in Egypt in their reports.

The day after Madani’s arrest, the Cairo bar intervened to protest against his arrest. The *Batonnier* of the bar met the Attorney General, who appeared uninformed about the incident, even though the law requires the Attorney General to be informed when police take lawyers into custody. While the Attorney General promised to investigate, no action was taken, prompting the *Batonnier* to call upon the Attorney General again on May 6, 1994. After Madani’s death was announced, the *Batonnier* met the Attorney General again, this time to discuss filing a suit against the Interior Minister on behalf of the Bar of Cairo. The Attorney General argued against this, and suggested that a suit can only be filed by the bar if the police damages a lawyers’ integrity, but not if death results from police action. Eventually, it was agreed that a suit against the state would be acceptable if filed by Madani’s family, and the bar proceeded to help arrange

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329 The following account is based on interviews with bar officials by the Center for the Independence of Judges and Lawyers in 1994. See Center for the Independence of Judges and Lawyers, *Clash in Egypt*, 75-80
for legal counsel and file the case. The Batonnier of the Bar Association of Egypt similarly intervened after Madani’s death was announced, and pressed the Attorney General to postpone Madani’s burial and to have a second autopsy conducted. This request was rejected by the Attorney General.

Of several prisoners who had died in police custody in the previous two years, Madani had unquestionably been the most prominent. Given the intransigent attitude of the government about investigating the circumstances of his death, lawyers convened at the offices of the Bar Association to devise a strategy for pressuring the government. Madani’s wife and two children were present at the meeting, while a large number of police were stationed outside the premises of the bar. The leaders of the bar framed the issue of Madani’s death as the governments’ “attack on justice” and on the legal profession. Abdel Aziz Mohammed, the head of the Bar of Cairo, said in his speech,

> The murder of Abdel Harith Madani is not merely a crime against every lawyer and the Bar, but against the whole population. The martyr’s only crime was to defend the victims, and his punishment was kidnapping and murder in order to frighten the lawyers and sway them from performing their duty. This incident will however give them strength and persistence to continue to defend the people’s rights.

A number of lawyers spoke of the injustice of the government, and demanded an impartial investigation including an second autopsy as well as publication of previous investigative reports. At the meeting it was decided that a general strike would be held by lawyers across Egypt on May 15. The countrywide strike was highly successful, and beyond the expectations of the government. Thousands of lawyers boycotted courts and staged sit-ins at the courts. There were also reports that some judges postponing hearings of cases, thereby supporting the lawyers

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331 Center for the Independence of Judges and Lawyers, *Clash in Egypt*, 81
332 Ibid., 82
in the protest against the government’s attack on the legal profession. According to the EOHR, the strike was the largest ever observed by the lawyers’ syndicate in the country.³³⁴

After the success of the strike, the bar organization decided to hold a peaceful march in Cairo on May 17. The plan was to begin the procession at the bar’s headquarters, and then march to Abdine Palace, the presidency, in order to hand a list of demands to the government. Around two thousand lawyers assembled at the bar’s headquarters on the morning of the 17th of May.³³⁵ After holding a joint midday prayer session, the lawyers shouted slogans against the government, such as “the government is a terrorist.”³³⁶ Later, lawyers handed flowers to police officers stationed outside the bar building. When the lawyers began their march toward the presidency, the riot police fired tear gas and rubber bullets directly at the procession.³³⁷ A number of lawyers were beaten up by the police, who later entered the bar association building and tore up banners and posters that the lawyers had prepared to carry at the demonstration.³³⁸ The lawyers made repeated attempts over the next two hours to reorganize the protest march, but the heavy-handed response of the police, as well as of the baton-wielding plainclothed security forces, prevented this. Dozens of lawyers were arrested at the demonstration, and at police raids at lawyers’ residences early the next morning.

For the next several weeks, the remand hearings of the detained lawyers at courthouses became a locus of protest.³³⁹ A large number of lawyers gathered at these hearings, and chanted slogans in support of the detainees as they were brought to the court. Meanwhile, given the government’s intransigence, the bar decided to intensify the protest. A hunger strike was begun

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³³⁴ Ibid.
³³⁶ Center for the Independence of Judges and Lawyers, *Clash in Egypt*, 83
³³⁸ Irish Times. “Police stop lawyers’ protest over death of colleague.” May 18, 1994
³³⁹ Center for the Independence of Judges and Lawyers, *Clash in Egypt*, 84
by the head of the Cairo bar and a few of his colleagues, which quickly grew to include more than 30 lawyers.\textsuperscript{340} Within a few days, a few of the lawyers participating in the hunger strike were hospitalized, which led to media coverage and sympathy for the lawyers’ cause. Emboldened by the success of the hunger strikes, the lawyers decided to hold a general strike and shutdown the court system in the country on the 28\textsuperscript{th} and 29\textsuperscript{th} of June, 1994.\textsuperscript{341}

However, just as the lawyers’ movement had began to escalate in end-June, it ended abruptly with the bar calling off the strike. The government began releasing the lawyers that had been detained after the movement began, and the Egyptian Bar Association’s secretary-general stated, “The association decided to cancel the strike to be able to secure the release of the remaining colleagues in detention to show good intentions and to safeguard the nation’s interest.”\textsuperscript{342} This is even though the lawyers had succeeded in bringing their protest to the center of public attention. The lawyers were conscious that the government had been publically challenged, and that their protest was being viewed as legitimate by the people. One of the hunger strikers, Abdullah Rabia, told the media, “the government was in a very bad situation…the government felt the lawyers were making them look bad. People were shouting that the lawyers are on strike, and the press was writing about this, not about the national dialogue.”\textsuperscript{343} And yet, coming close to pressuring the government on meeting the demand for investigating Madani’s death, as well as pressing on further demands such as lifting the State of Emergency, the bar called off the hunger strike and the country-wide boycott of courts on June 27, 1994.

\textsuperscript{340} Ibid.
\textsuperscript{341} The Globe and Mail, “Egyptian Bar Calls off strike,” June 27, 1994
\textsuperscript{342} Ibid.
\textsuperscript{343} The Philadelphia Inquirer, “Egyptian government moved to defuse conflict with lawyers.” June 29, 1994
Explaining the Outcomes of the Pakistani and Egyptian Lawyers Movements

There are a number of similarities between the Pakistani and the Egyptian lawyers movements. First, bar associations in both countries are comparable in terms of their size and organizational structure. Second, as described above, bar associations in both countries are embedded in society and politics, and have a history of mobilization going back to the colonial period (see chapters 3 and 7). Third, the political context in both countries was similar. Bar associations in both Egypt and Pakistan mobilized against strong authoritarian regimes, which responded to the movement by using force. Fourth, lawyers in both countries employed a similar repertoire of contention, including boycotts, hunger strikes, and street protests. Fifth, the precipitating events were quite newsworthy in both Egypt and Pakistan, and public opinion was in favor of the lawyers on the issue. Finally, lawyers in both countries succeeded in escalating their mobilization to a level that it became the most salient political issue at the time, widely covered by the press, and with high legitimacy in the public sphere.

And yet, the outcomes of the two movements were radically divergent. The Egyptian movement was successfully curtailed by the regime within a short period of its initiation. The movement in Pakistan, by contrast, continued for two years, and succeeded not only in meeting its core demand of reinstating the judges, but also spurred a democratic transition in the country. How was the Mubarak regime successful in deescalating legal mobilization in Egypt, while the Musharraf regime in Pakistan, employing tactics not dissimilar to Mubarak, was unable to suppress the movement? The core difference, I argue, had to do with the relationship of the bar associations in the two countries with other political organizations.

When lawyers mobilized in Egypt in 1994, the Lawyers’ Syndicate was controlled by members of the Muslim Brotherhood, which was at the time a banned political party, not
permitted to take part in electoral politics. In Egypt, as in other parts of the Arab world, authoritarian regimes have suppressed party politics in order to stifle dissent. An alternative avenue for political parties to mobilize their constituents has been through professional associations, which hold regular elections. The 1992 Bar Council election in Egypt was characterized by considerable factionalism along partisan lines. The Muslim Brotherhood was able to launch a successful campaign amidst the disunity, and successfully placed 14 lawyers on a board comprising a total of 24 members. After the elections, there was considerable concern among lawyers about the independence of the bar from political forces, which they believed could compromise the professionalism of the bar. Aware of this criticism, Brotherhood lawyers elected to the council made public assurances of their non-partisan commitment to the interests of the profession. In the initial period of the lawyers’ movement in May 1994, the lawyers were united against the government. Even though Madani had been associated with the Muslim Brotherhood, his death was perceived as an attack on the legal profession, even by secularist lawyers. However, factionalism and partisanship began to appear after about two weeks of internal unity. Ironically, it was the secularists who wanted to continue the strike, whereas the Brotherhood dominated bar council appeared willing to compromise with the government. The hunger-strike, though originally started by the head of the Cairo bar, had come to be dominated by the secularist lawyers, who were unwilling to negotiate with the regime. Eventually, however, the regime was able to exploit the factionalism within the bar. One consideration for the Brotherhood was an impending national dialogue about the future of Egyptian politics in which

345 Center for the Independence of Judges and Lawyers, Clash in Egypt, 7
346 Ibid., 23
347 Ibid., 85
349 Tamir Moustafa, The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt (Cambridge University Press, 2009), 139
they would be participating.\footnote{The Philadelphia Inquirer, “Egyptian government moved to defuse conflict with lawyers.” June 29, 1994} The dialogue, which Mubarak had proposed after succeeding in a one-contestant presidential election the previous year for third presidential term, had been overshadowed in the public sphere by the lawyers’ protest.

In Pakistan, by contrast, the bar was not split along partisan or ideological lines. Most of the Supreme Court Bar Association elections during this period were won by candidates of an anti-establishment bloc, comprising lawyers with diverse political and ideological affiliations.\footnote{The account of the SCBA bar elections during this period is based on Malik’s chapter “The Battle for an Independent Bar” in 
*The Pakistan Lawyers’ Movement*, 16-31} The fault lines had been determined starting 2003, after the struggle of the bar against the Legal Framework Order (LFO), through which the Musharraf regime sought to amend the Constitution. The bar launched a strong campaign against the LFO, initially in collaboration with opposition parties, include the Mutahida Majlis Amal (MMA). Later, the MMA reached an agreement with the pro-Musharraf Pakistan Muslim League (PML-Q), and the LFO proposals became part of the Constitution through the 17\th Amendment. This is even though the opposition parties had a written agreement with leaders of the bar to oppose the LFO amendments. Senior leaders of the bar felt they had been “betrayed”\footnote{Ibid., 12} by the opposition parties, and fielded candidates with anti-establishment leanings for the upcoming bar elections. For instance, Tariq Mehmood, who was elected President for the 2003-2004 term, had resigned from his position as a judge of Baluchistan High Court, as a protest against the judiciary’s involvement in the controversial referendum organized by the Musharraf regime in 2002. The next president, Qazi Jamil, was a former judge of the Peshawar High Court, whose decisions on the bench had irked the executive and he had not received confirmation to became a permanent judge of the court.\footnote{Ibid., 14} The following year, 2005-06, Malik Qayyum, former judge of the Lahore High Court, received support of the
establishment and soon after gaining presidency of the bar, began compromising the
independence of the profession. After his election, Qayyum met General Musharraf, Prime
Minister Shaukat Aziz and other senior leaders, and subsequently received Rs. 120 million from
the Federal and the Punjab government to spend on lawyers’ welfare. Munir Malik, who would
become the next president of the bar notes that, “the phrase ‘welfare of lawyers’ soon acquired a
distinct connotation in the legal fraternity as meaning a shifting of the focus of the legal
fraternity from the struggle for the establishment of the rule of law to collaborating with the
establishment for personal gain and advancement.”\footnote{Ibid., 18.} The rewards for senior lawyers in the pro-
establishment camp were high, including allotments of residential and commercial real estate in
the capital, as well as the possibility of being appointed on governmental committees. Against
this backdrop, Malik notes that the 2006-07 elections were perceived among the legal
community as a “pivotal contest between proponents of an independent bar and the
establishment forces bent upon destroying it.”\footnote{Ibid., 19} As candidate for the Presidency of SCBA, he
proclaimed that he was “determined that Bar should revert to its historic role of strengthening the
hand of democratic forces and opposing any attempts to subvert the rule of law.”\footnote{Ibid.} After he
succeeded in winning the elections by a narrow margin, his supporters chanted slogans of “Go
Musharraf Go” at the office of the bar, which demonstrates that it represented a victory for the
anti-establishment candidate.\footnote{Malik Qayyum, the incumbent president of the bar, held an illegal recount, based on which he declared Raja
Nawaz, the pro-establishment candidate as President. Munir Malik challenged Qayyum’s actions before the Pakistan
Bar Council (PBC), which reinstated him as president. PBC’s action was then challenged by Qayyum in the Punjab
High Court, and while the case of pending, Munir Malik filed a petition at the Supreme Court under article 185(3) of
the Constitution. The Supreme Court vacated the interim order of the High Court, and remanded the matter to the}
Above, I have argued that the main difference which explains the differential outcome of the lawyers’ movements in Pakistan and Egypt is the relative autonomy of the bar associations in these countries from other political actors. Theoretically, professional associations belong to the category of civil society, which Linz and Stepan define as “that arena of the polity where self-organizing and relatively autonomous groups, movements, and individuals attempt to articulate values, to create associations and solidarities, and to advance their interests.” Political parties belong a separate sphere within the polity, which Linz and Stepan call ‘political society,’ in which “political actors compete for the legitimate right to exercise control over public power and the state apparatus.” Given these different orientations and roles, an important concern arises as to what is the ideal relationship between civil society and political society organizations.

Scholarly literature on democratization, where this question has received most attention, emphasizes that the separation, as well as complementarity, between the two spheres is important for democratic consolidation. Linz and Stepan argue that a vibrant civil society is valuable during all stages of democratization, and see a danger in civil society and political society working at cross-purposes. Diamond thinks the complementarity can only work if accompanied by autonomy, and argues that “[o]rganizations and networks in civil society may form alliances with parties, but if they become captured by parties, or hegemonic within them, they thereby move their primary locus of activity to political society and lose much of their

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359 Ibid.
360 Ibid., 18
ability to perform certain unique mediating and democracy building functions.”\textsuperscript{361} Further, he thinks that the politicization of civil society organization along partisan lines undermines “cross-cutting bonds of solidarity and civility.”\textsuperscript{362} Based on an analysis of civil society organizations in Latin America, Brysk has argued that affiliation with political parties can often erode the public legitimacy of associations.\textsuperscript{363} Ozler and Sarkissian have found that civil society organizations in Turkey are viewed as “arms of political parties,” and lacking autonomy, are unable to play a constructive role in democratic consolidation.\textsuperscript{364} While this literature emphasizes the need for an autonomous civil society, it does not elaborate upon the particular mechanisms which renders a politicized civil society ineffective. One of the problems is examining all civil society organizations within a single category. Civil society is a diverse set, and it is likely that autonomy may be more important for some types of associations than for others. Based on the comparison of the lawyers’ movements in Pakistan and Egypt, I argue that there are two mechanisms through which the mobilization potential of professional association is reduced, given their affiliation with political parties.

First, political parties usually mobilize constituents on a large set of agendas, whereas professional groups represent a narrower set of issues. If political parties capture professional groups, it is likely that the parties will try to use associations to advance a broader set of agendas, which may be irrelevant to, or even incongruent with, the interests of the profession. The raison d'être of professional associations is to protect the corporatist interests of the profession, while parties have wide ranging agendas. One of the main differences between the two lawyers’

\textsuperscript{361} Larry Diamond, “Rethinking Civil Society, toward democratic consolidation,” in \textit{Journal of Democracy} (5.3: 5-17, 1994), 7
\textsuperscript{362} Larry Diamond, Developing Democracy: Toward Consolidation (Johns Hopkins University Press, 1999), 225
movements was the level of autonomy from partisan interests. The bar in Pakistan operated autonomously from the political parties. While opposition parties did lend support to the movement when it was in their interest, the lawyers’ movement itself was orchestrated by an autonomous bar. Throughout the movement, the Pakistani bar maintained a one-point agenda, which was perfectly in line with the corporatist interest of the profession: the reinstatement of the deposed judges. In Egypt, by contrast, the bar was controlled by lawyers affiliated with the Muslim Brotherhood, which hoped to become a mainstream political party in the future. In devising their strategy, Brotherhood members on the Syndicate board likely considered not only the interests of the profession, but also, and perhaps primarily, the interests of their political party. As noted, it was ironically the secular members of the bar who wanted to continue agitation which started when an Islamist lawyer died in police custody. The decision making calculus, hence, did not revolve primarily along what would be best for the profession. Instead, owing to party involvement, dissention and fragmentation resulted with the bar. Interestingly, in the same year, party involvement had caused infighting and fragmentation within the EOHR, the most prominent human rights advocacy organization in Egypt.  

The 1994 EOHR election had been captured by the Nasserite Party. Rather than human rights issues, the focus on the campaign had been on engineering a win for the party candidates, such as by adding new members from rural Egypt affiliated with the party. The losing side, rather than criticizing the agenda of the winning side, argued that this was a “coup by the Nasserites.” The accounts of party involvement in both the Egyptian bar and EOHR demonstrate how the shifting of agendas cause internal dissention, and diminish the mobilization potential of associations.

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366 Ibid.
Second, there is fundamental difference between the goals of professional groups and political parties. Parties are primarily interested in winning the electoral game, and in the exercise of public power by controlling the state apparatus. Professional groups, on the other hand, focus primarily on promoting their interests or political goals that have a nexus with their profession. If parties capture professional groups, the strategic objectives of the association will shift from interest articulation to assisting the party to come to power. In the case of Egypt, it appears that continued mobilization was in the best interests of the bar, as evidenced by the insistence of secularist lawyers to continue the movement. Had the bar succeeded in pressuring the regime to conduct an independent investigation, it would have been a major victory for the profession, which would have ensured that the regime would be wary of illegally arresting and torturing lawyers in the future. Further, it was likely, given the attention the movement received in the public sphere, that the lawyers could challenge the State of Emergency itself, under which it was possible for the regime to detain dissidents such as Madani. However, it appears that the Brotherhood was willing to compromise given the political situation at the time.\footnote{Economist. “Egypt: Who did it.” July 2, 1994} In Pakistan, instead, the decision-making calculus of the movement leaders was not subordinate to the concerns of political parties. This is evidenced by the shift in support of the Pakistan People’s Party (PPP). While the PPP initially supported the movement when it still an opposition party, after the end of the military dictatorship, PPP formed a government and refused to reinstate the deposed judges. The lawyers, however, continued their mobilization, now targeted at the PPP government. This shows that if associations are not subordinated to a particular political party, it has a higher mobilization potential, since they can shop around and find the ally that can best help it in promoting its interests. Hence, professional groups such as the bar can certainly enhance their mobilization potential by working together with and having linkages with parties.
However, if the association is subordinate to a political party, or is subsumed in party politics, its mobilization potential is reduced given the two factors discussed above.

**Conclusion**

At a time when authoritarianism seemed to be consolidated in Pakistan, the legal profession led a two-year long movement against powerful executive officials. Apart from two major events of contention which the bar called the ‘long marches,’ there were nearly 300 bar-led anti-government events that were reported by just one national newspaper, which covered only seven large cities in the country. In addition, bar associations in a large number of small towns actively engaged in protest, including by regularly boycotting courts. At the time the movement started in 2007, it was the first consequential anti-regime mobilization in the country since General Musharraf had taken control of the executive in 1999. By the time the movement ended in 2009, Musharraf had resigned, civilian governance had returned, and the Supreme Court had emerged as one of the most powerful institutions in the country. While this chapter focused on exploring the mechanics and intensity of lawyers’ mobilization, I explore the process through which the mobilization influenced the public sphere, and led to the building of rule of law and the empowerment of the judiciary in chapters 5 and 6. Further, in this chapter I also explored the conditions that facilitate the emergence of effective legal mobilization by comparing the Pakistan lawyers’ movement with two other movements. Through a comparison with a movement organized by the medical profession, I inferred that the legal profession possess a unique resource profile that endows it with a higher mobilization potential compared with other profession. Finally, a comparison with the Egyptian lawyers’ movement demonstrated the importance of autonomy of the profession from both the state and political society.
How can one explain the rapid expansion of judicial power in Pakistan between 2005-09? The question necessarily involves an investigation into the bases of judicial power, an examination of whether one or more of these changed, and whether and how that transformed the power of the Court. As discussed in Chapter 1, scholars analyzing judicial empowerment have narrowly focused on elite-centric bases of judicial power. The failure of the these theories in explaining the transformation of the judiciary in Pakistan forces us to look beyond delegative models of judicial power. If it was not a change maneuvered by political elites, and no change was made structurally in the constitutional power of the Supreme Court, then what happened in Pakistan that led to the empowerment of the judiciary?

As discussed in the previous chapter, the main event that seems to have changed the course of constitutional politics in this period is the lawyers’ movement for the restoration of the judiciary, which began in 2007 and concluded in 2009. The lawyers’ movement, however, was focused on the reinstatement of suspended judges, and the movement did succeed, twice, in the reinstatement of the judges. How did this movement also contribute to judicial ‘empowerment,’ apart from achieving its narrower overt objective of judicial ‘reinstatement’? In other words, what was the basis of judicial power the movement supported, which led to the expansion of judicial power in Pakistan?

In this chapter, I explore how public support in the citizenry provides a high court with what I call ‘epistemic’ power. Based on an examination of Pakistani case, I develop a model to
explain why citizens would support the empowerment of an anti-majoritarian court in the context of an emerging democracy. I explain that a citizen is likely to support constitutional checks even as a supporter of the incumbent political party. In contrast to previous models of citizen support for constitutional courts, I argue that apart from performing information and coordination functions, citizens also look to courts for actual policing of constitutional boundaries. This function becomes necessary, I argue, because of certain shortcomings in modern representative democracy that depends fundamentally on party politics.

**Public Support and Epistemic Power of Courts**

In chapter 6, I build an argument to show that legal mobilization led to judicial empowerment in Pakistan by altering the valuation and perception of the Supreme Court in the public mind. But, one may ask, does knowledge, popularity, or legitimacy of courts among the citizenry have any implication for the power of the judiciary? Does such support in the public provide a basis for judicial power? From an analysis of the Pakistani case, I argue that while such support is important for most political institutions, it is essential for the empowerment of a court engaged in constitutional adjudication. This is because the court does not have an implementing arm of its own, and relies on other actors, often those it challenges, for the implementation its judgments. This factor has often been stressed, most famously in *The Federalist* by Hamilton, as courts lacking the power of the “sword or the purse.” Scholars who take an elite-centric view take this presumed weakness too far, and assume that since courts lack such powers, they do not have
much autonomous power of their own. Hamilton himself was careful to note that courts do have the power of “judgment,” but denied that they had “force” or “will.”

Examining the case at hand, it appears that while the empowered Court certainly lacked the power of the sword or purse, it had the power of ‘voice.’ The power of voice likely depends on how many are exposed to it, and how they perceive the entity that speaks. Once there is a large audience that is ready to listen, and considers the speaker legitimate, then voice can no longer be considered to lack ‘force’ or ‘will.’ Arguing that the court is weak merely because it lacks an implementing arm is problematic, since it entails that whichever actor has more means of violence at its disposal will be more powerful. For example, in any country, the military is likely to be the most powerful institution, if we focus on ‘hard’ power or access to means of violence. However, in democracies, the military is subordinate to the government, and takes its orders from elected officials. In India, for instance, the military has more power of the ‘sword’ at its disposal than does the political party in power. What, then, prevents the military from taking over the state from the elected government? Arguably, a strong norm has developed in India over several decades of democratic governance, such that a military takeover would be deemed highly illegitimate by the citizenry. Similarly, it cannot be assumed that a court engaged in a constitutional contest with institutions with greater ‘hard’ power, including access to guns or money, will thereby always be in a weaker position. If the court’s main resource, its ‘voice,’ has reception and legitimacy in the citizenry, it can potentially be more powerful than the other institutions.

The court, hence, has epistemic power, even if it lacks an implementing arm. This epistemic power is not entirely passive, such that along with ‘judgment’ the court also has

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368 See *The Federalist* No. 78
‘voice,’ the reception of which in the public sphere is an important determinant of the court’s power. In Pakistan, once legal mobilization had created strong receptivity of the Court’s decisions, the newly liberalized media gave extensive coverage to court decisions, especially those that were unfavorable to the incumbents. An example is disqualification of Prime Minister Yusuf Gilani by the Supreme Court, who was convicted on the basis of contempt of court in 2012 (see Chapter 2). While the incumbent government tried its best to avert this outcome, the Prime Minister had to vacate his office after the Supreme Court declared him ineligible to hold the Prime Minister’s office. The epistemic power of the Court, arising from the receptivity and legitimacy of the Court in the public sphere, was strong enough to lead to the removal of a democratically elected Prime Minister. The fact that there was public support in empowering the court can be gauged from that fact that for three years preceding this judgment (2010-2012), public opinion of the chief justice remained more favorable than for the Prime Minister.369

While scholars focusing on judicial empowerment in emerging democracies have neglected the examination of public support as a basis of judicial power, the importance of public opinion to judicial power has been examined in the context of consolidated democracies. Consider for example Franklin D. Roosevelt’s (FDR) plan in 1937 to “pack” the US Supreme Court with friendly judges. In the context of the New Deal, the Court seemed resistant to allow the government to engage in the economic programs that the President and others in his government saw necessary.370 Within four months of publically announcing the plan to

370 Several methods were suggested by New Deal allies at the time to curb the power of the Court, including proposals such as increasing the size of the bench, abolishing judicial review, requiring a higher standard than simple majority to invalidate federal legislation, and instituting a mandatory retirement age for judges. However, the proposal that FDR ultimately took up came from Princeton Professor Edward Corwin, which would allow the president to nominate an additional Supreme Court justice for each current judge who was above seventy and had served 10 years or more on the Court. See Gregory Caldeira, “Public Opinion and the US Supreme Court: FDR’s Court-Packing Plan,” in The American Political Science Review, Vol. 81, No. 4 (Dec. 1987, 1142)
restructure the court, it was apparent that the plan was a failure. In his analysis of FDR’s failure at court packing, Caldeira argues that public support for the US Supreme Court was critical in preventing FDR’s government from restructuring the Court. The Court faced a difficult decision between preserving ‘structural integrity’ and ‘substantive policy,’ and by retreating from its earlier jurisprudential position on New Deal legislation, the Court chose to preserve the latter. The Court’s actions had a measurable and significant impact on public attitudes towards the Court. Two events in particular caused a steep decline in public support for FDR’s plan. First, the \textit{NLRB v Jones and Laughlin Steel} decision upheld the National Labor Relations Act (or Wagner Act) of 1935, signaling an end to the Court’s jurisprudence of annulling New Deal legislation. Second, the retirement of the conservative Justice Van Devanter meant that an FDR appointee would take his place, thus reducing the need to ‘pack’ the court. In addition to the actions taken by the Court, however, as discussed in Chapter 1, the press and the bar associations took a leading role in criticizing and delegitimizing FDR’s plan. The Federal Bar Association, as well as the state bars of most states, condemned the plan and issued resolutions and declarations to that effect. In the press, FDR’s plan became the “biggest news story of the decade,” with much of the coverage being critical of the President. For example, one newspapers editor wrote as follows about the plan: “Relish the idea or not, there are strong indications that America is headed toward a dictatorship. It can only be prevented if the people rally around this fundamental issue of maintaining the integrity of our courts.”

\begin{footnotes}
\item[371] Caldeira, “Public Opinion and the US Supreme Court”
\item[372] See Marian McKenna, \textit{Franklin Roosevelt and the Great American Constitutional War: The Court Packing Crisis of 1937} (Fordham University Press; 2002)
\item[373] Ibid, 305
\item[374] William White, “Topics of the Daily” (Literary Digest; February 12, 1937, 1); quoted in McKenna, \textit{Franklin Roosevelt and the Great American Constitutional War}
\end{footnotes}
Though the episode of public rivalry between the executive and the judiciary over FDR’s plan to pack the Court illustrates the importance of public opinion, it is unclear whether the Court could have preserved its institutional integrity had it not altered its jurisprudence on economic issues. Another example of a high profile confrontation between the executive and the judiciary illustrates that the latter may prevail even without retreating from its position. In 1952, the West German Federal Constitutional Court (FCC) and Chancellor Adenauer’s government clashed over the constitutionality of two treaties, the General Treaty and the European Defense Community Treaty. Initially the government had believed that the abstract review proceeding to determine the validity of the treaties under Basic Law would not be of much concern. However, once it became apparent the FCC was likely to rule against the government, a series of confrontational events between the executive and the court ensued. The Minister of Justice Dehler was sufficiently perturbed about the Court’s position that he is reported to have claimed that he “would blow up the entire constitutional court himself.” The government considered a number of strategies to weaken the Court, including pressurizing the FCC to end the proceeding, rallying the public to support the government’s position, and altering the FCC’s institutional structure. Even in the face of tremendous pressure from the executive, the Court refused to retreat from its position. The government publically declared its intent to ensure ratification, even if this would require it to alter the institutional structure of the Court. Within two weeks, however, the government abandoned its position, and publically declared its support for the FCC’s authority to engage in constitutional review. This change of heart, as Vanberg has pointed out, was not sincere, but motivated by the immense public backlash the government

faced in its attempt to manipulate the court’s structure. The press, Vanberg notes, was overwhelmingly opposed to the government’s attitude toward the FCC. In condemning the government, for instance, Der Spiegel stated, “A highest court which errs is still better than one whose authority is undermined by the president and the government.” The government was fully aware of the spate of criticism in the public media, and took actions to appease the public about the government’s initial plans to restructure the court. In fact, the cabinet published a declaration supporting the FCC. The West German case is a powerful example of the importance of public opinion in providing a base of support to judicial institutions against incursions by otherwise more powerful branches of government.

The two episodes of confrontation between the executive and the judicial branches described above are illustrative of the role played by public opinion in providing a basis of power for courts. In Pakistan, similarly, the lawyers’ movement mobilized public opinion in favor of a judiciary that had been under attack by the executive. However, through their street movement, the lawyers not only succeeded in their goal of reinstating the judges, but also in significantly empowering the restored judiciary. In contrast to the delegative empowerment model which looks at political elites as providing the basis of judicial power, the source of courts’ power in these examples is located from the public rather than from self-interest of political elites. In fact, in these cases, public opinion shields courts from the actions of political elites, whose interests and preferences are being threatened by the courts.

376 Vanberg, “Establishing Judicial Independence in West Germany”
377 Ibid, 345
378 The declaration, which was personally delivered by Chancellor Adenauer to FCC judges, stated, “The cabinet unanimously declares that it never conceived of encroaching on the rights or the dignity of the constitutional court, or even to question them. The cabinet respects the FCC as an integral part of the democratic Rechtsstaat....” Ibid, 346
I argued above that the expansion of judicial power in Pakistan occurred because legal mobilization led to the creation of public support for the Supreme Court during 2005-13. From this observation, a question arises as to why citizens would support an independent and powerful court. The initial period of the expansion of judicial power, from 2005 to 2008, can be explained by the anti-authoritarian nature of legal mobilization. During this period, the military regime led by Musharraf had become increasingly unpopular, and some commentators see legal agitation in favor of the Supreme Court as a movement for the restoration of democracy. As explained in section III of this chapter, though the lawyers’ movement had an important role to play in spurring a democratic transition in Pakistan, this was an unintended consequence of the pro-judiciary mobilization. The continuation of the lawyers’ movement beyond the fall of Musharraf into the democratic period demonstrates that the core proposition put forward by the movement into the public sphere was judicial empowerment rather than the end of dictatorship.

With the return of electoral democracy after the February 2008 elections and the subsequent resignation of General Musharraf in August 2008, why would citizens still be interested in following, and indeed supporting, a pro-judiciary social movement? After all, in the 2008 parliamentary elections, the pro-regime Pakistan Muslim League (Q) secured only 50 of the 341 seats in the national assembly, compared to 118 seats in the previous elections held in 2002. The two parties opposed to military rule, whose leaders had been exiled after Musharraf had come to power in 1999, became dominant, with Pakistan Peoples’ Party (PPP) winning 118 seats and Pakistan Muslim League (PML-N) winning 89 seats. PPP formed the government at the

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center, while PML-N formed a provincial government in the largest province, Punjab. The relative fairness of the elections over the previous one can be gauged from the fact that even though the elections were held while Musharraf was still in power, the pro-Musharraf PML-Q suffered a heavy loss against the anti-regime parties. As explained in section III below, the movement for the restoration of the judiciary contributed to the delegitimization of both the regime and PML-Q, paving the way for the return of civilian governance in Pakistan. However, the pro-judiciary lawyers’ movement continued into the civilian period, and indeed gained enough strength to pressure the PPP government to restore the deposed judges in 2009. The very last movement event, the March 2009 long march, was one of the largest protest events in the country’s history. The bar-led movement was popular enough at this point to attract hundreds of thousands of citizens to join the call for the restoration of democracy. While opposition parties joined the protest and organized its workers, a fair proportion of the protestors were ordinary citizens mobilized through the media.

Why would citizens continue to support pro-judiciary legal agitation, given they had been able to exert their ‘general will’ and elect a parliament of their choice? In other words, why would the people support the restoration and empowerment of an unelected institution, given they had just recently been able to elect a government of their choice after a decade of authoritarian rule? In the United States, there has been considerable debate among constitutional scholars on what Bickel termed the “countermajoritarian difficulty,” arising from the power of an unelected court to annul the decisions representing the will of the majority. From a normative standpoint, several scholars since Bickel have developed theories justifying judicial review on various grounds. For instance, Grey argues that the enforcement of fundamental values provides

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380 See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press; 1986)
justification for overruling the will of the majority.\textsuperscript{381} One of the most important contributions to the debate has been by Ely, who defends judicial review on structural grounds.\textsuperscript{382} Ely sidesteps the challenge posed by Bickel by viewing the court’s position in constitutional politics in ways that enhances democracy. For this to happen, the court’s power of judicial review ought to be limited to those actions that can facilitate democracy.

Apart from normative analyses of the counter-majoritarian difficulty, which consider the legitimacy of judicial review in a democratic context, some political scientists have attempted to address the challenge by pointing out the invaluable function performed by a judiciary in the context of a representative democracy. For instance, political scientist David Law has developed a model to explain why a rational citizen in a democratic context is likely to support an independent judiciary.\textsuperscript{383} Law argues that the principal-agent problem inheres in democratic politics. In a modern constitutional democracy, the government, as an agent of the people, is supposed to exercise public authority within the bounds set by the constitution. However, given the limitations of the principal in being able to effectively monitor and control the agent’s actions, the agent may engage in self-interested behavior that would be inimical to the interests of the principal. In Law’s framework, there are two fundamental problems that prevent the people, the principal, in effectively controlling the activities of the agent, the government. The first is an information problem, such that the people need to know whether the agent has in fact transgressed the bounds set by the constitutional framework that defines the limits of the exercise

of public authority. Second, there is a coordination problem which may prevent the people from acting together if they lack a coordination mechanism.

Judicial institutions can perform these two critical functions, Law argues, and thereby enhance the people’s ability to monitor and control the actions of their agent, the government. Courts solve the information problem by carefully examining the government’s behavior with reference to the constitutional framework, hence providing reliable low-cost information to the public about possible transgressions by public officials from the limits of their delegated authority. Law notes that courts are particularly well suited for this task because they are specialized institutions with expertise at judging the conformity of an actor’s behavior with established rules. Ordinary citizens lack the kind of expertise needed to judge whether the government’s actions have been consistent with the constitution. Without an effective method to inform the public about nonconformity of public officials with the predefined rules, elections will not prove to be a useful device in limiting the abuse of power by elected governments. Courts solve the coordination problem by creating similar expectations among the people through their rulings. The rulings provide a signal to the people about the government, which is unique and readily accessible. In this way, Courts act as ‘focal points’ in coordinating citizens’ expectations. The institutional uniqueness and public prominence of constitutional courts help in the performance of this coordination role.

A court can hence be useful in solving the principal-agent problem that characterizes modern democracy, by providing the people with information and a mechanism for coordination. But, cannot such a function be provided by other existing institutions in society? For instance, perhaps the media can perform the role of providing information about transgressions of public authority and creating coordination among the people. Academics and public intellectuals, using
the media, can use their expertise to inform the public about violations of the constitution by public officials. Law entertains this idea, but finds that these avenues for solving the principal-agent problem are inadequate when compared to a specialized judiciary. This is because courts have a certain prominence in society, and speak with a single voice. In contrast to a panoply of opinions in media, there is usually a single high court vested with the power to adjudicate constitutional claims.

Given the expertise and uniqueness of constitutional courts, Law’s argument about the superiority of courts over other institutions in solving the information and coordination problems seems persuasive. The alternatives, including media, academia, and civil society, lack the singularity and competence to solve the coordination and information problems. However, as a theory of the value of judicial review to the citizens in a democracy, Law’s argument seems less convincing. This is because the functions Law describes can adequately be performed by a prominent institution that only has the power to issue advisory opinions, without having the power to annul governmental action.

Imagine a Kelsenian-type constitutional court, which has been granted the power to make declaratory judgments on constitutional issues. The court entertains constitutional complaints from aggrieved citizens. Rather than having true judicial review powers, however, the sole power available to judges on this court is the publication of reasoned judgments. Let’s also imagine that the institutional positioning of the court is such that it is considered to be a prominent, unique and prestigious institution. Such a court, with powers of constitutional comment without judicial review, can adequately perform the various functions that Law’s model delineates. First, it can provide low-cost and reliable information to the electorate about constitutional violations by public officials. Second, it can also act as a focal point leading to a convergence in citizens’
expectations, thereby solving the coordination problem. Hence, Law’s model is a good one for a single prominent institution with the power of constitutional comment, but does not provide an adequate theory of why citizens should also support the granting of judicial review power to the court. That is, along with ‘voice’ (to point out transgressions), why must the constitutional court also be granted ‘teeth’ (to annul governmental action)?

Law’s model for explaining why the public supports constitutional courts is unable to explain the most important feature of these courts: the power to annul executive and legislative actions of elected officials. It seems intuitive, as Law argues, that the public should support an institution that provides it with low-cost reliable information about public officials’ unconstitutional actions. But, this does not mean that the principal, the people, would also delegate remedial powers to the court. Once the people have the information, they can very well punish misconduct through regular elections. The key question, then, is why the people would support powerful courts that go beyond providing reliable information and engage in remedial actions related to unconstitutional behavior by the government.

A possible answer emerges from the examination of judicial expansion in Pakistan, where court empowerment occurred in a democratizing context through a process of popular mobilization. It appears that in the context of an emerging representative democracy, the principal, the people, sought something more from an empowered court than merely providing information and coordinating expectations. Given certain limitations of representative democracy

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\(^{384}\) One can also further point out the limitations of focusing on information and coordination problems, as Law does, and imagine that the Court now also has the power to impose monetary fines for constitutional violations. In this sense, the court’s function would be similar to the role played by the European Court of Human Rights in the countries comprising the Council of Europe. A domestic court with the power to issue declaratory judgments and fine the government, but lacking the ability to annul governmental actions, would surely be able to perform the information-providing and coordination-creating functions discussed by Weingast and Law. But, we are left with the question of why citizens would prefer courts with judicial review powers to a Strasbourg-like court with more limited powers.
as it exists in contemporary political systems, it appears that the electorate in Pakistan wanted the court to actually be empowered to check the power of political elites, including those they had themselves elected.

One of the problems with a highly abstracted model, such as Law’s, is that while it adequately captures the preferences of the actors within the narrow confines of the model, it may be disconnected with how actors actually think in a concrete political setting. For example, Law’s model gives scant attention to electoral dynamics, including party politics and policy preferences of voters. Below, based on field research in Pakistan, I develop a model to explain public support for constitutional courts which takes seriously the concrete political context within which a citizen-voter may decide to support an empowered judiciary.

One of the most puzzling aspects of institutional change in Pakistan over the last decade has been the disproportionately high support for the judiciary compared with elected officials. In the years immediately following a democratic transition in Pakistan in 2008, the higher judiciary had remarkably high approval ratings compared with democratically elected leaders. A nationally representative 2011 Gallup-Pakistan poll found that Chief Justice Chaudhry was the most popular public figure in Pakistan. The 2012 Gallup-Pakistan poll reported that 85% of the people in Pakistan were happy with the performance of the chief judge.\(^{385}\) In the 2013 poll, the Chief Justice was again the most popular public figure in the country with an approval rating of 70%.\(^{386}\) In comparison, the outgoing president Zardari, had an approval rating of only 21%. Similarly, the Pew Center polls for 2010-2012 showed higher approval ratings for the Chief Justice than for President Zardari or for Prime Minister Gilani.\(^{387}\)

\(^{385}\) *The News International*, “CJ’s popularity has increased: Gallup Poll” (August 11, 2012)

\(^{386}\) *The Wall Street Journal*, “Pakistani Judge Gains Clout” (April 22, 2013)

\(^{387}\) Pew Research Center. “Pakistan Public Opinion” (Global Attitudes and Trends; June 27, 2012)
While the high support for the judiciary compared with elected officials in Pakistan during 2008-13 is certainly interesting, an important aspect of the support not captured by most nationally representative surveys is the opinion of the Court along party lines. Through interviews and short surveys with lawyers and citizens in Lahore and Islamabad conducted in 2013 and 2014, I learned that support of the high judiciary was remarkably high across party lines. The most surprising result that emerged from these short surveys was that even supporters of those political parties whose leaders’ actions had recently been challenged by the court supported the expansion of judicial power in Pakistan. It appears that citizens in the newly democratizing environment in Pakistan concurrently supported political parties as well as a powerful judiciary which could challenge the power of the parties, including the one favored by them.

While it is understandable why citizens would support judicial scrutiny of the actions of a political party she does not favor, it is not readily apparent why they would also support scrutiny over the decisions of the party they have voted for. Law’s answer is that the citizen would like to have reliable information about whether the party leadership is acting within constitutional bounds. Through in-depth interviews with lawyers and citizens, I learned that in Pakistan, the people wanted the court to go beyond: to check and even punish transgressions of power by elected officials, even belonging to the party of their choice. Hence, apart from providing information and creating coordination, the court in Pakistan had an additional democracy-enhancing function, which I explain below by building a model for citizens’ support for the court that is sensitive to the actual political context in which elections take place.

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388 This result is corroborated by a Pew Center survey, which notes “a majority of those in the PML-N (69%) and a plurality in the PPP (46%) hold favorable views of Pakistan’s chief justice.” [http://www.pewglobal.org/2011/06/21/chapter-2-ratings-of-leaders-and-institutions/]
The prevalent form of democracy in the contemporary world is representative democracy, in which a small subset of the people is elected by voters to engage in policymaking and governance. In democracies around the world, public officials are elected on political party platforms. Political parties in modern democracies compete by offering voters ideologically differentiated policy agendas. While direct democracy allows citizens to vote on individual policy issues, modern representative democracy essentially allows citizens to vote on a package of policy options that have been put together by competing political parties. In essence, what contrasts direct democracy and contemporary representative democracy is whether citizens vote on single policy issues or on a package of policies. Political scientist Budge argues that the policy packages that are offered to voters by political parties are a core feature of modern democracy, and it would be unrealistic to claim that an elected individual can move forward with an exclusive policy agenda that differs from that of his or her party’s.

In democratizing Pakistan, as in modern representative democracies around the world, voters have to choose between a limited set of policy packages. Often, at the national level, and especially in countries with first-past-the-post electoral systems, there are only few such policy packages available to voters. For various reasons beyond the scope of this study, the barriers to entry for new political parties are high, not only in emerging democracies but also in consolidated democracies. Hence, an individual voter has to choose between a limited set of policy packages, none of which may fully correspond to her own policy preferences on each of the issues. In fact, it would be a rare voter whose preferences would be exactly aligned with the stated policies of a particular political party. In most cases, voters would have some kind of

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390 Ibid.
weighting mechanism to decide which issues are most important to her, and vote for the party which does favorably on the issues of highest importance.

Even when the choice has been made in favor of a party, however, the voter is confronted with a number of party policies that the voter might disagree with. One method to prevent the party officials from implementing these policies would be to establish a system of constitutional checks, such as by enabling a court to perform judicial review of legislative and executive actions. In this way, a voter can select the most acceptable policy package offered by a political party, but also prevent the party from overstepping the limits with policies that the voter finds most egregious. The high support for the Supreme Court in Pakistan across party lines can be explained by this dynamic, whereby given the limited choice of political parties, the electorate would support a mechanism to keep even their favored party in check. This became apparent during interviews with lawyers and non-lawyer citizens about the basis of their support for the Supreme Court. A number of interviewees, while expressing strong support for their favored political party, also saw imperfections within the party based on past performance and the inclusion of certain politicians whom they considered corrupt within the party. While they supported their favored parties, they also celebrated the Court’s ability to check corruption within the party.391 Based on this insight, I develop a model for citizens’ support for an empowered court in a country with representative democracy and a limited number of political parties.

391 For example, a PPP supporter I interviewed believed strongly in the ideology and legacy of the party, but was not satisfied with Zardari’s leadership of the party. Hence, he expressed support of the Court’s actions in attempting to adjudicate Zardari’s corruption cases. Similarly, a PML-N supporter suggested that the “lack of checks and balances” on Sharif’s government following the 1997 elections had created a feeling of unbridled power among the party leadership, and to abuses of power by the elected officials. While his ideological leanings were closest to PML-N, he did not vote in the 2008 elections. However, he claimed that with greater oversight through the Supreme Court and the media, he felt comfortable voting for PML-N.
Consider a hypothetical voter who has a choice between two political parties. In this simplified model, there are only five issues on which the parties declare their policies prior to the elections (issues A-E). The importance of the issues varies to the voter, ranging from very high for issue A to low importance for issue E. In the table 5.1 below, the preferences of the voter on each of the five issues is juxtaposed with the declared policies of the two political parties on the issues. For each actor, a score ranging from 1 to 10 represents its policy position. The closer the score of the voter to the political party’s, the more their preferences and goals are aligned. For example, on issue A, the preference of the voter is 8 and the stated policy of Party Y is also 8. Hence, the preference of the voter is exactly aligned with the stated party policy on this issue. By contrast, party Z’s stated policy is 7 points away from the voter’s preferred position on issue A.

How will the voter decide which party to vote for in this model? One method is to simply aggregate the difference in policy positions for both parties from the voter’s preferences. The voter’s and party Y’s policy views differ on issue C (two points) and issue D (four points), for a total of 6 points. For party Z, the total difference is 15 points. Hence, if all issues matter to the voter equally, the voter would simply vote for Party Y. However, a more realistic model would take into account the level of importance to the voter of various policy issues, as shown in the table below. This would involve weighing the various policy divergences, and then making a decision. As the model is defined, the policies of party Y are identical to the voter’s preferences on two most important issues, with little divergence on the moderate-level issue. Hence, even with the weighting, the voter will vote for party Y.
Table 5.1. Preferences of the Voter and difference from Parties’ Policies

<table>
<thead>
<tr>
<th>Issue</th>
<th>Importance of Issue to Voter</th>
<th>Voter Preference (1-10)</th>
<th>Political Party Y (1-10)</th>
<th>Political Party Z (1-10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Very High</td>
<td>8</td>
<td>8</td>
<td>1*</td>
</tr>
<tr>
<td>B</td>
<td>High</td>
<td>6</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>C</td>
<td>Moderate</td>
<td>4</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>D</td>
<td>Low</td>
<td>6</td>
<td>10*</td>
<td>6</td>
</tr>
<tr>
<td>E</td>
<td>Low</td>
<td>6</td>
<td>6</td>
<td>1*</td>
</tr>
</tbody>
</table>

Note: * denotes an extreme position, one the voter believes is unconstitutional

The problem, however, is that even though the voter prefers party Y to party Z, the voter is dissatisfied on two policy issues. The voter would definitely prefer if the party’s policies were exactly aligned with her preferences. Now, let’s suppose that when a party adopts an extreme policy position (1 or 10), the policy, if instituted, is likely to be in violation of the constitution. The voter in this case disagrees with party Y on issue C, but can do little because the party’s position is within the bounds of constitutionality.

On issue D, however, the voter believes that his favored party (Y) is actually proposing a policy in violation of the constitution. Because the voter gives low importance to this issue, it does not affect her overall preference for party Y. However, on this issue, the voter would prefer to have a mechanism to prevent party Y from actually implementing the policy. An empowered constitutional court can engage in judicial review of party Y’s action, and by nullifying it, prevent the party from implementing its unconstitutional policy. Similarly, the voter believes that party Z’s policy position on issues A and E violate the constitution. Even if party Y is unsuccessful in winning the elections, the voter would still be better off with a constitutional court that can prevent party Z from implementing unconstitutional policies.

The people would hence support judicial review as a mechanism for preventing politicians from implementing unconstitutional policies because of a fundamental shortcoming of
modern representative democracy. Given the importance of political parties in democratic systems around the world, voters are forced to choose between competing policy packages. While a voter may prefer a policy package overall, she is likely to disagree with the party on several issues, and may find that the party’s proposals are unconstitutional on some. The people may hence prefer a constitutional review mechanism that will prevent even their favored political party from instituting policies that violate the constitution.

The model just described leads to a counter-intuitive result. Voters may value judicial intervention in policymaking and governance by members of their preferred political parties. To understand this, imagine that a particular issue is of very high importance in the minds of voters. For example, in some countries, including Pakistan, ethnic parties mobilize the electorate on the basis of identity, such that this aspect becomes disproportionately more important to ethnic voters. However, since the ethnic party is able to mobilize support based on an issue of high importance (identity), the party is then incentivized to pursue unconstitutional goals on issues of lower importance. Such behavior is also unlikely to be punished in the subsequent election, since identity has a disproportionate important over policy issues to the voter. While the voter may prefer voting for the ethnic party based on ethnic sentiment, she may also feel that it would be unjustified for the leadership of the ethnic party to engage in self-serving unconstitutional behavior. Hence, she may support judicial review, even if the court challenges her preferred political party. Ethnicity in the example can be replaced with other issues on which voters place disproportionate importance. For instance, during times of conflict, a party may mobilize voters on an anti-war policy agenda. This may matter disproportionately to a certain constituency, and if they party makes progress on its anti-war agenda, supporters may continue voting for it in the future. But, the party may also have other plans, such as to introduce laws limiting the freedom
of media, which the voters believe are unconstitutional. Hence, they may support a constitutional
court that can engage in judicial review, and prevent the very party they put into office from
pursuing unconstitutional policy goals.

Conclusion

In this chapter, I developed a model to explain why citizens are likely to support a counter-
majoritarian court in the context of an emerging democracy. The model presented above explains
why even supporters of an incumbent political party may value constitutional checks on the
ability of the party to fully implement its policy objectives. Given the limited number of policy
packages available in modern representative democracy, most voters are likely to disagree with
some policies, and may find it useful for the courts to nullify those actions which are
unconstitutional. It is true that in some cases courts may strike down unconstitutional actions
which a voter may prefer, or may genuinely believe is within the scope of the constitution. On
balance, however, as the observation of high support for judicial empowerment in Pakistan
shows, if the voter believes in the efficacy and impartiality of the court, she will prefer
constitutional checks, even on her favored political party. This presents an additional reason why
citizens may support constitutional courts, along with the informational and coordination
functions that have been previously been pointed out by scholars.
In chapter 5, I argued that the expansion of judicial power in Pakistan during 2005-09 had its basis in rapid increase in the Supreme Court’s epistemic power, which I have defined as the receptivity and legitimacy of a court in the public sphere. The transformation was not in the constitutional text or in the orientations of the political elite toward the Court, but in the citizenry. This transformation of the Court’s perception in the public sphere, I argue, was brought about through legal mobilization during this period. The social movement led by the lawyers fundamentally transformed the knowledge and perception of the Court in the public sphere. While the movement was directed against the authoritarian regime, the real work of the movement, with regard to court empowerment, was in the public sphere.

However, a question arises as to why legal mobilization was successful in empowering the Court during 2005-09, and not earlier? After all, as discussed in Chapter 3, the legal profession had become ‘embedded’ in the sub-continent by the time of independence, especially given the role played by lawyers in the decolonization movement. In Pakistan, lawyers remained active in public life throughout the latter half of the twentieth country, often engaging in anti-government mobilization. Most importantly, lawyers also supported judicial independence at key junctures. Why, then, did it take several decades before legal mobilization could successfully support the rise of an effective court capable of adjudicating claims against powerful actors? Or, why did earlier episodes of contention by lawyers not lead to significant judicial empowerment?
The answer has to do with the basis of the power of an effective court, which, I have argued, is epistemic. It is the power of the court to influence a public that is receptive and considers the court a legitimate institution. The capacity of legal mobilization to expand this basis of the court’s power will necessarily depend on the nature of the public sphere, as well as the channels available to a movement to influence it. In Pakistan, starting 2002, the public sphere underwent radical transformation, after Musharraf and his close aides decided to liberalize Pakistan’s electronic media. From three state-owned channels at the start of the Musharraf regime, the media structure in the country was completely transformed with the introduction of more than 50 private satellite channels by the time of Musharraf’s resignation. Notably, a large proportion, nearly a third, of the licenses granted were for news and current affairs channels, which is a remarkable occurrence under a military dictatorship. The military appeared to be confident of its ability to curtail dissent through the newly liberalized media, which, for reasons discussed below, turned out to be inflated. As a result of the opening up of new media channels, Pakistan’s public sphere rapidly expanded. The number of citizens exposed to private news channels grew from zero to nearly 40 million in a short span of about six years. Even if we take into account previous exposure to private news sources through newspapers, the growth was still exponential. More importantly, the quality of coverage was different compared with newspapers. With live coverage, visual footage, and the possibility of debating real time political issues which would be comprehended even by illiterate or semi-literate citizens, an opportunity structure emerged that was highly conducive for capturing public attention through anti-government mobilization.

The rapid expansion of judicial power during 2005-09 can hence be explained by the ability of legal mobilization to influence the rapidly transforming public sphere in Pakistan.
Below, I explain the process through the lawyers’ mobilization created a constituency of support for the court in the public sphere. I first examine the transformation of the public sphere resulting from the liberalization of electronic media under Musharraf. Next, I consider how the new opportunity structure affected the ability of legal mobilization to influence the public mind. Finally, I explain how the reinstated court, buoyed by the popularity following a successful bar-led street movement, further enhanced its legitimacy in the new public sphere through legal mobilization from within the court. From a relatively obscure institution whose decisions were known only to the educated elite, the Supreme Court emerged at the end of the lawyers’ movement as a well known, popular, and highly legitimate institution in the public mind.

**Pakistan Media from 1947 to 2000**

While there had been a number of independent publishers of newspapers and journals around the time of independence, freedom of press was increasingly curtailed as the country took an authoritarian turn in the 1950s. Earlier military governments in particular adopted a number of measures to curb the press freedoms, and to utilize the press as an instrument to consolidate their power. Soon after declaring martial law in 1958, General Ayub Khan, the first military dictator to rule Pakistan, established the Bureau of National Research and Reconstruction (BNRR).[^392]

BNRR was used by the government to employ journalists who were willing to publish pro-regime articles in the national newspapers. The next year, in 1959, the regime forcibly changed the management of the Progressive Papers Limited (PPL), which published newspapers, including *The Pakistan Times* and *Imroze*, which the military felt were socialist in orientation. In

[^392]: The BNRR later became the Ministry of Information. See Marco Mezzera and Safdal Sial, “Media and Governance in Pakistan: A Controversial yet Essential Relationship” (Initiative for Peace Building; October 2010)
1964, the regime took over control of the PPL and renamed it as the National Press Trust (NPT), which in the next two decades became a large media group after acquiring several other newspapers. The continued support received by the NPT by the regime can be gauged by the fact that by 1983, it received around half of the government’s advertisement budget.\textsuperscript{393} The first set of laws regulating the media were also promulgated under Ayub Khan’s military government in 1963. The Press and Publication Ordinance (1963) was designed to allow the regime a free hand to control the media. The government was empowered to close down media organizations and arrest journalists if content published was deemed to be against national interest. The next military regime, under Zia ul Haq (1977-1988) was even more pervasive in its control over the media. Like his predecessors, General Zia was certainly interested in quelling dissent, and using the media to bolster the legitimacy of his regime. However, Zia’s censorship agenda was not restricted to news and opinion, but also intruded into the realm of entertainment. Under Zia, Pakistan’s media took a conservative turn, with limitations placed on dancing and interactions between males and females.\textsuperscript{394}

While promising in their electoral manifestos to encourage the development of free media in Pakistan, civilian leadership did not fare much better in liberalizing the media. At best, the leaders simply prolonged the status quo, benefitting from the lack of independent forums that could raise dissent against their governments. At worst, the civilian governments actually used their control over the media to malign opposition politicians. The first democratically elected civilian leadership, under Pakistan People’s Party’s Zulfiqar Bhutto, had promised to dissolve the NPT before coming to power in 1972. However, after winning the elections, the government retained control of the newspapers published by the NPT, and embarked on a campaign to

\textsuperscript{393} Ibid, 13  
\textsuperscript{394} Seemi Tahir, “Globalization and National Television Networks: An Analysis of Pakistan Television,” in Television in Contemporary Asia (Sage Publications; 2000, 355)
malign opposition politicians who dared to criticize Bhutto or his close aides. In the 1977 elections, the PPP leadership ensured that speeches of opposition politicians belonging to the Pakistan National Alliance (PNA) were recorded without sound, so that viewers could see the opposition leaders but not hear what they had to say. Benazir Bhutto, who became Prime Minister in 1988 after General Zia’s regime ended, had like her father promised complete freedom of media in Pakistan. However, very limited gains were made during her two terms in the 1990s. A new television channel with partial private ownership, the Shalimar Television Network (STN), was launched in an attempt to break the monopoly of the state owned channel, PTV. While this contributed to a more liberal programming in entertainment, it had little impact in the political sphere, as the news, or *Khabarnama*, was the same as that telecast on the state-controlled PTV. In the latter half of the 1990s, Prime Minister Nawaz Sharif’s government reversed the policy of allowing freedom of expression in entertainment programs, with censorship extending to popular music videos and entertainment programs co-hosted by men and women. The policy, however, was highly unpopular, and the controls over entertainment programs had to be withdrawn within a few months. As Tahir explains, the interference of the government had by the late 1990s created a “belief that Pakistan television is a personal channel of the Prime Minister or the government of the day, and not a public corporation meeting the public need for information and entertainment.”

In sum, state control over media was established early in Pakistan’s history during the first military regime, and continued into the decade of civilian rule in the 1990s. While government intrusion into freedom of media was highest during the two military regimes, the

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395 Mezzera and Sial, “Media and Governance in Pakistan,” 13
397 Tahir, “Globalization and National Television Networks,” 356
The Rise of Private Television under Musharraf, 2002-2008

While his predecessors, both military dictators and democratically elected leaders, had actively worked to stifle the freedom of media, Musharraf’s media policy was remarkably different. At the time Musharraf overthrew Prime Minister Nawaz Sharif’s government in 1999, the state had a complete monopoly over television in Pakistan. In 2001, for instance, there were only three television channels in the country, all operated by the government-run Pakistan Television Corporation (PTV). By the time Musharraf resigned from his position as President in 2008, there were about 50 privately-owned satellite television channels in Pakistan. By 2012, the number of licensed private channels had grown to 89, with more than a third of the licenses granted for news and current affairs channels. Viewership of private television channels in Pakistan grew from zero at the start of Musharraf’s regime, to around 38 million at the time of his resignation.398

The graph below (figure 6.1) demonstrates the rapid liberalization of electronic media in Pakistan.399 The liberalization of media under Musharraf is a remarkable occurrence. The regime

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398 Gibran Peshiman, “Media-Powered Democracy: How Media Support has been Pivotal to Pakistan’s Latest Democratization Project” (Reuters Institute for the Study of Journalism; 2013, 15)
399 Data for number of private television channels is from the annual publication of Pakistan’s Ministry of Finance, The Economic Survey of Pakistan
had come to power after overthrowing Sharif’s democratically elected government, which had just two years earlier won 137 of the 217 national assembly seats in the 1997 general elections. Like earlier military regimes, Musharraf adopted a number of policies to consolidate his power, including engineering a regime-friendly political party and holding a controversial presidential referendum in 2002. Given these measures, as well as the exile of Sharif and Bhutto, had helped in the consolidation of power, the regime would seem to have little to gain by the liberalization of media in the country. The rapid expansion of private television certainly carried with it the risk that it would open up channels for dissent, which is why all previous governments in country had kept close watch over freedom of the media. Given the precedence, it is safe to assume that Musharraf and his aides were aware of the risks involved, but still chose to rapidly liberalize electronic media in Pakistan.

![Figure 6.1. Growth of Private Television Channels in Pakistan 2000-2015](image)
Though decision-making by a military regime is characterized by lack of transparency, analysis of events surrounding the opening of satellite television points to at least three explanations of why the Musharraf regime opted for the establishment of private television channels in Pakistan.\footnote{See Mezzera and Sial, “Media and Governance in Pakistan”; Human Yusuf and Emrys Shoemaker, “The Media of Pakistan: Fostering Inclusion in a Fragile Democracy” (BBC Media Action; September 2013); Shahan Mufti, “Musharraf’s Monster,” in \textit{Columbia Journalism Review} 46 No. 4, 2007; Zafarullah Khan and Brian Joseph, “The Media Take Center Stage,” in \textit{Journal of Democracy}, Vol. 19, No. 4, October 2008} First, some commentators note that Musharraf and his close aides in the regime were concerned about the country’s national image, especially given the high viewership of Indian satellite channels in the region. There was a perception shared by the security establishment and intelligentsia that there was a battle for public opinion in the region, which Pakistan state-owned channel PTV was losing owing to the more innovative and entertaining Indian satellite channels. This perception likely developed following the 1999 Kargil War, during which millions of television viewers in Pakistan relied on Indian news channels for coverage of the conflict, rather than on the PTV, which offered less detailed coverage of the military setbacks.\footnote{Mezzera and Sial, “Media and Governance in Pakistan,”27} For the military regime encouraging the growth of privately-owned media, including television channels focused on current affairs, was important in order to compete in the ‘media war’ in the region. Second, unlike the previous highly conservative military dictator Zia ul Haq, Musharraf articulated a more liberal cultural vision for Pakistan. Liberalization of media was consistent with his ideology of “enlightened moderation,” which was based on curbing extremism and encouraging moderate interpretations of Islam. While his immediate predecessor, the democratically elected Sharif, had tried to censor entertainment programs on national television in the late 1990s, Musharraf not only encouraged freedom of expression in entertainment programs but also showed tolerance for political satire targeted at his regime.
In contrast to the two agency-centric explanations above, some analysts posit a structural explanation for the rise of liberalized media in Pakistan. Rather than seeing liberalization of media as the result of the regime’s strategic decision-making, it is seen as an inevitable development given technological progress in the field of media and a high demand among the people for private television. According to this view, the availability of internet and cellular technology to significant proportions of the population catalyzed the liberalization of electronic media in the country. While technological process and public demand certainly had a role to play in media liberalization, these factors do not explain the timing and manner in which media was opened in Pakistan. The most important aspects about the process, as discussed below, are the steep pace of liberalization, as well that the encouragement of news and current affairs channels, which are better explained by two the agency-centric accounts discussed above.

**Transformation of Public Sphere in Pakistan (2002-2008)**

The rapid liberalization of electronic media in Pakistan starting 2002 fundamentally transformed the public sphere in the country. As noted above, before 2002, the state had a complete monopoly over television channels in Pakistan. From three state owned PTV channels at the start of Musharraf’s regime, by 2008 there were around 50 private satellite television channels in Pakistan. As noted above, viewership of private television channels increased from zero to 38 million during this six-year period.

The significance of this transformation can be understood by comparing television viewership in the liberalized environment with previous exposure of the public to information from private sources. Before PEMRA began granting licenses to private channels in 2002, the only access citizens had to non-state media sources was through newspapers. Given the country’s
literacy rate, newspaper readership was quite low even at the turn of the century. In 2003, circulation of newspapers was around 6.2 million.\textsuperscript{402} If we take this number as a benchmark, access to private media increased by around 500 percent from 2003 to 2008. However, the impact on the public sphere was even larger than that demonstrated by the impressive percentage increase. This is because print media in Pakistan around 2000 only had limited freedom. While there were occasional instances of courageous journalism, the state and political elites throughout Pakistan’s history had, as discussed above, adopted a number of measures to quell dissent. Only in the English press was there greater tolerance for criticism, but only because the readership of English newspapers was fairly low, and unlikely to cause any major problems for the government.

The opening up of private television caused a sea change in Pakistan’s public sphere. In a country with low literacy rates, and one in which a literate culture had not developed beyond a narrow educated elite owing to the low quality of public education, the vast majority of the citizenry had effectively never been a part of the public sphere.\textsuperscript{403} While mobilization through parties and the ritual of voting during the democratic period had brought some exposure to electoral politics, this process did not lead to genuine debate on political issues owing to clientalism and kinship-based voting behavior. With a short period of six years starting 2002, private television channels in Pakistan gave 38 million viewers a new kind of exposure to political issues, characterized by debate on current affairs. One of the most interesting aspect of media liberalization in Pakistan was the willingness, or even encouragement, of the military regime to give out licenses for news and current affairs channels. This is understandable given an

\textsuperscript{402} International Media Support, “Media in Pakistan: Between Radicalization and Democratization in an Unfolding Conflict” (Report; July 2009)

\textsuperscript{403} See Shahan Mufti, “Musharraf’s Monster, 48, who argues that owing to illiteracy and lack of penetration of print media in rural areas, print media was not “mass media.”
important motivation for liberalizing the media was the ability of Pakistan’s channels to compete in the ‘media war’ in the region. Interestingly, news channels, nearly a third of all private channels, have been among the most popular in the country since liberalization began. One form of program in particular, the political talk show, is the category with the highest viewership. Hosts of these program have become well recognized public figures, and given their high popularity, several have even transitioned into becoming political analysts. In my short survey of citizens in Lahore and Islamabad, I found that only around 60% could name the current President of Pakistan, while 75% could name the host of one of the more popular talk show programs. As one commentator has noted, talk-show hosts are “Pakistan’s new public intellectuals,” given their ability to inform public opinion through the “extremely powerful medium of television, which has become the new public sphere.”

It seems implausible, at first glance, that an authoritarian military regime would encourage greater public debate and freedom of media. While Musharraf had liberal leanings in the cultural sphere, the regime did not grant complete freedom to the new private channels. A system of checks was instituted, so that the military establishment would be able to control the activities of the channels. However, owing to a number of factors, a new space for free expression of opinion was created in the liberalized environment, which became increasingly difficult for the regime to contain. First, the rapidity of the liberalization process was such that the regime could not appreciate the consequences of opening up television channels. While PEMRA granted a limited number of licenses in the first two years after its formation, the rate increased rapidly after 2004-05. By the time legal mobilization began to challenge the regime

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405 See Chapter 4
406 Akbar Zaidi, The New Intellectuals (Dawn, April 08, 2012)
407 See International Media Support, “Media in Pakistan: Between Radicalization and Democratization in an Unfolding Conflict” (Report; July 2009)
in 2007, there were already several dozen private channels that had became operational in the
country. Second, while the private channels were initially careful about criticizing the regime,
and might even have favored the regime’s liberalization initiatives, they were ultimately in the
business of making profits. For news and current affairs channels, this would necessitate
coverage of ‘breaking news’ which would pique public excitement. With their primary loyalty to
the bottom line, the news outlets were incentivized to push the limits to cover anti-regime
activities, if they were considered newsworthy. Third, the rapid opening up of scores of news
channels with viewership in the millions created a drive among journalists to advance to the top
of the profession. Compared with newspaper reporters and columnists, the prestige and salaries
of television reporters, anchors, and talks show hosts were considerably higher. Hence, reporters
were driven to cover the most sensational stories, and anchors to debate highly controversial
issues, in an attempt to advance within the profession. Finally, with a panoply of news channels
appearing, the regime overestimated its ability to control each one of them. This is because even
if most outlets remained loyal to the regime, some would be willing to take the risk of supporting
alternative powerholders, such as opposition parties, in the anticipation of greater advantages if
their favored actor would succeed in the future. In addition, the task of constantly monitoring and
controlling dozens of 24-hour news channels with scores of current affairs shows is itself
arduous.

Owing to the factors discussed above, the regime’s confidence in its ability to control the
newly liberalized media in Pakistan was inflated. While the regime did not create a ‘free’ media
environment in Pakistan, it certainly liberalized it, by granting several dozen licenses to private
television channels within a span of five years. With significant privatization of Pakistan’s
economy starting the 1990s, the new television channels were not significantly reliant on
government advertisement for revenue, as newspapers had been in earlier decades. When the opportunity arose to capture the public’s attention by covering the anti-regime lawyers’ mobilization in 2007, the new channels were willing to take the risk of annoying the regime to increase their viewership and profits.

**Legal Mobilization and Judicial Empowerment**

A core feature of the literature on judicialization of politics is the exclusive focus on the decisions and behavior of political elites and judges in explaining change in judicial power. I have argued that in examining court effectiveness, it is critical to analyze societal actors. In particular, it is important to consider the capacity of legal actors to mobilize, and the channels available for legal mobilization to influence the public sphere. In other words, judicial empowerment is not a two-person game, which includes only political elites and judges. Similarly, legal mobilization cannot be conceived of as involving only contentious lawyers and the regime.\(^{408}\) In distinguishing between various forms and outcomes of contentious action, Goldstone argues that “cultural valuation” by society plays an important role in determining the evolution and outcome of a social movement.\(^{409}\) For example, in cases in which state response to contentious action is characterized by weak or inconsistent repression, the movement can either morph into a revolution or irregular warfare. The direction it develops in depends, according to Goldstone, on the valuation of the protest movement in society. A supportive valuation by society is more conducive to revolutionary mobilization, whereas non-supportive valuation leads

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\(^{408}\) Tarrow and Tilly note social movements should not be thought of as two-person game, and that movements are part of a “broader parallelogram of forces.” See Sidney Tarrow and Charles Tilly, “Contentious Politics and Social Movements,” in Carles Boix and Susan Stokes (eds) *The Oxford Handbook of Contemporary Politics* (Oxford University Press; 2009, 455).


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groups to engage in irregular warfare. As an extension to this theory, one can also posit that the valuation of a movement is not static, but is partially defined by the strategies employed by the movement itself.

My main thesis is that one of the fundamental differences between the Riaz Court (2002-03) and the Third Chaudhry Court (2009-2013) was their valuation in the public mind. At the conclusion of the lawyers’ movement, the public had become significantly more knowledgeable about the Court, and considered it a highly legitimate institution. Hence, in explaining the empowerment of the Court, I take a social movement perspective in contrast to focusing exclusively on elite bargaining processes, as is the case with much recent scholarship on judicialization of politics (see Chapter 1). In the remaining part of this section, I explore how the lawyers’ movement transformed the valuation of the Court in society. Following Tarrow, I take a comprehensive view of the development and impact of social movements, which includes analyses of political opportunity structures, mobilization strategies, and the construction of collective action frames.

To understand the role of legal mobilization in court empowerment, it is useful to juxtapose the two most important instances of contentious activity by lawyers against the Musharraf regime. The first was in 2002-03, when Musharraf attempted to amend the Constitution through the Legal Framework Ordinance (LFO). Among various provisions of the LFO, the bar was particularly opposed to three-year increase in retirement age of Supreme Court judges, from 65 to 68. For the bar leadership, this measure was intended to prolong the tenure of

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410 The Supreme Court of Pakistan under the leadership of Chief Justice Shiekh Riaz Ahmad (February 1, 2002 to December 31, 2003)
411 Tarrow argues for a synthesis of approaches as the ideal method to study social movements in contrast to focusing only on a single branch of social movement theory. See Sidney Tarrow, *Power in Movement* (Cambridge University Press 1998, 19)
pro-Musharraf judges on the bench, in particular the then-incumbent Chief Justice Sheikh Riaz Ahmad. Some saw this as a favor Musharraf was returning to the judges who had given him a three year period in the Zafar Ali Shah case to restore the Constitution. The bar launched a campaign against the LFO, along with opposition parties aggrieved by the LFO. In October 2003, a procession of lawyers in 100 cars left Lahore for Islamabad, planning to converge at the Supreme Court building. With many large urban centers falling enroute on the Grand Trunk Road, the size of the procession increased five-fold. However, Chief Justice Riaz Ahmad ordered the premises of the Supreme Court sealed, and the protesters congregated at the Rawalpindi District Bar Association office. While lawyers continued their agitation, the LFO provisions were ultimately ratified by the Parliament as the 17th Amendment to the Constitution after the pro-Musharraf PML-Q reached a deal with the opposition parties. At this, the lawyers felt “betrayed,” since the opposition had agreed through a written agreement to reject the LFO amendments.

It is interesting to note that one of the main amendments the lawyers had resisted, the increase of the judges’ retirement age by three years, was left out of the 17th Amendment. Hence, legal agitation against the LFO had been successful to some extent. As a result of this, Chief Justice Riaz Ahmad, who had availed himself of the extension through the LFO, immediately retired after the Parliament ratified the 17th Amendment. However, the bar leadership was disappointed at the outcome of the legal mobilization against the LFO. Munir Malik, President of the Sindh High Court Bar Association at the time, thought that the movement had been unsuccessful in influencing the broader citizenry. Malik recollected that while the lawyers’

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412 Malik, “The Pakistan’s Lawyers Movement,” 11
413 Dawn, “PBC disputes verdicts given after Oct’ 99” (June 29, 2003); Daily Times, “Judiciary suffered due to corruption: PBC” (June 29, 2003)
414 The agreement was signed by bar leaders and the leadership of the Mutahhida Majlis-e Amal (MMA) in the Supreme Court Bar Association library. See Malik, “The Pakistan’s Lawyers Movement,” 13
response to the LFO had been “overwhelming,” they “failed to explain and communicate to [the citizens] what Rule of Law meant in their lives and why they need an independent judiciary.”

The main difficulty, Malik noted, was that the lawyers, owing to the lack of media freedom, were unable to effectively “reach out to the public.”

By the time the lawyers’ movement began in 2007, the political opportunity structure for legal mobilization had radically transformed. Social movement scholars have employed the concept of political opportunity structure to describe elements of the political context that facilitate the growth of movements. In Pakistan, rapid liberalization of electronic media expanded and transformed the public sphere, creating a new opening for contentious mobilization against the regime. Compared with their previous episode of contention in 2002-03, lawyers now had access to a channel to influence nearly 40 million viewers through private news channels. Meanwhile, news channels were also looking for a breakthrough to increase their viewership. With Musharraf’s firm grip over politics since the LFO episode and the 2003 general elections, shows on the new private channels had so far been “static forums.” With a panoply of actors in the new media space, it difficult to assess whether the media’s decision to cover lawyers’ protest was principled. However, it is certainly the case that coverage of protest events significantly increased viewership of the news channels. While initial coverage by the media was calculated and reserved, the response of the government pushed the media to side with the lawyers in the confrontation. First, on March 16, 2007, soon after the lawyers’ movement

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415 Ibid, 11-14
416 Ibid, 14
419 Peshiman, “Media-Powered Democracy,” 18-20
began, security personnel “attacked and ransacked” the offices of Geo TV, minutes after it had
displayed footage of clash between police and protesting lawyers.\textsuperscript{420} Second, after the lawyers’
movement and its coverage on television escalated, Musharraf attempted to pass new laws
severely restricting the freedom of the new channels to operate without governmental
interference.\textsuperscript{421} The final push came with the declaration of emergency, after which media
channels were taken off air for a period of three weeks.\textsuperscript{422} The crackdown of media, as well as
the police attacks on journalists, led to the creation of alliance between protesting lawyers and
the media under attack.\textsuperscript{423} Moreover, despite the risks involved, coverage of the anti-regime
protest significantly enhanced the public perception of the media. A national survey conducted in
early 2008 reported that the media had the highest approval rating in the country, compared to
the army, government and opposition.\textsuperscript{424} Since these were private channels, a higher approval
rating and increase in viewership would mean the possibility of higher profits in the future. In
addition, anchors and reporters popularity increased as a consequence of their coverage of the
anti-regime mobilization.

The liberalization of media hence provided a political opportunity for legal mobilization.
The triggering event came with the removal of the Chief Justice through Musharraf’s presidential
reference. Mobilization was further catalyzed by the manhandling of the suspended Chief Justice
by Musharraf’s security personnel, the footage of which was widely circulated through the
privatized media to viewers that constituted Pakistan’s new public sphere. For the first time in
the country’s history, millions of viewers watched live coverage of anti-government street
mobilization, with media anchors and reporters critical of the government’s repression of the

\textsuperscript{420} Dawn, “Police storm office of TC channel: Musharraf apologizes for raid.” (March 17, 2007)
\textsuperscript{421} Economist, “Pakistan’s Press: Gagging on it.” (June 7\textsuperscript{th}, 2007)
\textsuperscript{422} Malik, “The Pakistan’s Lawyers Movement,” 129
\textsuperscript{423} Peshiman, “Media-Powered Democracy,” 18-20
\textsuperscript{424} Pakistan Public Opinion Survey (January 19-29, 2008), The International Republican Institute
protestors. While the core aim of the movement, the reinstatement of deposed judges, was twice fulfilled, legal mobilization also created a new constituency of support for the Court in the public. This happened through three distinct mechanisms, discussed below.

First, legal mobilization was highly educative and led to a marked increase in citizens’ knowledge of the Court and its powers and constitutional functions. Through the strategic use of newly liberalized media following the constitutional crisis precipitated by the suspension of the Chief Justice, lawyers were able to thrust the Court in the center of the now expanded public sphere. But this process was not automatic, such that the opening up of several dozen private media channels did not by itself ensure that there would be coverage of salient constitutional issues. As Gamson notes, social movements face competition from other ‘sponsors of frames,’ including the government, political parties, interest groups, and corporations.\(^{425}\) While a large public sphere accessible through privatized media may be necessary for an enhancement of knowledge of the Court, it is not sufficient. Because the expanded public space is liberalized, there is also intense competition for public viewership. In Pakistan, during 2007-09, it was legal mobilization that enabled the Court to come to the center of public attention, and to forge a place for itself in the broader public sphere. While it was critical that the groundwork of the legal mobilization be laid from within the Court through adjudication of cases against the interest of the regime, the real expansion of judicial power occurred through legal mobilization on the street. As Tarrow and Kreisi have noted, the coverage of movement events depends on the structure of the media and the way they operate.\(^{426}\) Further, Tarrow and Gamson note that the


\(^{426}\) Tarrow, “Power in Movement”; Kriesi, “Political Context and Opportunity”
role of “visual symbolism”\textsuperscript{427} and “visual spectacle”\textsuperscript{428} is of particular importance in the age of television.

The lawyers’ movement in Pakistan put a premium on visual spectacle, which encouraged coverage of events on the new private channels. To begin with, social movement scholars have noted the importance of costume in contentious mobilization. For Tarrow, costumes such as the simple military tunics of Communists, the khaki dress of Indian nationalists and scruffy beards of guerillas in Latin America are attempts at “symbolic mobilization,” which aid in distinguishing the movement from its opponents and in creating “symbols of revolt.”\textsuperscript{429} In this sense, it helped Pakistan’s lawyers that a norm had existed that litigators had to be dressed in black coats and ties when attending court proceedings. Throughout the movement, lawyers came to the protest events in their official dress, such that news coverage began using the term “black coats” synonymously to refer to lawyers.\textsuperscript{430} This had symbolic relevance, since there existed a perception that the anti-government protestors were members of a learned profession, and police violence, which was often bloody, arguably had a stronger impact on the public mind because of the lawyers’ choice of ‘professional’ costume at the protest events. It is interesting in this regard that one of the strategies used by the regime to counter the success of the movement was to stage a pro-regime rally by ‘fake lawyers’ wearing black suits.\textsuperscript{431} The two-year lawyers’ movement was characterized by a large number of ‘performances’ that were telecast live on television channels. Some, such as the regular Thursday boycott of Lahore courts by the Lahore High Court.

\textsuperscript{427} Tarrow, “Power in Movement,” 114
\textsuperscript{428} Gamson, “Media and Social Movements,” 9469
\textsuperscript{429} Tarrow, “Power in Movement,” 106
\textsuperscript{430} Examples of domestic news coverage are numerous. For examples of the term used even in international press, see Zahid Hussain, “Can the ‘black coats’ restore democracy?” (The Times, London; June 26, 2008); Bruce Loudon, “Pakistani ‘black coats’ lead democracy fight” (The Australian; November 9, 2007)
\textsuperscript{431} The Nation (Pakistan), “Advocates guise cost govt millions of rupees.” (April 13, 2007)
Bar Association, were repeated and over time became too familiar to get media attention.\footnote{The Nation, “LHC Bar Demands Musharraf’s Resignation” (May 14, 2007); The Nation. “LHCBA fails to ensure complete courts’ boycott” (May 29, 2008)}

Given there is a premium on novelty and on confrontation in terms of retaining the attention of the public on mass media, the leaders of the movement organized events such the two ‘long marches’ and hunger strikes. Pro-judiciary and anti-regime slogans were popularized and chanted at protest events covered by the television channels. Around live coverage of the protest events, the viewership of current affairs talk shows discussing the confrontation of the legal community with the regime soared. The movement also had a first mover advantage, such that after the liberalization of electronic media in Pakistan, the lawyers’ confrontation was the first significant political event that piqued the interest of the viewers of current affairs channels. Hence, talk show hosts and journalists learned the vocabulary of constitutional politics and often invited constitutional lawyers and leaders of the lawyers’ movement to discuss ongoing constitutional issues.

While a large segment of the citizenry likely watched coverage of the lawyers’ movement because it was an anti-regime confrontation, an important consequence was that their knowledge of the Supreme Court, the Constitution, and the process of constitutional adjudication increased markedly. For a public to support an institution, or to have an opinion about its functioning, it is at first necessary for it to know about the existence of the institution, and in basic terms, what powers it possesses. Through repeated coverage of the protest movements, the public came to understand that the Chief Justice is an important public official who can, using the powers of the Supreme Court, even challenge an authoritarian ruler who has the power of the executive, including the military, behind him. My survey with citizens\footnote{See Chapter 4} indicated that a very large percentage, nearly 85%, could name the Iftikhar Chaudhry as Chief Justice of Pakistan, while a
very small percentage, less than 10%, could name any of the previous Chief Justices. This implies that the concept of a chief justice as a consequential public official likely entered the public mind starting with the constitutional crisis of 2007, and with the ensuing coverage of legal mobilization on the newly liberalized media. As another example, I asked citizens and asking them to name images of the Supreme Court of Pakistan and the Parliament House; more people could identify the former building than the latter, given several protests occurred in front of the building and the media frequently used the building in the backdrop while covering the constitutional crisis. This further highlights the importance of the movement in increasing the knowledge of the Court in the public mind.

Second, through high-risk activism on the street, lawyers portrayed the judiciary as an institution worth defending, even in face of a repressive regime willing to use violence. In order to understand the importance of this mechanism of building judicial support, it is worth noting a distinction made by Klandermans between consensus formation and consensus mobilization.\(^{434}\) Whereas through the former, collective understandings and definitions of a situation are produced, through the latter the views and ideas held by social actors are consciously spread among the public. While the first mechanism above contributed to consensus formation through educating the public about the existence and function of the Court, the second mechanism entailed a more deliberate attempt by movement entrepreneurs to mobilize support for the movement’s goal, the empowerment of the judiciary, in the public sphere. Gamson has noted that mass media often become “the critical gallery for discourse,” and the leaders of the lawyers movement understood that a consensus had to be created through mobilization in favor

of the judiciary.\textsuperscript{435} Malik describes one of the meetings of the Chief Justice’s legal team as follows:\textsuperscript{436}

That evening, the Chief Justice’s legal team had a meeting at his residence. Among other things, we decided on a division of labour. It was agreed that Aitzaz would concentrate on arguing the case itself and Hamid would assist in research and drafting. The rest of us would focus on the battle to win the case in court of public opinion. After every hearing, Kurd and I would jointly inform the media of the Council’s proceedings while I would brief them of the Chief Justice’s plans for the coming week. Tariq Mehmood was assigned the responsibility of getting on as many TV talk shows as possible.

Further, writing about the movement’s strategy, Malik notes that, “We wanted to directly involve the people of Pakistan in chartering their constitutional destiny… the first element of our strategy was to change the beliefs that had enslaved the masses even after their liberation from colonial rule… we wanted to educate the people that their fundamental rights and liberties could only be realized under an independent judiciary and we wished to explain what we meant by an independent judiciary.”\textsuperscript{437}

Social movement scholars note that social movements construct meaning through framing. For Snow and Benford, a frame “simplifies and condenses the ‘world out there’ by selectively punctuating and encoding” and are devices that “underscore and embellish the seriousness and injustice of a social condition or redefine as unjust or immoral what was previously seen as unfortunate but perhaps tolerable.”\textsuperscript{438} The political events that had precipitated the constitutional crisis in Pakistan during 2007-09 were susceptible to being framed in various ways. For example, they could have been interpreted as arising out of a personal rivalry between the Chief Justice and President Musharraf. The leaders of the bar strategically framed the contention as a battle for the independence of the judiciary and as a struggle for

\textsuperscript{435} Gamson, “Media and Social Movements,” 9469
\textsuperscript{436} Malik, “The Pakistan’s Lawyers Movement,” 66-67
\textsuperscript{437} Ibid
protecting the guardian of citizens’ fundamental rights from the unconstitutional actions of the executive. The embeddedness and organization of the bar, discussed in Chapter 4, was significant in this regard. Malik notes that the movement was “buoyed by the fact that the legal fraternity had shown unprecedented unity among its ranks and the calls for protest given by the central leadership were followed in letter and spirit.”

Finally, a third mechanism which led to judicial empowerment has to do with the valuation of legal mobilization in public mind. Throughout the period, the leaders of a movement consciously eschewed violence as strategy to popularize the movement. Further, the perseverance of the lawyers through the two-year period, and finally the success of the movement, gave credence to their cause and significantly increased the popularity of the Court. It is noteworthy that apart from twice succeeding in reinstating deposed judges, the movement played a significant role in the breakdown of the military regime and the return to civilian governance after a hiatus of nearly a decade (see Chapter 8).

Through the three mechanisms described above, legal mobilization had led to a profound transformation of the perception of the Supreme Court in the public mind. From an obscure institution whose decisions were known only to a select few among the educated elite, the Court emerged at the end of the lawyers’ movement as a well-known, popular, highly effective and legitimate institution in the public mind. To be sure, not all of this was the result of conscious action on part of the leaders of the movement. As Guigni notes, even though social movements are rational attempts to bring social change, not all consequences are intended or related to the movement’s goals. In the present case, while the immediate goal of the movement was the

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439 Malik, “The Pakistan’s Lawyers Movement,” 77
restoration of the deposed judges, the larger consequence, as described above, was the empowerment of the judiciary through educating the public about the Court, and legitimizing and popularizing it in the public mind.

**Supreme Court and Legal Mobilization: Forging Links with the Citizens**

As discussed above, the third Chaudhry Court, which began operation in March 2009 after the second bar-led long march was successful in the reinstatement of deposed judges, occupied a markedly different place in the public mind compared with the Riaz Court of 2002-03 or even the first or second Chaudhry Courts (2005-07). My core argument is that it is this heightened popularity and legitimization of the Court in the public sphere, brought about through legal mobilization visually portrayed to nearly forty million citizens through the newly liberalized electronic media, that enabled the Court to effectively challenge the core interests of powerful political elites of various stripes. As noted earlier, media liberalization alone would not have been sufficient to bring about this transformation. A prior condition, as discussed in Chapter 3, was the embeddedness of the bar in the politics and society of the country, and especially lawyers’ role in leading the struggle against colonization in the formative years of the institutional development of the bar.

With the reinstatement of the judges in March 2009, the bar-led street movement demobilized, given the core demand of the movement had been met. However, the restored judiciary continued the process of forging a link with the public from within the Court, which led to a concretion of the perception of the Court in the public mind that had been created through the lawyers’ struggle. Substantively, as discussed in Chapter 2, the Court adjudicated several
cases of public importance during this period in which public officials were held accountable for abuses of power. Notably, the Court disqualified an incumbent Prime Minister, Yusuf Gilani, from holding office after he had failed to initiate legal proceedings related to corruption against the incumbent President. The next Prime Minister, Raja Ashraf, was also implicated in corruption cases in the Supreme Court related to rental power projects, and near the end of his term, the Court had also ordered his arrest in connection with these cases. The substance of the restored Court’s rulings is of course the outcome that has to be explained, and for which an explanation based on legal mobilization is presented here. However, once the Court had been empowered through legal mobilization, the rulings themselves had an additive impact on the popularity and legitimacy of the Court.

Apart from the substantive aspects of the Court’s adjudication, the Court also attempted to build on its popularity and further connect with the public sphere through procedural mechanisms. Some of these, such as the use of *suo moto* device and publication of judgments in Urdu, helped in keeping the Court relevant in the public imagination. It is worth noting that judges were self-consciously aware of recalibrated position of the Court in the public sphere, and of the need to strengthen this positioning. For instance, at an international conference of judges in Islamabad, Chief Justice Chaudhry stated the following about the role of the judiciary in Pakistan, “The lack of good governance on the part of the executive shifts the burden of responding to the deficiencies of governance toward the judiciary, which is increasingly relied upon by the public for the fulfillment of their aspirations as citizens of Pakistan.”

With this perception of the Court’s role, legal mobilization continued from within the Court, in an attempt to make the Court more accessible and relevant to the public. Below, the procedural mechanisms

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441 Saeed Shah, “Pakistani Judge Gains Clout: Chief Justice Plays Activist Role in Term Spanning Era of Democratic Transition” (The Wall Street Journal; April 22, 2013)
used to expand access and to ‘indigenize,’ or increase the relevance of the Court, for the public are examined.

Access to Constitutional Justice: Suo Moto and Human Rights Cell

After the reinstatement of the judiciary in 2009, the Supreme Court rapidly expanded access through two mechanisms. The first, discussed in Chapter 2, was through the Human Rights Cell, which accepted direct petitions from citizens. Between 2009 and 2012, the Court disposed of 161,000 complaints received by the Cell. Since the Court assumes jurisdiction over such cases based on a violation of fundamental rights under Article 184(3) of the Constitution, only a subset of the individual petitions are adjudicated, while the remaining are rejected based on a failure to raise a violation of a fundamental right.

Apart from lowering standing requirements and initiating a mechanism for citizens’ direct access, the restored Supreme Court began actively using the *suo moto* procedure to initiate proceedings. This is a novel procedure which allows a court to initiate judicial proceedings even if the court has not been petitioned for redress from an aggrieved party, making rules of standing entirely irrelevant. Over the last few decades, the high courts of India and Pakistan have on occasion used *suo moto* jurisdiction. In many cases, this judge-initiated proceeding has usually been used in response to events reported by the media concerning flagrant violations of fundamental rights. Though the device was used earlier in India than in Pakistan, since 2005, it has been used with greater frequency by Pakistan’s Supreme Court.

In order to understand the significance of the use of the *suo moto* procedure in Pakistan post-2009, I have studied media coverage about *suo moto* proceedings, using the number of
articles published in a leading newspaper. The graph below shows the number of distinct articles published in *The Nation (Pakistan)*, which contained the term “suo moto” in the text of the article from 2005 to 2013.\(^{442}\) As shown in the graph below (figure 6.2), there was much discussion in the press on *suo moto* actions taken by the Court in 2007, when legal mobilization began. Notable cases during this period initiated through this procedure focused on issues such as leasing of public parks to private firms, police violence, forced marriage of young girls in rural areas, and poor conditions in district hospitals. There is a marked decrease in reporting on *suo moto* actions in 2008-09. During this period, the military regime suspended sixty judges of the superior courts.

**Figure 6.2. Frequency of Articles about Suo Moto Actions in The Nation (Pakistan)**

Following the restoration of the judiciary in 2009, the Court has been particularly active in initiating proceedings through the *suo moto* device. In nearly all cases, the proceedings were initiated by the Court after there had been reports of violation of fundamental rights in the media. As shown in the graph above, several hundred articles were published in the press discussing *suo moto*.

\(^{442}\) Searchable archives for the newspaper are not available for the years preceding 2005, but coverage in those years is expected to be limited because *suo moto* proceedings were very rare before 2005.
moto actions taken by the Court in the post-2009 period. Similarly, these cases were frequently reported on the news and current affairs television channels. Examples of cases include illegal land allotments, corruption in awarding of government contracts, corruption in the operation of public sector enterprises, rape cases in rural areas, torture of workers, destruction of a widow’s house to build a ‘model village,’ police brutality on women doctors, blasphemy victims, torture of female polling staff, fake degrees of public officials, and nomination of the Prime Minister’s son-in-law to the position of Executive Director of the World Bank even though he lacked requisite qualifications.

The Court’s ability to expand access to constitutional justice, I argue, can be explained by its empowerment through legal mobilization. To see this it is important to note that while the framework for access and jurisdiction are often delineated in the constitution or by statute, courts potentially have significant discretion in terms of determining the actual scope of their jurisdiction and of access such as by defining court procedures, by interpreting and ruling on constitutional and statutory provisions relating to access and jurisdiction, and by defining the scope of ancillary powers that courts possess.

Focusing on emerging democracies, it would seem that hegemonic political elites would favor narrow access to constitutional courts, and limited jurisdiction for the court. Hitherto powerless political groups and interests, by contrast, would likely favor wider availability of a channel to redress violations of their fundamental rights. Direct access to high courts has

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443 For example in Pakistan Steel Mills (Suo Moto Case No. 15/2009 (PLD 2012 S.C. 610)) and suo moto notice of loss of Rs. 40 billion in purchase of locomotives from a U.S. based company by Ministry of Railways (Suo Moto Case No. 7 of 2011 (2012 SCMR 226))
significant benefits in ensuring the protection of constitutional rights.\textsuperscript{445} Without direct access, the citizens whose constitutional rights have been violated will have to litigate their case through the normal judicial system, the costs of which are likely to be prohibitive. In many cases, especially in emerging democracies, it is often poor citizens who are deprived of their constitutional rights, and it is unlikely that they can afford the litigation costs that would be required to pursue their claims in ordinary courts. In addition, the rights of such litigants in most cases been violated by powerful groups and individuals, and the chances of prevailing with such imbalance in power at lower levels of the judiciary may be quite low. Individual constitutional complainst not only lower the financial barrier for poor litigants to access the court for constitutional violation, it also provides a fast-track judicial recourse. Speed is likely to be of importance here, since several constitutional violations can involve the possibility of irreparable harm of individuals. In other words, in emerging democracies, expanded access can potentially weaken the position of hegemonic elites, since the constitutional court provides an arena for marginalized individuals and groups to seek remedies against violations of constitutional rights.

Looking at the Pakistani case, it appears that the ability of courts to expand their authority to decide the limits of access and the scope of jurisdiction with regard to constitutional issues is dependent on the political origins of judicial power. If judicial power is based on delegation from political elites who had originally empowered the court to protect their self-interests,\textsuperscript{446} the political elites will likely retain instruments to curtail the power of courts that may begin to threaten their. Hence, such courts would likely have limited ability to control procedures related to access and jurisdiction. By contrast, courts that develop visibility in the public mind as

protectors of fundamental rights can be bolder in checking the actions of political elites. Though initially instituted by politicians, with a constituency in the people independent of the mediatory role of politicians, such courts are likely to have a much larger capacity for defining procedures that regulate access and the scope of jurisdiction to adjudicate constitutional claims. For example, Hirchl notes that the political origins of the South African Constitutional Court lie in the negotiated settlement that led to the democratic transition in the country in the 1990s.\textsuperscript{447} Focusing in particular on the question of access, it is interesting to note that direct access to the Constitutional Court is permitted to litigants bringing constitutional claims under the 1996 Constitution (Article 167(6)(a)). The constitutional provision gives discretion to the court in deciding access, such that a petition can be accepted, “in the interest of justice and with leave of the Constitutional Court.”\textsuperscript{448} However, the South African Court entertained only eight direct access applications between 1995 and 2005.\textsuperscript{449} Dugard’s research revealed that often poor and unrepresented applicants who try to access the Court’s Registry Office are “typically turned away with the advice to seek legal support elsewhere.”\textsuperscript{450} Given the revolutionary character of the democratic transition in South Africa, this decision by the Court to restrict access to litigants who most need it seems puzzling. The most important point to note about the South African case is that it is well within the constitutional authority of the Court to grant access to poor litigants. A possible explanation for such procedural restraint is that, as Hirchl notes, the political origins of the Court’s empowerment lie in the delegation of power from hegemonic political elites.\textsuperscript{451}

\textsuperscript{447} Hirchl, \textit{Towards Juristocracy}
\textsuperscript{448} When direct access had initially been instituted under the interim constitution of 1993, the requirements for admissibility were high. The Rules of the constitutional court had an “exceptional circumstances” requirement, which was preserved in the 1998 Rules. However, even though this requirement is not part of the 2003 Rules, the Constitutional Court has still construed the ability of litigants to bring constitutional complaints narrowly.
\textsuperscript{449} Dugard. 2006. “Court of First Instance?” 273
\textsuperscript{450} Ibid, 274
\textsuperscript{451} Hirchl, \textit{Towards Juristocracy}
Given the discussion above, it appears that in order to expand access, the Court would have to develop a larger constituency in the people.

Indigenizing the Court

South Asian judges have been sensitive to the colonial origins of their legal systems, and have often argued for making the law more relevant to the lives of the people. For instance, Chief Justice Bhagwati of the Indian Supreme Court (1985-1986) noted the Supreme Court had faced a “legitimation crisis” for the first few decades after independence from the British because rules of standing that prohibited poor litigants to access the superior judiciary.\footnote{PN Bhagwati. 1985. Judicial Activism and Public Interest Litigation. \textit{Columbia Journal of Transnational Law}, 561} Chief Justice Haleem (1981-1989), who was at the forefront of the development of the public interest litigation paradigm in Pakistan, labeled the rules of \textit{locus standi} as an “Anglo-Saxon outgrowth” that should no longer be retained.\footnote{PLD 1988 SC 416 at p. 488} Another chief justice of the Supreme Court of Pakistan, Justice Ajmal Mian (1997-1999), in noting the limits imposed by the adversarial system in the development of public interest litigation, labeled the system as an “inherited evil.”\footnote{“Hardships to litigants and miscarriage of justice caused by delay in courts” PLD 1991 Journal 103} While the specific issues addressed in these criticisms is about access to justice, the larger point concerns the colonial origins of the system itself.

In the post-restoration period starting 2009, some judges of the Supreme Court have attempted to increase the relevance of the Court’s opinions in the public mind through rebranding the Court as an indigenous institution. The most significant step in this regard has been the official publication of several of the Court’s judgments in Urdu. Before 2009-10, all
judgments of the Court had been written and published in English. After the appointment of Justice Jawwad Khawaja to the Supreme Court in 2009, a number of important decisions of the Court were published simultaneously in English and Urdu, including on the Court’s official website. This was significant especially since the newly liberalized electronic media, which routinely covered court judgments, was almost exclusively in Urdu, and the actual judgments of the Court were hence made accessible to journalists and other political analysts. More importantly, it was a symbolic step to highlight the turn in the Court’s jurisprudence from protecting the core interests of the power elite to becoming guardians of the constitution. The Court further built on this step in 2015, when a three-member bench headed by Chief Justice Jawwad Khawaja directed the government to take steps for the adoption of Urdu as the official language. The Court declared that, “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.”455 In addition to using and promoting the use of Urdu, judges have also recently attempted to justify their reasoning based on traditional or pre-colonial sources, such as by citing works of moral and political philosophy, including Persian and Urdu poetry, and Islamic jurisprudence, in its official judgments.

**Conclusion**

In Chapter 2, I juxtaposed the jurisprudence of the Supreme Court of Pakistan in two periods, pre-2005 and 2009-2013, and argued that the Court had become markedly more effective in the latter period at holding the political elite accountable for abuses of power. I also argued that the dominant paradigm for explaining judicial empowerment, which focuses on strategic decisions

455 Irfan Haider, “Supreme Court orders govt to adopt Urdu as official language,” (Dawn; September 8, 2016)
of political elite, cannot explain the expansion of judicial power in Pakistan. In Chapter 4, I showed that the only consequential political event between the two phases was the lawyers’ movement for the restoration of the judiciary. In this chapter, I explained how legal mobilization during this period led to the expansion of judicial power. I argue that the role of political elites was at best peripheral in causing judicial empowerment. Instead, the impetus for empowerment arose from within the realm of civil society, led by a bar with significant mobilization potential which had over several decades become embedded in society and politics (see Chapter 3). While the bar had been moderately effective in supporting judicial independence before 2005, the rapid liberalization of electronic media opened new channels for more effective legal mobilization. In the context of an expanded public sphere, I argue, legal mobilization led to judicial empowerment through three mechanisms. First, the movement turned out to be highly educative, such that it markedly increased citizens’ knowledge about the Court and its constitutional function. Second, through high-risk activism on the street, the lawyers portrayed the judiciary as an institution worth defending, even against a repressive regime willing to use violence. Third, the perseverance, and finally the success, of lawyers’ mobilization gave credence to their cause, and significantly increased the popularity of the Court in the public mind. At the end of the movement, the Court had developed considerable epistemic power: it emerged as a highly popular and legitimate institution, whose opinion had significant reception in the public sphere.
In the foregoing chapters, I developed a model to explain the effectiveness of judicial institutions in post-colonial countries through an inductive analysis of the transformation of the judiciary in Pakistan. My analysis revealed that the increased effectiveness of the judiciary in Pakistan resulted from legal mobilization in support of judicial empowerment. The basis of judicial power that legal mobilization enhanced was the court’s epistemic power in the public sphere. In this chapter, I present a model-testing analysis, in which I consider the effectiveness of judiciaries in Egypt and Turkey. The purpose of the analysis in this chapter is twofold. First, to examine whether there is a difference in judicial effectiveness, as defined in chapter 1, between the two cases and second, if so, whether the difference can be explained with reference to the model developed in part II above, that is, by examining the differential level of legal mobilization in the countries.

As noted in chapter 1, there are a number of similarities among the three countries, which make them suitable for comparison. In all three, the legal system was established de novo based on European precedents after the displacement of the sharia law based indigenous system. Legal representatives called vakils had provided legal counsel in each country, but the modern legal profession was generally not a continuation of this profession. For the last few decades, each of the countries has been characterized by varying levels of authoritarianism owing to the presence of a class of hegemonic elites. There are of course notable differences among the countries, but
most of these may, prima facie, suggest results opposite to what we observe with regard to judicial effectiveness. Turkey has, over the last few decades, been more democratic than Egypt and Pakistan, and those holding the view that political fragmentation aids judicial independence may find it odd that Turkey’s judiciary is less autonomous than of the other two countries. Turkey is also a more ‘developed’ country, with a much higher per capita GDP than of Egypt and Pakistan, which problematizes the claim that development of rule of law depends on the availability of adequate resources for institutional development.456

As noted in table 7.1, the Turkish judiciary has been less effective than Egypt’s in challenging the power of hegemonic elites, in opening up political space for less powerful interests, and in protecting citizens’ rights. The first part of this chapter is focused on providing evidence for this characterization of the relative effectiveness of the two judiciaries. In each case, I discuss a number of significant cases of the high courts, as well as other historical material to understand the jurisprudence of the courts in the countries. From this comparative analysis, I conclude that while the Egyptian judiciary was effective enough to be able to challenge the core interests of the regime, the Turkish judiciary acted on behalf of the regime to delimit the political space in a manner favorable to the hegemonic elites. The most notable example of this divergence is the judiciaries’ jurisprudence on the question of legalizing new opposition parties. Whereas the Egyptian judiciary was responsible for overriding the decisions of state elites that had denied legal status to a large number of opposition parties, the Turkish Constitutional Court adjudicated cases that led to the closure of 24 political parties.

456 Turkey is also more secular state that the other two, and indeed one of the most secularist of states in the world. Hence, those who believe certain value orientations, in particular those associated with religion, dispose institutions and nations towards illiberal tendencies may be surprised by the outcomes of the comparison of these three cases.
Table 7.1: Comparing Judicial Effectiveness in Pakistan, Egypt and Turkey

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<tr>
<td>Political regime</td>
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<td>Semi-Democracy</td>
<td>Authoritarian / Semi Democracy</td>
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<td>Political fragmentation</td>
<td>Low</td>
<td>Medium</td>
<td>Low/Medium</td>
<td>Low/Medium</td>
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<td>Hegemonic Elites</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Per Capita GDP (US$; 2014)</td>
<td>3,365</td>
<td>10,515</td>
<td>N/A</td>
<td>1,316</td>
</tr>
<tr>
<td>Formative Years of Bar (1900-1950)</td>
<td>Autonomous and powerful Central</td>
<td>Regime controlled Very peripheral, if any</td>
<td>Autonomous and powerful Central</td>
<td>Autonomous and powerful Central</td>
</tr>
<tr>
<td>Role of Legal Profession in Nationalist Movement</td>
<td>High</td>
<td>Low</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>Media Freedom</td>
<td>Low</td>
<td>Low</td>
<td>Low</td>
<td>Medium</td>
</tr>
<tr>
<td>Judicial Effectiveness</td>
<td>Partially effective</td>
<td>Not effective</td>
<td>Partially effective</td>
<td>Effective</td>
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Note: Shaded cells indicate similarities across the countries.

The divergence between the two cases, I argue, can be explained by examining the mobilization potential and political orientation of the legal professions in the two countries. As explained below, the Egyptian legal profession has been deeply involved in public affairs and has been quite restive, while the legal profession in Turkey has been politically quiescent and has largely been occupied with narrow corporatist interests. The difference in mobilization potential and political orientation in the countries, I argue, has its origins in the formative period of the development of the professions in the early half of the twentieth century. As in the case of Pakistan, the events during this period fundamentally shaped the professions in both countries. There was considerable institutional continuity from the formative period into the second half of the twentieth century. Though there were significant changes in the political context, and some disruptions in institutional functioning, the basic orientation of the profession, as developed during the formative period, continued into the latter half of the twentieth century.

457 Source: The World Bank, World Development Indicators (accessed, April 28, 2016)
As explored below in the discussion on the formation of the professions, there are striking similarities between the development of the legal professions in Egypt and Pakistan. In both, the modern legal profession was formed in the context of colonial rule, where after the failure of armed struggles against the occupier, the military option had become a virtual impossibility. Indeed, in both cases, the military had been taken under the command of the British after the occupation. In such a political context, resistance against the occupier was possible only through institutional channels, and took the form of constitutional agitation and civil disobedience. The legal community stepped forward in both countries to take up the challenge of expelling the colonizer. In both, lawyering became the largest and the most prestigious profession during the first half of the twentieth century, and lawyers dominated public life in these countries for several decades. While the profession supplied leadership to political parties, the bar itself was highly active in public affairs in both countries. This remarkable dominance of the profession over public life, I argue, led to the rapid embeddedness of the profession in society and politics, and hence endowed it with significant mobilization potential. The profession played an important role as a judicial support network in the latter half of the twentieth century, including by supporting political rights litigation.

Though the Ottoman Empire, the predecessor to the modern Turkish Republic, lost much of its territory after World War I, the Turkish military was successful in warding off imperial incursion in the War for Independence. Even before the war, in the early years of the twentieth century, political power in the Empire was consolidated in the hands of military strongmen. Of the ‘three pashas’ that were the dominant leaders of the Committee of Union and Progress (CUP), two, Ismail Pasha and Jamal Pasha, were Ottoman military officers. From the War for Independence, Ataturk, also a military commander, emerged as a dominant leader, and over the
years consolidated his grip over new state and remained President of the Republic from 1923 to 1938. Even Ataturk’s successor, Ismet Inonu, who was President from 1938 to 1950, had been a senior military officer before becoming a full time politician after the formation of the Republic. Hence, the entire first half of the twentieth century was characterized by authoritarian rule under military strongmen. As explained below, following the formation of the Republic, Ataturk and his supporters radically transformed the social and political institutions of the country in accordance with a particular vision of modernization. While the principles underlying this transformation were on the face egalitarian, they departed radically from the ideology of Ottoman Empire, and were not shared by several constituencies in society. The reforms hence had to be imposed, and in time created a class of elites who saw themselves as guardians of Kemalist principles, and were willing to disrupt the political process to preserve the ideals. Increasingly, this also became a means of protecting and perpetuating the privileged positioning of this class, and to prevent new entrants with different social and cultural visions and aspirations from entering the political space. What is critical, with respect to the argument of this chapter, is that the legal profession not only proved ineffective in challenging the hegemony of such political elites, but actually allied itself with the elites in defending their interests. This, I argue, was because the profession came into being and developed in a context of consolidated authoritarianism, in which state building elites had little tolerance for activities such as anti-government agitation through the bar for the rule of law. As explained, the state took active steps to remanufacture the legal profession in light of its chosen principles, and to significantly curtail its autonomy during the formative years of its development. There was, as in the case of Pakistan and Egypt, sufficient institutional continuity, such that the tamed profession subsequently failed
to play any consequential role in the political affairs of Turkey in the latter half of the twentieth century.

In the section below, I examine the jurisprudence of the Egyptian and Turkish judiciaries respectively in order to assess their effectiveness. I then analyze the process of formation of the legal professions in the two countries and argue, based on the model developed in part II, that the difference in judicial effectiveness can be explained by the potential for legal mobilization in the two countries.

The Effectiveness of Courts in Egypt

Judicial institutions in Egypt have been surprisingly effective in the context of consolidated authoritarianism.\textsuperscript{458} At the outset of the post-colonial period, political events unfolded that seemed inauspicious for the development of an effective judiciary. Following the 1952 Free Officers’ coup led by Gamal Abdel Nasser, the judicial system was significantly weakened by the regime through actions such as the annulment of the constitution and the establishment of exceptional courts. The regime’s lack of tolerance for autonomous legal institutions finally culminated in the “massacre of the judiciary” in 1969, when through executive decree over 200 judicial officers were purged. In addition, the regime established a new Supreme Council of Judicial Organizations to influence judicial appointments, and also dissolved the Judges’ Association. And yet, just a few years after the establishment of the Supreme Constitutional

Court (SCC) under Nasser’s successor Anwer Saadat in the 1970s, the judiciary had become a bold actor in Egyptian politics willing to challenge the interests of the regime.\(^{459}\)

Scholars of Egyptian constitutional politics agree that the SCC has been consequential actor in Egyptian politics over the last three decades.\(^{460}\) As Moustafa has noted, constitutional litigation became one of the most important channels for opposition activists to challenge abuses of power by the regime. Notably, after the regime’s Political Parties Committee rejected all applications for registration of new parties between 1977 and 2000 except that of the Socialist Labor Party, all other opposition parties were granted legal status through judicial rulings. By the mid-1990s, the judiciary had granted legal status to 10 opposition parties whose applications had been denied by the Political Parties Committee.\(^{461}\) While scholars agree that the SCC and other judicial organs have been consequential actors in Egyptian politics, an important question concerns the extent of the Egyptian courts’ capacity to challenge the powerful executive. From the observation that judicial challenges to the regime’s authority did not lead to the breakdown of the authoritarian regime and spur a democratic transition, some have concluded that the judiciary was unable to threaten the core interests of the regime. Below, I first describe several of the most important constitutional cases adjudicated by the SCC in the area of political rights, and then discuss whether these posed something more than a challenge to the regime’s peripheral interests.

\(^{459}\) The SCC was established through the 1971 Constitution promulgated under Saadat. However, the Constitution did not delineate the structure and function of the SCC in detail. The institutional structure was established through legislation in 1979, when the SCC began operating. See Lombardi, “Egypt’s Supreme Constitutional Court,” 217-41

\(^{460}\) See Tamir Moustafa, The Struggle for Constitutional Power; Brown, The Rule of Law in the Arab World; Lombardi, “Egypt’s Supreme Constitutional Court”; Chibli Mallat, Introduction to Middle Eastern Law (Oxford University Press; 2007, 197-207)

One of the most important areas in which the SCC challenged the power of the executive was in reform of electoral laws. After assuming office, Saadat has instituted a program of controlled liberalization under a corporatist system. Severe limitations were placed on political activity through the restrictive political parties law, the oversight of the regime-controlled Political Parties Committee, the emergency law, and restrictions on freedom of press. In addition, the proportional representation (PR) system precluded participation by independent candidates. After the 1984 elections, a member of the Egyptian bar challenged the constitutionality of the PR-list system before the SCC. A committee within the SCC concluded in a preliminary report that the electoral law was unconstitutional. Subsequently, after the SCC’s final ruling on the case, the People’s Assembly was dissolved and new elections were scheduled. This was a remarkable event in the country’s constitutional history, since the judiciary had for the first time held electoral laws unconstitutional, and the regime had abided by the decision of the SCC. The new electoral law did little to address the main concern that had initiated constitutional litigation against the electoral law. After the 1987 elections, the new electoral law was again challenged before the SCC by a lawyer. The design of electoral arrangements, which instituted two electoral systems in each constituency, one in which independents could participate and the other reserved for candidates on party lists, was challenged. The overall effect of the system was that party candidates were granted nearly nine-tenths of the seats in the Assembly. The petitioner, an independent candidate, challenged the arrangement arguing that it was violative of Articles 8, 40, and 62 of the Constitution, preventing independent candidates from contesting elections on equal terms with members of political parties. The Government

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462 Moustafa, *The Struggle for Constitutional Power*, 97-99; Boyle and Omar Sherif (eds), *Human Rights and Democracy*
463 Ibid
464 Ibid
argued that this was a political question and the judiciary was not competent to direct the legislature on definition of constituencies and the electoral process. The SCC held the challenged provisions of the electoral law unconstitutional, which led, for a second time, to the dissolution of the People’s Assembly. The SCC agreed with the plaintiff that the electoral law favored party candidates and was contrary to the constitutional principle of equal opportunity. In response to the Government’s contention that equality of opportunity existed because anyone was free to join a political party, the SCC held that legislation compelling candidates to join political parties in order to contest elections was violative of the Constitution’s guarantee of freedom of opinion (in Article 47). Following the SCC’s ruling, new legislation instituted a single-member district system in place of the PR-list system.

Another set of cases through which the SCC extended political rights to opposition activists concerned legislation that had banned certain individuals or parties from engaging in political activities. For example, Article 4 of Law No. 33 of 1978 prevented individuals who had “corrupted political life”\(^465\) before the 1952 Revolution from participating in political activities or becoming members of political parties.\(^466\) A petition was brought by Fu’ad Serag al-Din, the prerevolutionary head of the Wafd Party, to challenge the constitutionality of Article 4 of the law. The Government argued that the judiciary was not competent to review the legislation since it had been approved by the citizens through a popular referendum. The SCC rejected this argument, and held that curtailment of constitutionally granted rights was a constitutional not a

\(^{465}\) The law, known as “Law for the Protection of the Homefront and Social Peace,” stated, “whoever caused the corruption of political life before the July revolution, either through participation in the leadership or the administration of political parties in power before the revolution… shall be deprived of the right to join political parties and of the exercise of rights and activities of a political nature.” See Moustafa, *Struggle for Constitutional Power*, 103

\(^{466}\) Boyle and Sherif, *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt*, 244
political matter. The SCC held that the law contravened Articles 5 and 62 of the Constitution, which instituted a multi-party system and granted citizens the right to participate in public life. The SCC held that acceptance of through national referendum does not elevate the status of legislation to the level of a constitutional amendment, for which a specific procedure had been laid out in Article 189. Hence, legislative acts, even if approved by popular referendum, would remain subject to judicial review, and could be annulled if found unconstitutional. As a result of this judgment, hundreds of prominent opposition activists, including the petitioner and Dia’ al-Din Dawud, the founder of the Nasserist Party, were able to participate in public life.

In another ruling concerning participation in public life, a member of the Nasserist Party challenged a provision of Law No. 40 of 1977 under which his party’s application had been rejected by the Political Parties Committee. Under the provision, the Committee could reject applications if founders or leaders of the party had publically criticized the peace treaty between Egypt and Israel. The petitioner argued that the provision contravened the right to freedom of expression (Article 47) in the Constitution. The Court held for the petitioner, and stated, “[T]he challenged statute, which forbade criticism of the peace treaty, unequivocally denied the right to form political parties to which all citizens are entitled, thus violating Article 5 of the Constitution.” Further, the Court held that while the right of free expression was not unrestricted, in the present case, there was no justification for limiting the right. Treaty provisions, the Court explained, should not be taken as curtailing the right to free expression, and citizens ought to be able to openly discuss their implications and to express their opinion. After

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467 Case No. 56, Judicial Year 6, Decided on 21 June 1986, [SSDC, Vol. 3, 353-363]
468 Boyle and Sherif, Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt, 245
469 Case No. 44, Judicial Year 7 (Decided 7 May, 1988; SCCDC, Vol 4, 88)
470 Quoted in Boyle and Sherif, Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt, 248
the SCC annulled the provision, the Nasserist Party was able to gain legal status and participate in political activities.\textsuperscript{471}

Finally, a third important area in which the SCC limited the ability of the executive to curtail political rights concerned freedom of the press.\textsuperscript{472} One of the mechanisms through which the regime controlled activism by the opposition was through a provision of Law No. 40 of 1977 which provided for vicarious criminal liability in libel cases for party presidents, along with editors-in-chiefs, for articles published in newspapers associated with political parties. The Chairman of the Labor Party and the editor-in-chief of the party newspaper were on trial after an article was published criticizing the Petroleum Minister in the party’s newspaper. The party leaders petitioned the SCC, and the SCC held the provision was contrary to a number of articles of the Constitution. Further, the SCC also annulled parallel legislation two years later for vicarious liability of editors-in-chiefs.\textsuperscript{473}

Above, I have described the more prominent of a larger set of cases in which the SCC and other judicial organs in Egypt adjudicated cases directly against the interests of the regime. The SCC’s capacity to challenge the interests of the regime was well known to political activists, who actively used this channel to push for political reform. Following a landmark judgment of the court regarding supervision of elections by the judiciary, Ayman Nur of the Wafd Party said, “this ruling and the previous others will unquestionably affect the future of domestic politics…the judiciary has nearly taken over the role of the political parties in forcing the government to take action in the direction of greater democracy.”\textsuperscript{474} In the context of entrenched authoritarianism, however, there were also limits to the ability of the court to challenge certain

\textsuperscript{471} Ibid.
\textsuperscript{472} Moustafa, \textit{Struggle for Constitutional Power}, 140-145
\textsuperscript{473} Case No. 25, Judicial Year 16, Decided July 3, 1995 (Official Gazette No. 29, July 20 1995)
\textsuperscript{474} Al-Ahram Weekly, August 3-9. 2000. Quoted in Moustafa, \textit{The Struggle for Constitutional Power}, 191
interests of state elites. For example, the SCC upheld the constitutionality of the State Security Courts, which have been used by the regime to marginalize political opposition. Further, in the 1990s, the SCC refrained from holding unconstitutional the regime’s practice of diverting cases from the mainstream judiciary to the military courts in trials involving civilians. This venue was often used in trials involving political dissidents, especially from moderate Islamist groups such as the Muslim Brotherhood.\textsuperscript{475} Though there was consensus among constitutional experts that the law did not allow the executive to handpick particular cases for transfer to the military courts, but only to transfer categories of crimes, the SCC was unable to challenge the regime on this issue.\textsuperscript{476} Moreover, the SCC refrained from challenging the constitutionality of the controversial state of emergency that continued for over three decades under Mubarak.

In assessing the role of the judiciary in Egypt, commentators have often implicitly placed reliance on the fact that none of the judgments of courts in Egypt precipitated a breakdown of the authoritarian regime. The assumption that the effectiveness of the court has to be judged by the immediate consequences of the court’s ruling has led such commentators to undervalue the role of the judiciary in Egypt. For example, Moustafa argues that the jurisprudence of the Egyptian SCC may best be characterized as “insulated liberalism,”\textsuperscript{477} whereby the judiciary, given the political context in which it operated, could only affect state policy to the limit tolerated by the regime. Given this, he argues that the SCC was reluctant to, and indeed unable to, challenge the “core interests of the regime.”\textsuperscript{478} Brown has similarly noted that the Egyptian judiciary has at best been a source of irritation for the powerful authoritarian executive.\textsuperscript{479} In order to assess such

\textsuperscript{475} Moustafa, \textit{The Struggle for Constitutional Power}, 173
\textsuperscript{476} Brown, \textit{The Rule of Law in the Arab World}
\textsuperscript{477} Moustafa, \textit{Mobilizing the Law}, 203
\textsuperscript{478} Moustafa, \textit{The Struggle for Constitutional Power} 106
\textsuperscript{479} Brown argues, “Even when it has been fairly independent, the Egyptian judiciary has never been worse than annoying to the country’s political leadership.” See Brown, \textit{The Rule of Law in the Arab World}, 128
claims, it is important to evaluate how one defines the ‘core interests’ of an authoritarian regime. One possibility, which seems to have been the preference of such scholars, is to define core interests as those that the court has been unable to adjudicate against. Hence, as Moustafa and Brown have noted, the court refrained from challenging emergency rule and state security and military courts. The problem with this conception is that anything short of a judgment that calls for the immediate dismantling of the regime, such as by ordering the removal of the chief executive, would not be considered a challenge to core interests. For example, had the SCC prevented the regime from transferring cases from the regular judiciary to the military courts, it could be argued that the court was able to do so because the regime allowed it, which would be possible because it did not represent a core interest for the regime.

Another way to consider whether the judgments did in fact challenge the core interests of the regime is to analyze their potential in undermining authoritarianism in the long run. Following this line of argument, one would consider factors that would likely be important to an authoritarian regime that seeking to perpetuate its rule, and whether the court’s rulings cause damage, even if incrementally, to the infrastructure of power constructed by the regime. For example, if the regime passes a law that prevents non-governmental organizations from receiving funds from foreign sources, and the court annuls such a law, it can be argued that the regime tolerated this because it did not belong to the category of its ‘core interests.’ However, if the regime bans a political party that is certain to be in the opposition, and the court intervenes to grant legal status to such a political party, it is very difficult to argue that the court in this case did not challenge the core interest of the regime.

The cases discussed above, in which the SCC incrementally dismantled the regime’s electoral setup that was engineered to favor the regime-friendly party, granted legal status to
political parties whose licenses had been rejected by the regime’s Political Parties Committee, legalized a banned political party, and allowed prominent leaders who had been prevented from participating in political life to do so, can not, I argue, be considered peripheral. Consider, for instance, the long term impact of the SCC’s judgments in the late 1980s through which the country’s electoral laws were revised to allow independent candidates to contest elections. As a consequence of these rulings, members of the otherwise banned political party Muslim Brotherhood won eighty-eight seats, nearly twenty percent, in the 2005 People’s Assembly Elections. Moustafa acknowledges that these gains by the opposition party “would not have been possible if it had not been for the Supreme Constitutional Court rulings.”

Moustafa also notes that as a result of the SCC’s rulings, the regime had to change its methodology for maintaining political control “from an unfair legal framework to one that increasingly depended on physical coercion, intimidation, and electoral fraud.” It is difficult to see how such a shift, which was no doubt costly in terms of the regime’s legitimacy in society, did not affect the regime’s core interests. Hence, to conclude, the Egyptian judiciary did at several occasions challenge the core interests of the regime and thereby was, at the very least, a partially effective judiciary in the period considered.

The Effectiveness of the Judiciary in Turkey

Courts in Turkey have operated in a more democratic context compared with Egyptian courts for several decades. While Turkey is not a consolidated democracy, power has changed hands through multiparty elections on several occasions in the last few decades, and the military has directly ruled the country for a very short period compared with other countries with praetorian

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480 Moustafa, *The Struggle for Constitutional Power*, 215
481 Ibid., 103
tendencies. Given a more liberal context, and being situated in a more fragmented political setup, one might expect the Turkish judiciary to be more effective than Egypt’s in protecting political rights and in checking the power of state elites. Instead, Turkish judicial institutions, including the Constitutional Court (*Anayasa Mahkemesi*) established in 1962, have consistently protected the interests and ideologies of state elites at the expense of citizens’ political rights. Below, I explore the role of the Constitutional Court as envisioned by the framers of the 1961 and 1982 Constitutions, and two important political functions that the Court has performed in the decades after its establishment which exemplify the jurisprudence of the Court.

The Constituent Assembly that drafted the 1961 Constitution was comprised mainly of secular elites, who thought that the design of the political system had caused political instability in the country in the previous decade. The secular establishment decided to put an end to majoritarian democracy and replace it with a formally liberal model of democracy. An extensive charter of rights, as well as effective judicial guarantees for the rights, was included in the 1961 Constitution. Though formally a liberal constitution, especially compared with its successor in 1982, there were some features of the 1961 Constitution that were illiberal and fundamentally restricted political rights. For example, the National Security Council (NSC), established by the 1961 Constitution, became the most important channel for the military establishment’s control over the civilian government. In September 1980, the military establishment intervened in the democratic process for the third time in two decades. After dissolving the parliament, the military retained power for three years, during which a new constitution was drafted and

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submitted for approval to the citizens. After being approved by 91 percent of the voters, it was promulgated as the Republic’s new constitution in November 1982. The military regime was deeply involved with the drafting of this new constitution through the NSC. There was only limited public engagement and deliberation during the drafting process calling into question the democratic credentials of the 1982 constitution. The 1982 constitution is an instance of what Arjomand has called an ideological constitution, which seeks social transformation rather than a define, check and limit the power by the state. The military infused the 1982 constitution with an ideology of statist republicanism, which combined the idea of the common good with an interventionist role for the state. The interests of the state, hence, were raised above the interests of the citizens. Indeed, General Evren, the head of the state during the constitution-making phase, suggested the following about ideology of the new constitution:

> While trying to enhance and protect human rights and liberties, the state itself has certain rights and obligations as far as its continuity and future is concerned. We do not have the right to put the state into a powerless and inactive position. The state cannot be turned into a helpless institution… citizens should know that freedoms of thought and conscience exist. There are, however, limits to these freedoms… individual freedoms can be protected to the extent that the will and the sovereignty of the state are maintained. If the will and sovereignty of the state are undermined, then the only entity that can safeguard individual freedoms has withered away.

The framers of the 1982 Constitution envisioned the role of the Constitution Court as a guardian of the interests and values of the secular establishment. The official framework safeguarded the six principles of Kemalism – laicism, nationalism, republicanism, populism, statism and reformism – that were to be privileged above other constitutional principles, including the civil

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484 To begin with, a pro-military law professor was appointed as chair of the constitution drafting committee. Further, the NSC itself gave ‘final form’ to the text, as the Preamble states. The consultative process was restricted to a few speeches given by the Turkish head of state, which informed the people about the content of the constitution. Though there was a high approval rate, this can be construed as a desire for the people to expedite the constitution-making process, in which they had little role anyway, so that democracy could return to the country. See Mehmet Bilgin, “Constitution, Legitimacy and Democracy in Turkey,” in Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan, ed. Said Amir Arjomand, (Hart Publishing; 2007, 123-146)


and political rights of citizens. In the last three decades, the Court has played a critical role in maintaining the statist ideology laid out in the Constitution. The empowerment of a judiciary that ensures the maintenance of the status quo was an important step taken by the state elites in Turkey during the drafting of the 1961 and 1982 constitutions.

In Chapter 1, a distinction was made between courts that are empowered and those that are effective in constitutional and other adjudication. While the former type of courts are not insignificant actors in the politics of a country, their power has been delegated to them by power elites to perform a limited set of functions, that are usually aimed at perpetuating the power and ideology of those elites. Effective courts, on the other hand, are more autonomous, and to the extent possible in the particular political context in which they function, attempt to hold power elites accountable for their actions, especially those that curtail the rights of citizens. In this sense, while the Turkish judiciary has certainly been powerful in terms of protecting the interests and ideologies of state elites, it has been less ‘effective’ in protecting citizen’s rights, especially in terms of opening up the political space for new entrants that espouse interests and ideologies that differ from those of the state elites’. In order to appreciate the role of the Turkish Constitutional Court in upholding the dominance of state elites’ interests over citizens’ rights, I will focus below on two areas of the Court’s jurisprudence relating to the closure of political parties and abstract review.

In contrast to the Egyptian judiciary, which granted legal status to political parties whose applications had been rejected by the state, one of the most important functions of the Turkish judiciary has been to close down political parties whose interests or ideologies were not aligned

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487 Esin Orucu, “The Constitutional Court of Turkey: The Anayasa Mahkemesi as the Protector of the System,” in Andrew Harding and Peter Leyland (eds.) Constitutional Courts: A Comparative Study (Wildy, Simmonds and Hill Publishing; 2009)
with those of the Kemalist elites. From 1962 to 2008, the Court closed down 24 political parties, many of which were pro-Islamist or pro-Kurdish.\textsuperscript{488} It is worth noting that several of the parties that were dissolved through the Court’s orders had significant representation in the assembly. For example, the Welfare Party, dissolved in 1998, was the largest party at the time of its dissolution in the Parliament.\textsuperscript{489} Similarly, the Virtue party was the largest party in the opposition when it was dissolved.\textsuperscript{490} Once the court orders dissolution of a party, its assets are transferred to the Treasury by the operation of law, and bans are placed on top leaders from holding office in another party. In several cases, leaders of dissolved parties did manage to establish new parties, which were also subsequently dissolved through judicial action. For instance, the incumbent Justice and Development Party (AKP) is a successor of four parties – Virtue Party, Welfare Party, National Salvation Party and National Order Party – closed down in 2001, 1998, 1980 and 1971 respectively.\textsuperscript{491} In 2008, the Court took up a closure case against the AKP as well, which the party narrowly survived. The prosecution in the case had argued for the dissolution of the party along with the banning of more than 70 party leaders, including incumbent President Abdullah Gul and Prime Minister Recep Erdogan from engaging in political activities for five years.\textsuperscript{492} Six of the eleven judges voted to disband the party, just one short of the required number of votes. The AKP was fined monetarily for its anti-secular actions.\textsuperscript{493}

Scholars of Turkish politics have argued that closure of political parties by the court was a means to close off political space to new entrants who might challenge the hegemony of the

\begin{footnotes}
\item[488] See Yusuf Hakyemez, “Containing the Political Space: Party Closures and the Constitutional Court in Turkey,” in Insight Turkey (Vol. 10, No. 2; 2008, 136)
\item[489] Ibid.
\item[491] Shambayati, “The Guardian of the Regime,” 116
\item[492] BBC News, “Turkish court deciding AKP’s fate” (28 July, 2008)
\item[493] Robert Tait, “Turkey’s governing party avoids being shut down for anti-secularism,” (The Guardian; 30 July 2008)
\end{footnotes}
through the court’s action, political movements that sought to challenge the status quo through the democratic process, and to bring forth their social concerns into the public sphere, were prevented access to a channel for legitimate political action. Against this conception, one may argue that the court was merely following the letter of the law, and adjudicating the case based on principles enunciated in the constitution. The preamble to the constitution clearly states that there will be no protection for activities that are contrary to certain enumerated Kemalist principles, including secularism and national unity. However, as Kogacioglu notes, with regard to the closure cases, there were a number of different ways in which the constitutional text could have been interpreted, including several that the defendant-parties presented in their defense. However, the court based its jurisprudence selectively on certain provisions of the constitution, which would have the effect of delimiting the political space in manner more favorable to the ruling elites.

Second, from a comparison of the court’s rulings in abstract and concrete review cases, it appears that the court has a more activist posture when it comes to taming the parliament than in protecting citizens’ fundamental rights. In the two decades following the promulgation of the 1982 Constitution, the Court annulled over 70 percent of the abstract review cases it adjudicated. Since violations of civil liberties usually take place as a result of the abuse of power by the executive after legislation has been passed by the parliament, the court’s record of adjudicating

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494 See for instance Dicle Kogacioglu. “Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain” in International Sociology 18: 258, 2003
495 Shambayati, “The Guardian of the Regime,” 112
496 The Preamble of the 1981 Constitution states:
No protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of indivisibility of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values, or the nationalism, principles, and reforms of Ataturk and his embracement of values of modern civilization; and as required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in the state affairs and politics. (quoted in Kogacioglu, “Dissolution of Political Parties,” 260)
497 Kogacioglu, “Dissolution of Political Parties,” 260
concrete review cases can be an indicator for the protection of civil liberties. In roughly the same period (1984-2000) the Court annulled only 18 percent of the cases it received for concrete review. Further, other than through the court’s rulings, members of the judiciary have at times publically warned elected officials about engaging in actions they consider unconstitutional. For example, the head of the Constitutional Court warned the AKP on the occasion of the court’s anniversary in 2005 from passing a law permitting the wearing of the headscarf in universities. The president of the court made sure to remind the AKP that the court had previously dissolved political parties because of anti-secular activities, and that this law could not even be changed through a constitutional amendment.

From the foregoing discussion, one can draw the conclusion that while politics in Turkey was certainly judicialized, the court was not an effective actor in terms of checking the power of state elites and protecting citizens’ fundamental rights. As Shambayati notes, even when the judiciary did rule against the state, it did so in a way that further enhanced the power of the ruling elite. For example, in the 1990s, following attacks on secular intellectuals by terrorists, the Council of State found that the state was liable owing to its inability to protect those affected.

While I have noted the divergence between the Egyptian and Turkish judiciaries with regard to their effectiveness above, in in the next section I offer an explanation for the divergence based on the model I have developed in the foregoing chapters.

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499 Ibid
500 Quoted in Shamabayati, “Courts in Semi-Democratic/Authoritarian Regimes,” 296
501 Ibid, 298
In the previous section, I compared judicial effectiveness in Egypt and Turkey. I described how the Egyptian judiciary has been able to challenge the core interests of a powerful authoritarian regime, and how the Turkish judiciary, while empowered and operating in a more democratic context, has been ineffective in challenging the power of state elites and protecting citizens’ fundamental rights. Below, based on the model developed in part II, I present an explanation for the surprising divergence in the two cases. I argue that the relative effectiveness of the judiciaries in the latter half of the twentieth century is related to the development of the legal profession in the earlier half of the century. While in Egypt, the profession became embedded in society and developed a strong political orientation owing to the leading role played by lawyers in decolonization, in Turkey, lawyers’ political role was marginal and they were on the receiving end of a restructuration process initiated by powerful military and bureaucratic state elites. As a result, the Egyptian legal profession developed a strong mobilization potential which carried into the post-revolutionary period owing to institutional continuity, albeit with some disruptions. By contrast, the displacement problem was not so readily solved in Turkey, where the bar did not become embedded in society and politics, and hence did not develop a strong mobilization potential.

**Formation of the Profession and Legal Mobilization in Egypt**

The modern Egyptian legal system was established, as in colonial India, through the replacement of the indigenous legal system with one borrowed from Europe. Until the 1870s, the legal

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system that existed in Egypt was combination of institutions established by the Ottoman Empire, of which Egypt was formally a province even though it had much autonomy, and local tribunals. Though the Ottoman legal system was shari’a (Islamic law) based, the Empire had instituted major legal reforms in the nineteenth century, including the codification of Islamic law in the form of Code Napoléon.\footnote{503}{Ibid, 24} In the early nineteenth century, alongside shari’a courts, Muhammad Ali also established tribunals and councils, with the latter applying the law of the Egyptian government.\footnote{504}{Ibid, 24} This hybrid legal system proved ineffective in the latter half of the nineteenth century, especially with regard to adjudicating and enforcing cases against Europeans. There was, by this time, a significant presence of foreigners in country, with much influence on Egyptian economy and politics, owing in particular to the capitulations. The project of setting up the Mixed Courts, which was spearheaded by Ismail Pasha’s Armenian advisor Nubar Pasha, was intended to address the inability of the Egyptian government to effectively deal with foreign interests through the existing legal system. However, the decade-long efforts of negotiating the structure of the new system with the capitulatory powers concluded in 1876 with an arrangement that considerably favored foreign interests. Among the concessions made, especially upon the insistence of the French, were adoption of the Code Napoléon, having a majority of Western judges on the bench, and a provision requiring the government to enforce a judgment of the Mixed Court against itself in cases in which a foreign plaintiff had prevailed against the government. Soon after the establishment of the Mixed Courts, as the Egyptian economy experienced decline and the government had to accept oversight of the

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\item \footnote{503}{Brown, \textit{The Rule of Law in the Arab World}, 2-3}
\item \footnote{504}{Ibid, 24}
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capitulatory powers over its economy, the Courts began to pass unfavorable rulings against the
government and Khedive Ismail. Ultimately, the courts that had been created by Ismail’s
government led to his own downfall. When Ismail was unable to pay back the debt owed to
foreign powers, and tried to evade judicial rulings passed by the courts, the European powers
pressured the Ottoman sultan to depose him. As Lord Cromer noted:

By irony of fate, the institution to which Ismail Pasha was induced to assent, probably with only a
half knowledge of what it meant, was the instrument which dealt him his political death-blow. When
the law courts, to whose creation the Powers of Europe had been parties, condemned him to pay
certain sums of money and when he found himself unable to pay them, the cup of his iniquity
overflowed and Europe – legally outraged, and politically timorous of what the future might bring
forth – spoke out and said, “You must pay or go.” Ismail Pasha could not pay. After a few ineffectual
struggles, he went.

Gradually, the Mixed Courts became the most important judicial institution in the country. While
originally set up to deal with legal issues involving foreigners, the jurisdiction of the courts
expanded to include litigation with any foreign interest, even if both parties were Egyptian. Such
jurisdiction, on the basis of a ‘mixed interest,’ could be assumed, for example, if one of the
companies party to the case had a single stockholder who was a foreigner. In time, as Binton
notes, with a presence of 140,000 foreigners in a country of fourteen million, there was
“practically no litigation of any large or general importance which is not attracted to their
jurisdiction.” Writing in 1930, Binton noted that these courts had seventy judges (of whom
two-thirds were foreigners), 1400 employees, and produced nearly 40,000 written judgments
annually.

After the establishment of the Mixed Courts, Egyptian leadership began work on
establishing a new system of domestic courts. Those instrumental in the establishment of the
Mixed Courts had imagined that these courts would in time expand their jurisdiction to purely

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505 Quoted in Reid, *Lawyers and Politics in the Arab World 1880-1960*, 31
507 Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, 25
domestic matters. However, the degree of foreign control of these courts convinced Egyptian leaders that a separate system of courts would have to be established, even if the leadership envisioned the eventual unification of the two systems that would end the hegemony of western lawyers and judges over cases involving foreign interests. One of the most important issues in the construction of the new system concerned the law that these courts would apply. Some leaders favored retaining a link with tradition, and for basing the code on shari’a, while others, hoping for the unification of the new courts with the Mixed Courts, argued for the adoption of the code of the Mixed Courts. Meanwhile, as the structure of the court was still under consideration, the Urabi revolt and the ensuing war between Egypt and Britain resulted in the occupation of the Egypt by the British in 1982. Occupation created a sense of urgency among Egyptian leadership, who thought that any further delay in the establishment of the new court system would mean greater loss of sovereignty to the occupying power. Hence, the National Courts were established in 1883, and began operating in 1884 after adopting the code of the Mixed Courts with some amendments. While the hope in adopting the laws, as well as the structure, of the Mixed Courts was the unification of the National Courts and the Mixed Courts within a short period of time, foreign influence remained strong enough to prevent this goal from coming to fruition for more than six decades after the establishment of the National Courts.

There was, hence, in Egypt a displacement of legal institutions after the arrival of the French and the British colonial powers, much like there was a displacement of indigenous legal institutions in colonial India. As Brown has noted, in the Egyptian case, the adoption of European law and legal structures cannot be considered an imposition by the colonizers, since
Egyptian leadership also favored the adoption of foreign models. While this may be true, the choice to replace indigenous institutions with foreign ones was, ironically, made to protect the sovereignty of Egypt from the influence of foreign powers, as noted above. Notwithstanding the deliberate adoption, what is critical is that there was a sharp disconnect in the development of legal institutions, such that the new legal setup was closer to that of the colonial powers than one that had developed in the region over several centuries. This displacement problem, as I explained in Chapters 1 and 3, can be an impediment to the effectiveness of legal institutions, since transplanted systems are, by definition, not contextually tailored for the receiving society, and it would likely take a very long time for them to become embedded in the politics and society of the new polity.

The displacement problem in Egypt, as in colonial India, was compounded by the fact that, after the establishment of the new legal system, foreign lawyers had a hegemony over the practice of law. Even though the Mixed Courts had been set up by the Egyptian government, the Mixed Bar Association was initially open to only to European lawyers. In 1877, for instance, when the bar held its second election, of the seventy-nine members present at the meeting, not even one had an Arabic name. Gradually, Egyptian subjects were allowed membership in the bar, but most of them were not of Egyptian origin. By 1916, about two-thirds of the bar’s members were Egyptian subjects, but were mostly Syrian Christians or Jews. By the fiftieth anniversary of the bar, the presidents had always been European and only a handful of lawyers of Arab origin had made it to the governing council of the organization.

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509 Ziadeh, Lawyers, the Rule of Law and Liberalism in Modern Egypt, 29
510 Ried, Lawyers and Politics in the Arab World, 47
Given the importance and expansive jurisdiction of the Mixed Courts, as noted above, and the exclusion of Egyptian lawyers from the Mixed Bar, it would seem that the development of a powerful and embedded legal profession would be unlikely in Egypt in the colonial period. While the establishment of National Courts in 1884 opened up the profession for the participation of native lawyers who were proficient in Arabic,\(^{511}\) lawyers had an unfavorable reputation and were not held in high esteem by the society. This was partly due to the status of the *wukala*, the advocates that used to assist clients in pre-colonial courts.\(^ {512}\) While *wukala* had provided legal representation, the profession had not developed to the level where it could protect its corporatist interest through a professional body and thereby become prominent in society. More importantly, with the most important cases being adjudicated in the Mixed Courts, the practice of law in the National Courts by native lawyers was not considered to be prestigious, and was not initially attractive to brightest students or to the scions of the elite classes in Egypt.

Even with such inauspicious beginnings, within a few decades, law had become the most prestigious profession in Egypt, and lawyers occupied positions of leadership in the most important institutions in the country. A number of factors contributed to the rise in prominence of the profession. To begin with, there was increasing professionalization of the body of native lawyers that practiced at the National Courts. In this process, it helped that the model of the Mixed Bar Association was available. Though the native lawyers resented the presence of the Mixed Bar owing to the hegemony of European practitioners,\(^ {513}\) they were willing to emulate it in an attempt to develop their profession further. As Reid notes, there were five elements which led to the professionalization of lawyering in Egypt after the establishment of the National Courts: establishment of a law school, publication of law journals, regulation of the profession,

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511 Reid, *The National Bar Association and Egyptian Politics 1912-1954*, 611
512 Ziadeh, *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, 21
513 Reid, *Lawyers and Politics in the Arab World*, 47
growth in the size of the profession, and establishment of the National Bar Association.\textsuperscript{514} The last of these, the founding of the native bar, was of particular importance in the professionalization of lawyering. Establishing the organization initially met with resistance from the government, which was wary of lawyers organized as corporate body. Efforts were initially made in 1902, when a proposal submitted to the Minister of Justice Fu’ad Ibrahim was rejected.\textsuperscript{515} In 1910, a prominent lawyer Aziz Khanki wrote an open letter to then Minister of Justice Sa’d Zaghlul for the establishment of the bar. The letter started with noting that French lawyers were close to holding centennial celebrations of the establishment of the French bar, and argued that lawyers would not be able to effectively perform their function without membership in an independent bar.\textsuperscript{516} The National Bar Association was founded shortly thereafter in 1912, and given the increasing prominence of the profession, the bar elections to elect the president became highly significant political events at the national level.\textsuperscript{517} Over the next several decades, the National Bar Association remained very active in protecting the corporatist interests of the profession, including by establishing admissions procedures, publishing journals, arranging lectures, and promoting the welfare of its members.\textsuperscript{518}

While professionalization certainly improved the status of lawyers in society, it was the political role played by lawyers in first half of the twentieth century that brought them to the center of public life in Egypt, and resulted in lawyering becoming the most revered profession in the country. The space opened up for lawyers to play a central role in public life because of the particular nature of the political context. After the British bombarded Alexandria and occupied

\textsuperscript{514} Ibid, 42  
\textsuperscript{515} Ibid, 48  
\textsuperscript{516} Ziadeh, Lawyers, the Rule of Law and Liberalism in Modern Egypt, 45  
\textsuperscript{517} Ibid, 46  
\textsuperscript{518} Ziadeh Lawyers, the Rule of Law and Liberalism in Modern Egypt, 48; Reid, Lawyers and Politics in the Arab World, 139
Egypt following the failure of the Urabi revolt, the military had not only been discredited, but was also placed under British command. In addition, with the opening up of secular schools in the colonial period, al-Azhar lost its prominence, and was no longer able to provide a locus for resistance against colonial interference in Egypt. The nature of colonial rule, in which a military rebellion was an impossibility, necessitated a different kind of resistance, which would employ legalistic and institutional methods to undermine the control of the British over Egypt. In addition, as Ziadeh notes, with the “internationalization of the Egyptian question,” lawyers, especially those who had studied abroad, were ideally suited to present Egypt’s case in the international arena.

Hence, it was not only that lawyers played a central role in the politics of Egypt during this period. What is critical, with regard to the development of the profession, is that lawyers were – like their counterparts in the subcontinent – at the forefront of the nationalist movement, aimed at undermining not only powerful executive authority, but also a hostile colonial power. Initially acting individually, and following the founding of the National Bar Association acting collectively, lawyers remained extremely active in Egyptian political life and provided the leadership and mobilization that led to the decolonization of Egypt. The initial orientation was developed by lawyers such a Mustafa Kamil (1874-1908), who got his law degree from Toulouse University in France, and returned to Egypt to practice law in order to “defend the rights of individuals, and… to defend the rights of the entire nation, because Egypt, the paradise of the world, does not deserve to have its honor trodden upon.” Soon after his return, he devoted his energies fully to the nationalist cause, and began publishing a newspaper, and travelling to Europe to advocate Egyptian independence. In 1907, Kamil led the formation of the Nationalist

519 Ziadeh Lawyers, the Rule of Law and Liberalism in Modern Egypt, 64

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Party, which, after his untimely death two months later, was subsequently led by another lawyer, Muhammad Farid (1868-1919). Farid’s father, an aristocrat, had been greatly dismayed to see his son become an advocate. He practice law for a number of years, and then became fully involved with the rising nationalist movement in 1904. Upon taking the leadership of the party, Farid declared that the slogan of the party was the expulsion of the British from Egypt and the formation of a constitutional government in place of the colonial administration. His activism, at this early stage of the development of the nationalist movement, was not tolerated by the authorities, and he was forced into exile in 1912.

There are a large number of episodes of lawyer-led contentious mobilization during this period. In some, lawyers acted collectively as a profession, while in other they led political parties and cabinets in the nationalist cause. Below, I will highlight a few instances of legal mobilization which demonstrate the central role played by lawyers in nationalist movement as well as in mobilizing against the authoritarian tendencies of the Egyptian government. An early episode, which brought the issue of constitutional government into public imagination, was spurred by a speech made by US President Theodore Roosevelt. During a tour of Africa, Roosevelt spoke at the Egyptian University, in which he argued that the advantages of a written constitution were limited for a country like Egypt, because in order to be ready for self-government, a nation needed generations of training. The Nationalist party staged a demonstration on these remarks, and three Egyptian lawyers wrote a letter addressed to Roosevelt in which they made a strong argument that Egypt was prepared for self rule, and analogized Egypt’s nationalist efforts to those of the Americans against the British in the late eighteenth century.

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520 Ibid, 67
It was after World War I that lawyers, acting collectively, began agitating against the British and became, as Ziadeh notes, “the leading force in the general call for independence and constitutional government.”

Perhaps the most important leader of this period was Sa’d Zaghlul, who had studied at al-Azhar before choosing law as a profession. Like other lawyers of his generation, when he started practicing law, it had been considered sufficiently disreputable for him to avoid informing his family and friends about the choice of his profession. However, by the time Zaghlul died in 1927, he was a national hero, and had contributed to the development of a profession which had become the most prestigious in the country. One of the first important instances in which the bar mobilized against the colonial authorities was after Zaghlul and three other leaders of the wafd were exiled to Malta in 1919. The wafd, or delegation, had been formed in 1918 to present the case for Egyptian independence at an international conference in Paris and at the British Foreign Office in London. After the wafd’s leaders were exiled, there were bloody demonstrations against the British and a strike by the students. Subsequently, the advocates decided to go on strike, which brought the administration of justice to a standstill. Given the prominence and respect of the lawyers by this time in Egyptian society, other professional and trade groups were also encouraged to follow. Through the Ministry of Justice, the British began intimidating the lawyers, threatening them with strong consequences if they did not end the strike, including by fining lawyers who did not show up to plead the cases. In response, the board of the bar declared, “the Bar, which is cognizant of its standing, cannot desist from showing its distaste for the events which [are] taking place.” When they were accused of being unprofessional by sacrificing the interests of their client, the bar’s General Assembly declared

521 Ibid, 69
522 Reid, Lawyers and Politics in the Arab World, 40
523 Reid, The National Bar Association and Egyptian Politics 1912-1954, 619
that, “the interests of the litigants, which you are so concerned about, also concern us; and it is these interests themselves which motivate us to protest in this way.”

As a consequence of the lawyers’ rebellion, the exiled leaders were released and allowed to travel to the peace conference. After the success of the strike, the tactic was used by lawyers on several occasions in nationalist mobilization. In December 1919, for instance, lawyers went on a one-week strike when Colonial Secretary Lord Milner was appointed as the head of commission to investigate the causes of the rebellion and to investigate the possibility of a compromise between the Britain’s interests and the aspirations of the Egyptians. Egyptians lawyers saw this as step toward formal colonization, and after condemning the sentencing of lawyers for political reasons, the bar’s general assembly gave the call for a strike based on “the grave circumstances obtaining at the time, especially the impending arrival of the Lord Milner Commission, which is a new manifestation of aggression against the independence of Egypt and which has the aim of confirming the British protectorate.” Similarly, lawyers went on strike again against the British in 1921 and 1922. The activism was high-risk, which can be gauged from the fact that between 1916 and 1923, six future presidents of the bar were imprisoned for nationalist agitation.

In 1920, following the failure of negotiations between Egyptians and the British, there was a crackdown on Egyptian leadership. Zaghlul and five other leaders were exiled to Seychelles in 1921, and the following year Marqus Hanna, the president of the bar, and several of his colleagues who had taken up the leadership of the Wafd Party, were arrested because of their engagement in political activities. A military court first sentenced them to death, which was

524 Minutes of the General Assembly of the National Bar Association, part I, p. 222; quoted in Ziadeh *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, 70
525 Ibid, 217
526 Reid, *The National Bar Association and Egyptian Politics 1912-1954*, 619
subsequently reduced to seven years in prison. The bar protested strongly against these actions, and sent a delegation to the King to petition against the conduct of the British military authorities requesting him to “save the country, to restore to those exiled or arrested their liberty and to put an end to martial law, so that … the rule of law be established.”527 Later, in 1923, after Zaghlul was released, the Wafd Party won the first elections held after the promulgation of the Constitution in 1923. However, after the assassination of Sir Lee Stack, the Sirdar of the Egyptian Army and Governor General of Sudan by extremists, Britain put forward to the government an ultimatum which contained provisions unrelated to the redressing issues resulting from the assassination. Zaghlul chose to resign rather than accept these demands, which were accepted by the next government in power led by Ahmad Ziwar. The bar reacted strongly to this, and issued a declaration that the provisions in the British ultimatum were not binding on the nation.528 Subsequently, the bar was again spurred into action by a number of causes célèbres that targeted prominent Wafd leaders in the aftermath of the assassination of Sir Lee Stack. Some of the most prominent lawyers in Egypt stepped forward to defend the leaders in these trials, were successful in getting acquittals for all except one, who was sentenced to death. The episode greatly enhanced the prominence of the legal profession, since there was much publicity of the trials, especially after a British judge resigned upon disagreeing with his colleagues on the acquittals. The bar, by now emboldened given its prominence, issued a condemnatory statement against the British judge for “violating the tenets of his profession.”529

Lawyers continued nationalist mobilization over the next few years. The bar took a strong stand against the suspension of the Constitution in 1928, and contributed toward the conclusion of the treaty with Britain that granted independence to Egypt in 1936. However, British influence

527 Minutes, part I, pp. 186-187
528 Ziadeh, Lawyers, the Rule of Law and Liberalism in Modern Egypt, 74
529 Ibid, 75
in Egypt did not end with the conclusion of the treaty, especially since British troops remained in
the country. The issue came up in 1946, when the lawyers went on strike again against the
government of Ismail Sidqi. Sidqi, who had not been able to reach an agreement with the British
on the issue of the troops, decided to travel to London with his foreign secretary and reached an
agreement with the British Foreign Secretary Bevin. The Sidqi-Bevin draft agreement was
strongly criticized in Egypt, and led to demonstrations in which students were arrested.
Subsequently, lawyers who stepped forward to defend the students were also arrested. The bar
called an extraordinary meeting of its general assembly in which the actions of the government
in arresting the lawyers was strongly condemned. One of the members of the bar explained the
situation as follows:530

> The country is in danger, and the first symptom of this danger I that the whip of the executioner
> has fallen upon the shoulders of the lawyers. But the executioner in not interested in the lawyers
> per se; he wants to strike the nation by hitting those who come forward to defend their country, so
> that those who we defend will come to feel that [lawyers] have failed in their defense.

The bar passed a unanimous resolution condemning the draft agreement and also called for a
strike as a protest against the actions of the government. This episode demonstrates the
mobilization potential that the bar now had after having successfully mobilized for, and having
played a central role in, a political project as grand as the expulsion of a foreign occupying
power from the country. The bar was now embedded in society and politics, and ready to
continue mobilizing against the authoritarian actions of the Egyptian government. For example,
the bar called extraordinary meetings in 1949 and 1952 to condemn the continuance of martial
law because of which several political prisoners had been detained without trial.

The political context changed radically with the army revolt of 1952, after which the
country took a sharp authoritarian turn toward military dictatorship under the leadership of

530 Ibid,84
Nasser. Initially the lawyers had been ambivalent toward the army revolt. The bar at the time was more supportive of Naguib, who was willing to return the country to parliamentary democracy, but Nasser, who did not want a return of what he saw as the corrupt power elites, appeared stronger in the power struggle. The bar continued to fight for the return to constitutional democracy, and made a last courageous effort in 1954 at a emergency meeting. Umar Umar, the Wafdist president of the bar, declared at the meeting:

The country, while expressing its gratitude to the courageous army [for doing away with the corrupt monarchy], desires to preserve it for the task of defense so that nothing will distract it from that glorious duty. Such a desire, as well as the interest of Egypt and that of the army itself, require it that it go back to the barracks… As a result, and in preparation for the return to normal conditions, public interest requires that the Revolutionary Command Council terminate its duties today.

The bar demanded the return of parliamentary democracy, the end of martial law, and the release of all political prisoners. However, with Nasser ascendant in the power struggle with Naguib, the board of the bar was dissolved in 1954, and Law 709 of 1954 extinguished the independence of the bar by providing that the board be appointed by the Minister of Justice. While bar elections were allowed again in 1958, before the elections, Nasser ordered by presidential decree that candidates for election to the board had to be members of the only political party, the National Union.

After the military coup of 1952 and the ensuing nationalization of the economy, lawyers prominence in public life and their sources of income diminished. However, the mobilization potential that the profession had developed during several decades of struggle against imperialism did not end, and lawyers continued to mobilize against the government in the latter half of the twentieth century. In 1966, for example, the bar took strong positions on international and Arab nationalist issues, which was followed by new legislation from the government

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531 Ibid 157
restricting the ability of the bar to engage in activities that were outside the framework of the Arab Socialist Union. In 1971, after Saadat succeeded Nasser, the Speaker of the assembly and several cabinet members resigned in order to challenge Saadat’s leadership. In response, Saadat had them arrested, and ordered national institutions, including the bar, to declare support for his leadership. The bar rejected this demand, and this refusal to lend support led to the dissolution of the Bar Council. However, in the bar elections held a few weeks later, a large number of the members of the dissolved bar council were reelected. In 1978, the bar took a strong position against Egypt’s peace treaty with Israel, including by holding public demonstrations. Saadat was sufficiently irked by the activities of the bar to call the a meeting of the Parliament from recess to consider the activities of the Bar Council. Saadat himself accused the bar of acting against national and governmental interests in in a message broadcast through official media outlets, and directed the Parliament to form a special committee to investigate the matter. In response, the Parliamentary committee ordered the dissolution of the Bar and the appointment of temporary committee by the Minister of Justice. When the government tried to pass new legislation to curtail the powers and autonomy of the bar (Law Number 125), the bar leadership filed a case in the Supreme Constitutional Court to challenge the constitutionality of the law. While the government attempted to prevent the court from reviewing the law by passing additional legislation, the Court continued review, and declared the law unconstitutional. While in the 1990s the mobilization potential of the bar was weakened to a degree owing to factionalism and partisanship, the bar remained strong enough to effectively mobilize in the streets against Mubarak’s regime, as discussed in Chapter 4, with respect to the

533 Ibid, 20
534 Ibid
lawyers’ protests following the death under detention of a member of the bar. In addition to the bar association, a social club of judges called the Judges Club has also been active in Egypt since its establishment in 1939. In the two decades after the army revolt of 1952, the Judges Club managed to maintain its autonomy, and remained inclined toward the liberal ideals espoused by the legal profession in earlier decades in contrast with the Arab socialist ideology imposed by the regime on society. The Judges Club continued to play an important role in subsequent decades, including the monitoring of elections by the judiciary.

In sum, while the legal system was established *de novo* in Egypt following the arrival of the imperial powers, the legal profession rapidly developed a prominent positioning in politics and society. This rise of the profession, I argue, resulted from the central position of lawyers in providing the leadership for the decolonization movement during the earlier half of the twentieth century. As noted earlier, the British High Commissioner noted in 1934 that lawyers are “the last element a Government should provoke” and that a lawyers’ strike could potentially “dislocate public life” in the country. The prominence of lawyers in politics during this period can be gauged from the fact that between 1919 and 1952, 14 of 19 prime ministers of Egypt held law degree, and an additional two had previously been judges. During the same period, almost all cabinets were comprised of a majority of lawyers. Further, as Reid notes, the dominance of lawyers in public life was known not only by the lawyers themselves, but also by the general public. The events following the formation of the national bar, and the involvement of lawyers in the nationalist movement, I argue, led to an embeddedness of the profession in society, and

536 Brown, *The Rule of Law in the Arab World*, 89-90
537 Moustafa, *The Struggle for Constitutional Power*, 188-190
538 Reid, *Lawyers and Politics in the Arab World*, 118
539 Ibid, 119
provided mobilization potential to the bar to continue its struggle for the rule of law in the latter half of the twentieth century.

**Development of the Legal Profession in Republican Turkey**

The development of the modern legal profession in Turkey stands in stark contrast with that of Egypt and Pakistan. While Egyptian lawyers, as discussed above, and Indian lawyers, as discussed in chapter 3, dominated public life in the first half of the twentieth century in their respective countries, lawyers in Turkey occupied a marginal position in public life during the same period. What makes these countries comparable is that in each there was a displacement of indigenous legal institutions by European-inspired systems, and a concomitant development of the legal profession based on western models. In each case, the pre-colonial system had been based on *sharia* law, and legal practitioners called *wakala* had represented clients in courts of law in each of these jurisdictions. However, modern lawyering developed very differently in Egypt and the subcontinent on the one hand, and in Turkey on the other.

While Turkey did not experience the kind of formal colonization that was experienced by Egypt and India, the Ottoman Empire was certainly subject to imperial interference, which was repelled through the War for Independence from which Mustafa Kemal (later ‘Ataturk’) emerged as the leader of a smaller territory within the Empire, the modern Turkish Republic. The events surrounding the breakdown of the Ottoman Empire, the formation of the Republic after the War for Independence, and the subsequent modernizing reforms under Ataturk and the Kemalist Republican People’s Party (CHP) are complex and beyond the scope of the analysis in this
The focus in this section is on the development of the legal profession following the founding of the modern Turkish Republic in 1923.\textsuperscript{541}

In contrast with Egypt and India, where the development of the legal profession happened in the context of decolonization, in Turkey, the formative decades of the development of modern lawyering were in the context of state and nation building under authoritarian military and bureaucratic state elites. Far from occupying positions of leadership in public life, lawyers were at the receiving end of radical reforms instituted in the decades following the establishment of the Republic by Kemalist elites. After Ataturk emerged victorious during the early years of the Republic in the struggle with conservatives who had wanted to build on the legacy of the Ottoman Empire, he initiated a period of sweeping reforms aimed at radically westernizing Turkish society and culture. In Ataturk’s words, the aim of the reforms was to “elevate the republican people to the level of contemporary civilization,”\textsuperscript{542} which, for the Kemalists, was essentially western, and stood in sharp contrast to socio-political features of Islam.

For the republican elites, the restructuring and reformation of the legal sphere in line with the principles of Kemalism was essential in order to lift the society to the level of ‘contemporary civilization.’ In fact, as Ozman notes, for many Kemalist elites, the complete restructuring of society envisioned could only be achieved through top-down instrumental use of the law.\textsuperscript{543} Accordingly, Islamic Law or \textit{sharia}, which had formed the basis of the legal system of the

\textsuperscript{542} Quoted in Ozman, “Law, Ideology and Modernization in Turkey,” 70
\textsuperscript{543} Ozman, “Law, Ideology and Modernization in Turkey,” 71
Ottoman Empire for several centuries, was replaced wholesale by the Swiss Civil Code and other codes borrowed from European countries. Radical judicial reforms were also instituted, with a complete abolishment of the *shariat* courts with republican courts established on model of French courts.

The displacement of Islamic Law and the establishment of secular European-inspired courts was not considered sufficient by the Kemalist elites for the project of transforming the legal system into an instrument for the perpetuation of Kemalist principles. For these modernizing elites, it was important that the legal profession itself undergo a restructuration, such that the primary responsibility of the profession would become protecting the Republic. The secularist leadership under Ataturk hence embarked on a project to remanufacture the legal profession such that lawyers and judges would become guardians of the Kemalist principles.\(^544\)

This was of particular importance to the secular elites since a large number of lawyers and judges, who had began their careers in the Ottoman period, still had leanings toward Islam. The election of a pro-Caliphate lawyer to the position of the president of the Istanbul bar in the 1920s was strong indication for the secular elites of the continuing support for the *ancien régime* among lawyers.\(^545\) Ataturk himself commented that the event demonstrated the hostility of “the outdated legal professionals of the outdated law” towards the new regime, and argued that such lawyers were to be regarded as “the greatest and most deceitful enemies of the Republican regime, waiting to censure both the principles and defenders of the revolution.”\(^546\)

Hence, a number of institutional measures were taken to create a new generation of lawyers steeped in republican ideology. The importance of this project for the secular elites can

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544 Ibid
545 Ibid
546 Quoted in Ozman, “Law, Ideology and Modernization in Turkey,” 75
be gauged from the fact that the first institution of higher education to be set up in the Republic was the Ankara Law School. The institution was designed to inculcate Kemalist ideology and loyalty to the republic, including through the curriculum and by maintenance of close ties to the government. While this was an important step toward creating a new cadre of lawyers, the project was not complete until the reorganization of the Istanbul Law School in connection with the abolishment of Darulfanun, one of the oldest institutions of higher education in the country. The Minister of Education, who led the reform project, criticized the ‘apathetic’ stance of the institution in particular in the faculties of law and political science, as evidenced by the continued teaching of Islamic Law, and argued that continuance of the institution could prove to be dangerous for the Kemalist regime. Hence, in 1933, the academic staff of Darulfunun was dismissed, the institution was abolished and replaced by the Istanbul University, in which a new curriculum with ‘Turkified’ texts was adopted.547

The most important set of reforms, with regard to the development of the profession, focused on aligning the bar associations with the civilizing mission of the Kemalist elites.548 For this to happen, it was important to curtail the autonomy of the bar. In 1924, the Attorney’s Code was adopted, which required that practicing lawyer be Turkish citizens and have an honorable reputation. While the former requirement, of citizenship, was used to reinforce notions of national unity, the latter was employed to disbar lawyers who had anti-Kemalist leanings. In case of the Istanbul Bar Association, for instance, 374 of the 805 members of the bar association was disbarred through this process.549 Further, in 1938 a new code was enacted, which envisioned lawyers in a public service role. Rather than being considered as a profession autonomous from the state focused on the representation of their clients, the code envisioned

547 Ozman, “Law, Ideology and Modernization in Turkey,” 77
548 Ibid, 77-81
549 Ibid
lawyers as performing a public service for the republican regime, to which lawyers owed their loyalty. Hence, lawyers were not permitted to provide counsel to defendants who had been involved in anti-Kemalist activities or those that posed a challenge to national unity, which included participation in Islamist or communist activities. The resulting conflict between obligations to clients and that those emerging from the public service imperative was to be resolved in favor of the latter, with public interest being equated to the interests of the republican regime. The state throughout the formative period of the development of the bar kept close watch over the activities of the profession, including through the Justice Ministry’s formal oversight over board decisions and the ability of the Minister of Justice to dissolve the board.

In sum, as a result of the remanufacturing process described above, the legal community in Turkey became aligned with the ideology of the ruling military and bureaucratic elites, and became supportive actors in the perpetuation of the hegemony of the elites. While individual lawyers have sought to advance plaintiffs’ interests through cause lawyering, the bar has been politically quiescent relative to bars in Egypt and Pakistan. The Bar Association in Turkey was also established much later, in 1969, and has not since engaged in significant mobilization in favor of citizens’ rights or against the authoritarian tendencies of the regime. Instead, when the bar has on occasion mobilized, it has done so to protecting statist ideology at the expense of citizens’ rights. For example, in 2005, when a female lawyer who was the defendant in a case was removed from the Court of Cassation by a judge for wearing a headscarf, the action was supported by the bar association. The Presidents of the National Bar Association and several regional bar associations issued a joint press release in which they argued that the right to fair

550 Arslan, “The Political Role of the Judiciary in Turkey,” 223
trial was conditional on obeying the law, and hence the justified the decision of the judge.\textsuperscript{551} In another instance, Turkish bar associations condemned the ratification of the United Nations International Convents on Civil and Political Rights and Social, Economic and Cultural Rights by the government because of clauses related to the right to self determination. The bar saw these clauses as violating of the Turkish state’s ‘territorial integrity,’ and issued a public declaration that since the covenants have “threatened our nation-state and sovereignty” they should not be ratified.\textsuperscript{552} By contrast, members of the Egyptian bar, having developed a strong mobilization potential during the anti-colonial struggle, remained committed to mobilizing for greater political rights for the Egyptian citizens. As discussed in chapter 4, secular lawyers in Egypt participated in hunger strikes even to the point of being hospitalized in 1994, to protest the regime’s actions which had resulted in the death of an Islamist lawyer.

Conclusion
While both Egypt and Turkey had powerful judiciaries in the latter half of the twentieth century, there was a significant difference in the jurisprudence of the two judiciaries in terms of upholding rights and opening up the political space for new sets of interests. Based on a model I developed through an examination of the transformation of the Supreme Court of Pakistan in part II of this study, I argue that the basis of judicial power in the two cases was different. Whereas in Turkey, the court was empowered through delegative empowerment, in Egyptian judiciary had epistemic power in the public sphere. In this regard it is worth noting that the Supreme Constitutional Court had, as Moustafa notes, “entered the public consciousness” by the mid-1990s.\textsuperscript{553} Further, when the regime attempted to curtail the powers of the Court in 1996, the attempt was met with sharp criticism in the public sphere. A justice of the Court attributed the

\begin{itemize}
\item \textsuperscript{551} Ibid, 228
\item \textsuperscript{552} Ibid, 229
\item \textsuperscript{553} Moustafa, \textit{The Struggle for Constitution Power}, 137
\end{itemize}
failure of the regime’s attempt to public support. Adel Omer Sherif, a member of the bench, commented, “the Court had raised constitutional awareness among the people. It especially raised popular consciousness of the necessity of maintaining the democratic process and respecting individual rights and freedoms, and these two elements were behind the defeat of this attack on the Court.”

In Turkey, by contrast, in a 2005 survey of Turkish citizens, only three percent saw the judiciary as a credible institution. This comparison suggests that the ability of the Egyptian judiciary to adjudicate claims against the power elite emerges from its epistemic power in the public sphere, which the Turkish court lacks.

Much like in Pakistan, legal mobilization aided the development of a constituency of support for the Egyptian judiciary in society. After its establishment in the colonial period, the legal profession became embedded in society and politics rapidly owing to the leading role it played in the ant-colonial movement. Given institutional continuity, albeit with some disruptions, the legal profession continued to act as a judicial support network, including by bringing political rights cases to the court. By contrast, the legal profession in Turkey developed in a context of consolidated authoritarianism under military strongmen. With negligible engagement in public affairs in the formative period of its development, and institutional continuity into the twentieth century, it failed to act as a judicial support network for the purpose of building an independent constituency for the court in society. Instead of developing the court’s caseload on political rights cases by aiding litigants whose rights had been infringed by the state, and thereby opening up the political space for new interests, the profession aligned itself with the interests of the hegemonic elites.

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PART IV. CONCLUSION

CHAPTER 8

Alternative Explanations, Pathologies and Prescriptions, and Unintended Consequences

The purpose of this study was to understand the political processes that lead to the establishment of rule of law in postcolonial states, the vast majority of which are developing countries. While rule of law is a broader concept than judicial effectiveness, I have chosen to focus on the latter because constitutional review by courts is widely considered to be the most effective institutional mechanism for building the rule of law. While this may not have been the motivation for elites in a large number of countries in which constitutional review was instituted, it is certainly a normative aspiration, and one for which there is evidence in the functioning of judiciaries in some countries, both in western countries and in the postcolonial world. I have argued that building an effective judiciary is a highly contentious process, in which an alternative source of support for courts needs to be built in society, which has to be sufficient to countervail the power resourceful political elites have over courts. The model was developed through a detailed examination of the transformation of the Supreme Court of Pakistan, as well as a comparison of jurisprudence of the Supreme Constitutional Court of Egypt and the Constitutional Court of Turkey. In this conclusion, I first consider alterative explanations for the expansion of judicial power in Pakistan, and for the differences between the Turkish and Egyptian high courts. I next consider a set of pathologies that prevent a meaningful analysis of the process that leads to the building of rule of law. Based on this study, I then briefly discuss factors that may facilitate the effectiveness of courts in postcolonial states. Finally, for the avoidance of any doubt of the
potential of legal mobilization to bring political change, I demonstrate how an unintended consequence of legal mobilization in Pakistan during 2007-09 was the breakdown of authoritarianism, and the initiation of a transition to democracy after nearly a decade of military rule.\footnote{Some parts of this chapter have previously been published in the following: Daud Munir, “From Judicial Autonomy to Regime Transformation: The Role of the Lawyers’ Movement in Pakistan,” in in Terrence Halliday, Lucien Karpik and Malcolm Feeley (eds), \textit{Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex} (Cambridge University Press; 2012); and Daud Munir, “Struggling for the Rule of Law,” \textit{Middle East Report and Information Project}, Vol. 39 (Summer 2009)}

### Alternative Explanations

In part II of this study, I argued that qualitatively higher effectiveness of the judiciary in Pakistan in the post-2009 period compared with the pre-2005 period was caused by an increase in the knowledge and legitimacy of the court in the public sphere, which in turn was the result of high intensity legal mobilization during 2005-09. In part III, I tested the model developed in part II, arguing that legal mobilization and public support for courts can explain the difference in judicial effectiveness of the high courts in Turkey and Egypt during the second half of the twentieth century. Below, I briefly discuss a few alternative explanations for the differential levels of judicial effectiveness in these cases.

First, a structural-textual explanation can be considered, which focuses on the positioning of the court in the constitutional system, as determined by the text of the constitution as well as in other legislative acts that determine the limits of a high court’s authority. Of foremost importance is the question of whether the court has been empowered by the constitution to engage in judicial review of governmental action. Once this power has been granted, there are other structural aspects that may determine the power of the court to effectively conduct judicial
review. For example, scholars have looked at appointment procedures, retirement ages, budgetary independence, and access procedures to explain varying levels of court independence. Based on the case examined in this study, I argue that while these factors undoubtedly have an impact on the starting position of judicial authority in the constitutional system, they do not determine the extent to which the power may ultimately evolve. In the case of Pakistan, this factor offers little by way of explanation because such textually-determined structural positioning of the judiciary did not undergo any significance change during, or in the period prior to, the transformation of the judiciary. While, under the Legal Framework Ordinance (LFO) of 2002, Musharraf had attempted to increase the retirement age of Supreme Court judges by three years, this clause was ultimately left out of the seventeenth amendment passed in December 2003. It is important to note that this measure was not undertaken with a the aim of enhancing judicial power, but for privileging regime-friendly judges on the Court. The explanation is especially unhelpful in this case because, if anything, given the disproportionate power wielded by the executive under Musharraf compared with civilian governments in the 1990s, one would expect the structural placement of the judiciary to be less favorable for the expansion of judicial power. The structural-textual explanation is equally unhelpful in understanding the model testing cases discussed in part III. As discussed in chapter 7, while the drafters of the 1982 Turkish constitution had envisioned a court that would be powerful and engage in adjudication on political issues, the establishment of the Supreme Constitutional Court in Egypt was primarily motivated by economic considerations. While the Egyptian court was able to shift tracks and

557 As a result, senior members of the judiciary who had availed themselves of the three-year extension, retired immediately. This included the Chief Justice of Pakistan, Sheikh Riaz Ahmed. See Charles Kennedy, “Constitutional and Political Change in Pakistan: The Military-Governance Paradigm,” in Rafiq Dossani and Henry Rowen (eds), Prospects for Peace in South Asia (Stanford University Press; 2005, 62-63).
adjudicate political rights cases against the interests of the regime, the Turkish Constitutional
Court remained tied to the original vision of the political elites who had established the court.

Second, as discussed in chapter 1, a political fragmentation thesis has been posited to
explain the basis of judicial independence. According to this theory, judiciaries become
independent, and are able to decide consequential political matters, when power is divided in the
political system. There is nothing that happened in Pakistan during the period in which judicial
power began to expand following 2005 that points to increasing political fragmentation. As noted
in chapters 2 and 4, Musharraf’s regime during this period was quite consolidated. Moreover, if
fragmentation increases judicial power, just preceding Musharraf’s rule, there had been a
“decade of democracy” in which the judicial was never as powerful as it was post-2009. Further,
the thesis is even more unhelpful in explaining the model-testing cases. Turkey has been more
democratic than Egypt (or Pakistan) during much of the latter half of the twentieth century.

Third, scholars have located the basis of judicial power in the potentially facilitative role
played by the Court in mediating conflict among political elites. The common assumption of
these theories is that the court lacks an autonomous basis of support, and that if we do observe a
powerful court, it must have been empowered by the self-interested strategic decisions of
political elites. This mediation-focused thesis does not really explain the empowerment of any of
the three cases examined in this study. Another delegative theory, which argues that judiciaries
are empowered by hegemonic elites for the purpose of preserving their powers, is, however,
more helpful. It offers a plausible explanation of the empowerment of the Turkish court, for
being able to adjudicate cases such as those that led to the closure of over twenty political parties
in the country. However, for the judicial effectiveness observed in Egypt and Pakistan, in which
the courts actively challenged the interests of very powerful dictators and incumbent civilian
leaders, it is difficult to see the role of hegemonic elites. While such elites did attempt to control the judiciary for enhancing their power, judicial power derived from an alternative source was able to countervail the power of the elites over the courts. Hence, these theories present an incomplete theory of judicial power that focuses exclusively on elite interests. But, while a court is part of a state’s governance apparatus, it is also embedded in society, through the legal profession and through the coverage of its opinions in media, which may have much receptivity among the public.

Finally, some have noted international influences on the development of constitutionalism and rule of law in developing countries. In Pakistan, during the period of judicial expansion, there was some international support for legal mobilization. For example, bar associations abroad held events to support the Pakistani bar. The American Bar Association (ABA) President sent a letter to President Musharraf criticizing his actions against the judiciary and the lawyers following the imposition of emergency rule. The Bar Association of San Francisco held organized a “rally for lawyers in Pakistan” on November 9, 2007, which was attended by about 100 lawyers. A rally attended by around 700 was also held at the footsteps of the New York County Courthouse on November 13, 2007, and was organized by members of the New York City Bar Association, the New York State Bar Association, and the New York County Lawyers’ Association. The ABA organized a march in support of Pakistani lawyers in Washington DC on November 14, in which around 700 lawyers who were dressed in black in solidarity with Pakistani lawyers, marched in front of the US Supreme Court building. Chief Justice Chaudhry was also received various awards for his role in fighting for the rule of law.

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558 See letter addressed to bar members on the Bar Association of San Francisco website (https://www.sfbar.org/forms/initiatives/pakistan_rally_member_letter.pdf)
559 “Bar Leaders Support the Rule of Law and their Counterparts in Pakistan” in Bar Leader, Vol. 23, Number 3 (Jan-Feb 2008)
560 Ibid
including the Harvard Law School’s Medal of Freedom in 2007, the past recipients of which included the litigation team of *Brown v Board of Education* and Nelson Mandela. These events are no doubt interesting in terms of showing the solidarity of the profession even across national boundaries. However, the events were held only because news of legal mobilization in Pakistan had become significant enough to reach the outside world. Hence, causally, the more important factor in determining the change in judicial power has to do with mobilization by lawyers in the cities and small towns in Pakistan. We get further support for the idea that domestic bases of support have an important role to play in empowering judiciaries from comparing Egypt and Turkey. While there has been some international influence through human rights groups and the internationalization of the Supreme Constitutional Court’s judgments in Egypt, international support was arguably even stronger in Turkey. This is because of the requirements for Turkey’s accession to the European Union, as well as the possibility of litigants to access the European Court of Human Rights. However, these influences have not had a significant impact on the jurisprudence of the Turkish court, since the adherence to Kemalist principles meant that there was little demand among the members of the legal profession for an expansive rights framework.

**Pathologies and Prescriptions**

The purpose of this study has been to examine the bases of judicial power in post-colonial states, especially with a view to understand why so few high courts in various parts of the developing world have been effective at challenging elite interests and protecting constitutional rights. While

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562 See Orucu, “The Constitutional Court of Turkey”
primarily an empirical analysis aimed at generating and testing theory using the cases of Pakistan, Egypt and Turkey, the study does present a few normative and policy implications, which I briefly note in this section. Before discussing these, I point to a few pathologies in thinking about building judicial power and the rule of law.

First, the concept of rule of law no doubt evokes a feeling of orderliness in social and political space. However, this does not mean that the process of building the rule of law will also be neat and orderly. Scholars and policy makers alike seem to assume that any process that is too politicized is likely to be inimical to the development of just and impartial judicial institutions. Some scholars have argued that the judicialization of politics is likely to lead to the politicization of the judiciary. In addition, the assumption that informs that work of the rule of law programs of a large number of multilateral institutions and other donors, including the World Bank, Asian Development Bank and USAID, is that the main impediments to the building of rule of law in developing nation-states are technical or financial. Hence, the panacea is to be found in reforms that will create orderliness, transparency, and consistency, such as by training judges, improving quality of records, or otherwise improving the operational efficiency of judicial institutions. However, this study suggests that the process for the building of rule of law will be anything but neat and orderly. It will likely involve societal mobilization which will threaten the interests of powerful individuals and institutions. When the interests of powerful actors are threatened, they are likely to respond in a variety of ways, which includes not only use of force, but also ‘softer’ methods such as attempting to influence public opinion. This is possible because, given their disproportionate power over societal resources, elites are able to support public intellectuals who will speak on their behalf by criticizing the movement that seeks to hold the elites accountable. This, of course, creates controversy. However, if the only way to build rule of law is for building
a basis of judicial power that will countervail the power of highly resourceful elites, it is doubtful that training judges will accomplish the ideal. Because hegemonic elites will resist the empowerment of a court that will hold them accountable for their transgressions, the process of building an alternative source of judicial power is likely to be highly political and disruptive of the current order.\textsuperscript{563}

Second, a related pathology is to focus on certain rulings of a court that is undergoing a society-led empowerment process, which seem to suggest an overstepping by the court of its mandate or lack of consistency in its judgments. This, of course, is the sort of criticism that is often put forth in the media by those seeking to protect threatened elites from judicial accountability. In response to such characterizations of empowered judiciaries, I will briefly note a few observations. To begin with, while it may be true that the court is overstepping its mandate, it is also true that the mandate has often been established by those elites whose privileges are now being threatened. Those who criticize effective courts also often do so from the standpoint of legislative supremacy, which has now more or less become extinct as a model of constitutional governance, having been replaced with a model that privileges checks on even legislative authority by constitutionally empower courts.\textsuperscript{564} Even if we assume that the court does interfere with legislative or executive function in areas which are best left to the latter branches, such commentators miss the forest for a few trees that support their position. The larger and more interesting proposition that emerges from a study of an empowered court is how it was able

\textsuperscript{563} Carothers makes a similar argument in his critique of rule of law initiative of multilateral donors. He writes, “Western nations and private donors have poured hundreds of millions of dollars into rule-of-law reform, but outside aid is no substitute for the will to reform, which must come from within. Countries in transition to democracy must first want to reform, and must then be thorough and patient in their legal makeovers.” See Thomas Carothers, “The Rule of Law Revival” in \textit{Foreign Affairs}, Vol. 77, No. 2 (Mar. - Apr., 1998, 96)

to challenge the power of elites who control the executive branch, and hence the entire security apparatus, including police forces, intelligence agencies, and the military. That the court is able to mount a challenge may be a sign of great optimism, given the vast majority of courts in the developing world remain subservient, and courts have proved to be effective guarantors of constitutional rights in several western democracies. While consistency and lack of contradiction are certainly included in the concept of the rule of law, as Fuller noted, there can be no rule of law if courts are not empowered to challenge the power of elites. The latter, I argue, is a sine qua non for a political system governed by the rule of law. As noted above, the process of building the rule of law is not necessarily orderly, and courts may at times overstep or even issue inconsistent rulings as they start down the road of challenging powerful incumbents. Over time, however, once the more difficult project of creating an effective court has been accomplished, as the judiciary becomes more resolute and the caseload grows in areas such as fundamental rights adjudication, there is likely to be a move toward consistency as well. Further, the well established practice according to which judges, in their written opinion, provide reasons for their decisions is an important check on the power of the court.

Third, as explored briefly in chapter 1, the role of civil society in building the rule of law is often poorly understood in the context of developing countries. Scholars and development practitioners alike assume that civil society aid the development of democratic institutions and rule of law. As Jamal noted in her insightful study of civil society associations in the Middle

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565 See Lon Fuller, *The Morality of Law* (Yale University Press; 1964)
566 This was noted in the English case English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, as follows: “The common law countries have developed a tradition of delivering judgments that detail the evidence and explain the findings… Reasons are required if decisions are to be acceptable to the parties and to members of the public… [The] requirement to give reasons concentrates the mind of the judge and it has even been contended that the requirement to give reasons served a vital function in constraining the judiciary’s exercise of power…”; see also Frederick Schauer, “Giving Reasons,” in *Stanford Law Review*, Vol. 47. No. 4 (April 1995), pp.633-659; Owen Fiss, “The Forms of Justice” in *Harvard Law Review* I, 13 (1979)
East, such associations may, under certain conditions, act to further empower authoritarian elites and act as barriers to democratization.\textsuperscript{567} Similarly, while this study locates the basis of power of an effective judiciary in societal mobilization, it also notes that associations in some contexts may be inimical to the development of an effective judiciary. While lawyers mobilized for judicial effectiveness in Egypt and Pakistan, they have largely failed to support expansion of political rights in Turkey. In addition, this study argues that civil society must be disaggregated, because, as noted in chapter 1, not all civil society actors have similar mobilization potential. Here, I add that not all civil society actors are likely to be similarly oriented in a particular society. In Pakistan, for instance, while a large number of civil society activists aligned with the goals of the movement, a few also became critical of the court’s adjudication which resulted in holding corrupt officials accountable.\textsuperscript{568} One problem, as Langhor has noted, is that when civil society organizations depend on foreign aid, they fail to develop ties with the larger society, and given lack of accountability to constituencies in society, fail to ineffectively mobilize for social change.\textsuperscript{569} Another factor which reduces the potential of civil society is the interference of political parties in the activities of associations, as discussed in chapter 4.

I now turn to whether one can distill any ideas from this study of high courts in Pakistan, Egypt and Turkey on the question of how to build effective courts. I have argued that support for an effective court is primarily located in society, in constituencies that are beyond the influence of political elites. At first glance, this does not seem overly optimistic regarding the prospects for

\textsuperscript{567} Amamey Jamal, Barriers to Democracy: The Other Side of Social Capital in Palestine and the Arab World (Princeton University Press; 2009)

\textsuperscript{568} See for example, Asma Jahangir, “Another aspect of the judgment” (Dawn; December 19, 2009). While Jahangir had been a human rights lawyer for several years, she remained critical of the Supreme Court at a time when it was highly effective in adjudicating human rights cases and challenging the power of corrupt incumbent elites.

the development of rule of law. Political elites, of course, possess disproportionate power in
society. If they are unwilling to support the effectiveness of courts, notwithstanding their
ostensible support for the rule of law, then any empowerment of courts will have to be
sufficiently strong to counteract the resistance that power elites will bring forth to prevent
effectiveness from taking hold. In noting this, I assume that it is not only dictators, but also
democratic elites who will disfavor a highly effective court in the political system. This is
because, of the many possible constellations and interests, the few that become ascendant even
in a democratic context are not likely to actively encourage the further opening of political space
for new entrants, who will most likely dilute their power in the system. While scholars have
correctly noted that elites may wish to empower courts as “insurance” for loss in elections or for
“hegemonic preservation,” it is unlikely that they will empower courts that will open up the
political space to hitherto disempowered interests, and will be willing to check their powers
when they infringe on the constitutionally granted rights of the citizens.570

The primary task of building judicial effectiveness, hence, falls on the shoulders of
societal actors. I differentiate political organizations and societal organizations based on their
objectives. While the former aim at taking over the control of state institutions for governing the
society, the latter remain in society and do not seek to control the state apparatus. Among
societal actors, I have argued that the legal profession is ideally suited for the task of providing a
constituency of support for courts. Importantly, the profession can play a role in building societal
support in the larger public sphere. In order to perform this function, the profession must be
embedded in society, develop a strong preceding of involvement in public affairs, and an
orientation disposed toward greater political rights. While building such history of mobilization

570 For a discussion of the insurance and hegemonic preservation models, see chapter 1
depends on the political context and the existence of political opportunities, some factors may facilitate mobilization. Autonomy of the profession seems essential, both from the state but also from political parties. While temporary alliances with opposition parties may aid mobilization, in a long-term partnership, associational interests will likely be subsumed under the interests of the party. In addition, the holding of associational elections along party lines is also likely to weaken their mobilization potential. Socialization and norms likely play an important role in perpetuating institutions, and in the creation of new institutional trajectories. Hence, for bars that have played an important role in the past in mobilization against colonial or authoritarian power, a commemoration of this historical role may aid in building mobilization potential. For countries in which the bar has not played such a role, including the case of Turkey considered in this study, the theory of embeddedness presented in not determinative. Over time, as political opportunity emerges, the bar may well develop a different political orientation and a history of mobilization. However, unless such precedent develops through active mobilization, there will likely be institutional continuity.

Another important factor discussed in this study that can support the expansion of public support for a court is the freedom of media. This is essential if the court has to develop its epistemic power in the public sphere, which is its ability to influence a public that is receptive and considers the courts a legitimate institution. Having channels to influence the public is also of great importance in the effectiveness of legal mobilization. As the case of Pakistan shows, this is especially so if there is liberalization of electronic media in a country. Instances of legal mobilization, especially contentious activity, is likely to have a significant impact on the public mind through this channel. This is especially if constitutional and political issues are actively
debated following court rulings challenging power elites or alongside coverage of contentious activity by legal actors.

Unintended Consequences: Legal Mobilization and Democratization in Pakistan

In part II of this study, I discussed how legal mobilization led to the empowerment of the judiciary in Pakistan during 2005-09. During this period, the expansion of judicial power in Pakistan occurred concurrently with democratization. To explain this parallel development, one may either posit a disaggregated explanation which deals with each event separately, or argue that the two outcomes emerged from common developments in the politics of the country during this period. Below, I argue that legal mobilization both enhanced judicial independence and spurred a transition to electoral democracy in Pakistan. If my empirical argument holds, the Pakistani case offers an opportunity to rethink approaches to explaining democratic transitions that favor elite strategic choice and undervalue the role of civil society actors in playing a central role in undermining authoritarianism.

As discussed in chapter 4, the military regime under Musharraf showed several signs of being a consolidated autocracy by early 2007. There were no visible signs of an internal rift in the military, the leaders of the most popular political parties were in exile, the economy experienced high growth, and key international allies extended billions of dollars of aid. Despite high economic growth during the Musharraf years, there was slow progress in poverty alleviation, and it is possible that there was discontent among the people against the military regime. However, opposition parties at this time were too weak to have presented a credible alternative and mobilize the citizens against the regime. Notwithstanding the Charter of Democracy signed by exiled opposition leaders Nawaz Sharif and Benazir Bhutto in London in
May 2006, in which they agreed on steps for the restore democracy in Pakistan, it is difficult to sustain the proposition that Pakistan was anywhere near to returning to civilian governance in early 2007.\textsuperscript{571} Further, if the capacity and readiness to use coercion is a sign of the solidity of the regime,\textsuperscript{572} the Musharraf regime seemed confident of its control over society.

How, then, could middle class professionals erode the authority of such a coherent and powerful regime? And, how does one determine whether the role played by the lawyers’ movement was decisive in bringing down the military regime? To begin with, contentious legal mobilization brought forth a vocabulary in the public sphere to challenge the basis of the authoritarian order created by the Musharraf regime. In line with the role theorized for civil society by the transitions approach, lawyers created a climate of ‘ethical rejection’ of the regime. The movement’s coverage by the media facilitated the production of discourse challenging the legitimacy of the regime. However, such dissent alone seems insufficient to derail the authority of a powerful military regime. As Stepan points out,\textsuperscript{573} erosion of civilian support is not sufficient for undermining a military regime. Instead, for the authoritarian order to break down, the loss of legitimacy must somehow be channelized into creating a “tangible cost or a direct threat” to the military regime.\textsuperscript{574} This gargantuan task, of directly damaging a military regime, is something transitions scholars have argued can be undertaken only by powerful opposition politicians or elites within the regime. While this may have been the case for a large number of transitions, in the present case, the task of undermining the regime was initiated by the legal

\textsuperscript{571} Moreover, Musharraf’s successor as army chief, who subsequently emerged as the key soft-liner in his regime, seemed to be fully supportive of Musharraf at this stage. As head of the most important intelligence agency, the Inter-Services Intelligence (ISI), General Kayani was present when Musharraf pressurized the Chief Justice to resign at the military headquarter in March 2007.
\textsuperscript{574} Ibid, 77
community. By adopting a direct confrontational stance the lawyers went beyond merely creating a climate of ethical rejection, and inflicted considerable damage to the military regime in 2007-08. Even though the aim of the lawyers in confronting the regime was limited to the restoration of deposed judges, their movement unintentionally weakened the basis of the authoritarian order itself. Below, I describe four mechanisms through which legal mobilization led to the breakdown of authoritarianism in Pakistan, and then proceed to discuss alternative explanations for the transition to democracy.

First, legal mobilization propelled the regime into a number of judicial crises, which the regime was unable to handle effectively. Initially, the challenge emerged within the Supreme Court, after the first Chaudhry court (2005-07) assumed an activist posture, and adjudicated cases against the interests of the regime. The most contentious of these included the missing persons cases and the privatization of Pakistan Steel Mills, discussed in Chapter 2. In political science scholarship, until recently, the role of the judiciary in authoritarian contexts had been assumed as inconsequential, since the regime elites were seen as making all major decisions. However, Moustafa and Ginsburg recently challenged this conception, and theorized a ‘rule by law’ dynamic in autocracies. They argue that legality is not irrelevant in authoritarian countries, and that the regime often empowers courts to perform functions that strengthen the regime’s control over society and politics. In the present case, by contrast, the judiciary was neither irrelevant nor acting as an arm of the executive. Instead, under Chaudhry, the Court began working at cross-purposes with the regime and began accepting legal challenges to the actions of the executive. This certainly irked the regime enough to suspend Chief Justice Chaudhry in the dramatic manner described in chapter 4. This initiated another judicial crisis.

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involving the question of the legality of Musharraf’s reference against the Chief Justice, which the regime was also unable to manage. The most difficult judicial crisis, however, emerged from the second Chaudhry court (July - November 2007), after the Chief Justice had been reinstated by the Supreme Court following popular mobilization by the lawyers. This involved a legal challenge to Musharraf’s eligibility to contest presidential elections while still occupying the position of Chief of Army Staff. The Supreme Court permitted Musharraf to contest the presidential elections held on October 6, 2007, but barred the Election Commission of Pakistan from declaring the results until the Court had decided the issue of his eligibility to contest the elections. While Musharraf comfortably won the election for another five-year term, pending hearings in the Supreme Court clouded this victory in uncertainty. The Court continued to deliberate for nearly a month, and when Musharraf sensed an imminent decision against him by the Supreme Court, he declared a state of emergency on November 3, 2007. This led to the suspension of Constitution and a requirement for judges of the higher judiciary to take an oath to the Provisional Constitutional Order (PCO). Hence, the lawyers’ movement acted as a judicial support network to propel the regime into repeated judicial crises, the ineffective handling of which led to the weakening of the Musharraf regime.

Second, apart from the constitutional realm, lawyers’ boycotts of normal court proceedings considerably threatened the working of the judicial system. Though there is no systematic data available on the full extent of the boycott, newspaper accounts show that a significant proportion of the lawyers regularly boycotted the courts. Through an event analysis of protests based on *The Nation* discussed in chapter 4, I found over a hundred boycott events spread over the courts in major cities in Pakistan. The Pakistan Bar Council (PBC) had issued a

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Directive to boycott court proceedings headed by PCO judges every Thursday after Musharraf had declared emergency rule. Particularly in Lahore, these Thursday boycotts were frequently observed during the period of the lawyers’ movement. Lahore High Court Bar Associations (LHCBA) organized the boycotts in the city, and officeholders would sometimes lead processions of lawyers into the courtrooms to pressure lawyers pleading their cases to leave the courtrooms.\footnote{For example, in February 2008, Lahore High Court Bar Association (LHCBA) secretary Sarfraz Cheema led a procession of 200 lawyers into the courtrooms of PCO judges Justice Sardar Muhammad Aslam and Justice Tariq Shamim, who were hearing cases at the time. The procession exhorted lawyers waiting to present their cases to leave the courtroom. See Dawn, “Lawyers out to implement PCO judges’ boycott” (February 08, 2008).} Apart from the major urban centers, these boycotts were also observed in smaller cities throughout the country, such as in Gujranwala, Sahiwal, Khanewal, Attock, Dera Ismail Khan, Mansehra, Haripur, Kohat, and Chakwal.\footnote{For example, the District Bar Association of Chakwal, a small city in Punjab, organized boycotts of courts in Chakwal, Talagang, and Choa Saiden Shah. Dawn, “Lawyers boycott courts” (April 25, 2008). For Sahiwal, Gujranwala, and Khanewal, see Dawn, “Lawyers boycott courts” (January 25, 2008). For Attock, see Dawn, “Lawyers boycott courts in Attock,” (February 12, 2008). For Dera Ismail Khan, Mansehra, Haripur, Khanewal, and Kohat, see Dawn, “Lawyers’ countrywide rallies in support of deposed CJ” (February 1, 2008).} With public opinion mobilized against the regime, the blame for the slowdown of the legal system was targeted at Musharraf rather than the legal community. Using the now burgeoning private news media, lawyers were about to effectively frame their protest, including boycotts against pro-regime PCO judges, as a means to build rule of law through the reinstatement of the deposed judges. The ability of lawyers to directly impact governance in the country by causing a slowdown of the administration of justice was an important mechanism to undermine the authority of the regime.

Third, the lawyers’ mobilization inflicted direct and tangible costs to the regime owing to their mobilization strategy, which was primarily street-based. Street mobilization against a military regime was both highly costly and risky for the lawyers. Since the protesters were salaried middle-class professionals, they had to incur the cost of fluctuations in their incomes as they boycotted courts and marched on the street. Further, after the imposition of emergency rule
in November 2007, Musharraf amended the Legal Practitioners and Bar Councils Act, allowing
the regime to revoke the professional license of dissident lawyers.\footnote{HRW 2007} More significant, however,
were the risks lawyers incurred in mobilizing against the regime. As discussed in chapter 4,
lawyers were arrested, illegally detained, beaten up, and tear gassed. There were at least two
violent events during the movement, in which several dozen protestors died. One of these was
orchestrated by the pro-regime political party MQM in Karachi in May 2007, during the deposed
Chief Justice’s visit to the city to address the local bar association.\footnote{The New York Times, “Riots in Karachi leave dozens dead.” (May 13, 2007)} During emergency rule, the
regime used the draconian Anti-Terrorism Act to detain several lawyers. Further the Army Act
of 1952 was amended to allow civilians to be tried in military courts for vague offenses such as
“giving statements conducive to public mischief.”\footnote{HRW 2007, p.8}

These are just a few of the instances of brutal repression the regime used to quell the
lawyers’ mobilization. Lawyers’ high risk street mobilization gave lie to the regime’s pretense of
legitimacy and support in society. Gradually, lawyers’ protests encouraged other civil society
groups, and subsequently political parties, to mobilize against the regime in favor of the deposed
judges. Given the high coverage of these bar-led street protests on the country’s now liberalized
electronic media, the regime’s legitimacy began to plummet. In response, the regime moved to
repress the movement to give an impression of social control. Repression, however, was costly,
especially since the media covered protest events live, including police repression. The regime
responded by attempting to control the media, by physically destroying offices of media
companies and passing new censorship laws. These measures, however, only backfired and the
regime was ultimately unsuccessful in controlling the media. The arrests, beatings and illegal
detainments of lawyers were visibly portrayed on the media. Given the non-partisan nature of the
lawyers’ movement in favor of the rule of law, public opinion was highly critical of the regime’s heavy handed response. In addition, the regime used tactics such as arranging counter-movements by fake lawyers and a national rally in support of Musharraf. These measures show that the regime’s attention had become heavily diverted by the lawyers’ movement. Rather than focusing on governance, the regime became preoccupied with suppressing legal mobilization, with the result that its control over society began to slip. Desperately in need for enhancing his legitimacy, Musharraf finally reached out to Benazir Bhutto, who, encouraged by the United States, was willing to negotiate a power sharing deal with Musharraf, which included amnesty against corruption cases and the ability to contest the 2008 parliamentary elections.

Finally, the event that most forcefully proves the cost inflicted by the lawyers’ movement to the regime is the regime’s imposition of emergency rule in November 2007. This was a clear instance of the diversion of the regime’s energies on fighting the civil society rather than focusing on important policy issues, such as confronting growing militancy and improving the law and order situation in Pakistan. Interestingly, the emergency proclamation was quite explicit about the actual reasons which had motivated the regime to take this step. Though there was some mention of the rise of extremism and the government’s need to address the threat of terrorist attacks more effectively, the proclamation focuses quite a bit on the judiciary. As reproduced below, several provisions of the proclamation revealed the threat the authoritarian regime felt from the empowered judiciary.582

582 BBC News, “Text of Pakistan emergency declaration” (November 3, 2007)
losing its efficacy to fight terrorism and intelligence agencies have been thwarted in their activities and prevented from pursuing terrorists;…

Whereas some judges by overstepping the limits of judicial authority have taken over the executive and legislative functions;

Whereas the government is committed to the independence of the judiciary and the rule of law and holds the superior judiciary in high esteem, it is nonetheless of paramount importance that the honourable judges confine the scope of their activity to the judicial function and not assume charge of administration;…

Whereas the humiliating treatment meted out to government officials by some members of the judiciary on a routine basis during court proceedings has demoralised the civil bureaucracy and senior government functionaries, to avoid being harassed, prefer inaction;…

Now, therefore, in pursuance of the deliberations and decisions of the said meetings, I General Pervez Musharraf, Chief of Army Staff, proclaim emergency throughout Pakistan.

I hereby order and proclaim that the constitution of the Islamic Republic of Pakistan shall remain in abeyance.

Following the declaration of emergency, the security apparatus busied itself with threatening, arresting, and beating up lawyers and other pro-judiciary civil society activists. This coup against the civil society had immense reputational costs both at home and internationally. Resorting to the most extreme option, of suspending the constitution itself through declaring a state of emergency, demonstrated how badly legal mobilization had already weakened the regime’s ability to effectively handle opposition through ‘normal’ politics. It visibly demonstrated to political parties that even a relatively smaller organized body such as the bar could successfully mobilize against the regime, and cause enough distress among the regime elites to resort to the extreme option of declaring emergency rule. Importantly, the declaration of emergency and the subsequent heavy handed repression of lawyers and other activists raised concern among the soft-liners in the regime, who were in favor of the military’s return to the barracks. A few weeks after the imposition of the state of emergency, Musharraf resigned from the army, and Ashfaq Kyani, a soft-liner within the regime, became Chief of Army Staff.
Structuring the Transition to Democracy

With opening up of electoral channels during transitions to democracy, social movements usually demobilize. In Pakistan, however, the lawyers’ movement continued unabated as the military regime was replaced by civilian leadership after the February 2008 general elections. Rather than engaging with partisan politics for the fulfillment of their aim of reinstating the judiciary, the legal community continued its autonomous mobilization against the newly elected Pakistan People’s Party (PPP) government in the capital. As Pickvance has noted, with the resumption of ‘normal politics,’ social movements often become subsumed in party politics. In Pakistan, this would have meant that the lawyers would explicitly align with one or more opposition parties to pressure to government to reinstate the deposed judges. Instead, the lawyers’ created a careful balance of remaining autonomous and non-partisan, while allowing political parties to attend street protest events and support their goal. In other words, it was the political parties that came to the lawyers’ street events, rather than the lawyers imploring the political parties for their support using institutional channels. Crucially, even though the opposition parties had a number of issues they would have liked to mobilize around, the lawyers never subsumed their movement into party politics, and maintained a single-point agenda.

Both through initiating the transition to democracy, and by continuing mobilization beyond it, the lawyers’ movement fundamentally defined the nature of the transition to democracy. Since the legal community played a central role in undermining the regime, and remained throughout the two-year period the only group consistently engaged in popular mobilization, their movement fundamentally structured the process of transition. The movement became an important conduit for democratic change, which opposition parties used to enter the

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political arena. However, using the platform of the movement had a price: the parties had to structure their politics in accordance with the demand of the movement. The case of the PPP is illustrative. It initially appropriated the movement to gain access to the newly created political opening in Pakistan. However, after winning the 2008 elections and forming the government, it turned back on its word and refused to reinstate the deposed judges. With this, the strong public opinion mobilized by the lawyers’ movement began adversely affecting the PPP. Realizing this, PML-N and other opposition parties, in search for greater legitimacy, threw their force behind the cause of the lawyers’ struggle, and pressured the PPP to fulfill its promise of reinstating the judges.

Lawyers’ continued mobilization into the civilian phase also helped to push the transition further. In many democratic transitions, including Pakistan’s earlier transitions, new political elites often nominally alter the structure of governance. In the present case, a movement espousing rule of law was the principal force in opening up the political space. Transition is a time when rules of the game are unclear, and the actor that takes the lead in affecting the transition can have a significant impact on the structure of the post-transition polity. For example, Collier and Mahoney have show that in countries where labor unions played a central role in democratization, labor-based parties earned a place in the successor regimes. In Pakistan, had a working class movement provided the opening, political parties would likely have resorted to redistributive claims to gain legitimacy. However, since the lawyers’ movement was an issue-based movement, the parties were forced to employ rhetoric that cut across ethnic or clientalistic claims. As political parties appropriated the movement for reentering the political arena, the language of their politics was fundamentally affected. This is evident by the fact that

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during the 2009 long march, one of the largest protest events in the country’s history, opposition parties mobilized citizens promising not economic redistribution or jobs, but the reinstatement of deposed judges of Pakistan higher courts.

Alternative Explanations for Democratization in Pakistan

I have argued above that Pakistan’s recent transition to democracy was initiated and structured by legal mobilization. Given the principal role played by a professional group, the lawyers, the transition can be defined as ‘society-led’ as opposed to having been initiated by regime elites or powerful opposition politicians. This account does not deny that soft-liners within the regime and opposition politicians were important players during the transition. However, in trying to explain a transition, what we are really after is the ‘but-for’ cause, the set of triggering events without which, arguably, the transition would not have occurred at the time it did. As Przeworski and Limongi have noted, in thinking about democratization, we are interested in only two types of regimes, such that “democracies emerge when dictatorships die.” So, the question regarding Pakistan’s recent transition is one about which actor played the principal role in initiating the breakdown of a consolidated authoritarian regime in 2007. Above, I have discussed several mechanisms through which lawyers’ mobilization inflicted direct and tangible harm to the military regime, at a time when no other group in society had hitherto mobilized against the Musharraf regime. Below, I discuss three alternative explanations for the recent democratization in Pakistan.

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585 Adam Prezeworski and Fernando Limongi, “Modernization: Theories and Facts,” in *World Politics* 49.2 (1997), 155-183
First, it can be argued that the breakdown of the authoritarian regime was caused by the actions and strategic decisions of political parties. In 2007, the parliament was comprised of number of parties, the largest of which was the regime-friendly Pakistan Muslim League Q (PML-Q). The two largest opposition parties, whose leaders had been in exile after Musharraf had come to power in 1999, were the Pakistan Peoples’ Party (PPP) and Pakistan Muslim League N (PML-N). In order to sustain the claim that the political parties led the transition to democracy, at least one of two things must be established. It must either be shown that opposition parties mobilized their workers to a level that brought tangible threat to the regime, or that there were other consequential party-organized events at a higher level which created crises for the regime. The first of these propositions can be rejected fairly easily. Until the very end of 2007, when lawyers had already been mobilizing on the streets for several months and had thrust the regime into several crises, opposition parties had engaged in minimal agitation, and that too mainly in support of the lawyers. It cannot, hence, be claimed that the Musharraf regime’s breakdown was initiated by opposition party mobilization.

Another possibility, which some commentators have raised, is that a meeting between PPP and PML-N leadership in London in 2006, where they signed a ‘Charter of Democracy,’ set in motion a chain of events which led to the transition to democracy.\(^586\) The Charter, signed by Bhutto and Sharif, delineated steps that would need to be taken to return the country to democratic rule. There are multiple problems with this explanation of the transition. To begin with, we would need to know what exactly are the political processes that were “set into motion”\(^587\) after the conclusion of this meeting. The political atmosphere in Pakistan remained

\(^{586}\) See Osama Siddique, Judicialization of Politics: Pakistan Supreme Court’s Jurisprudence after the Lawyers” Movement, in Unstable Constitutionalism: Law And Politics In South Asia (Mark Tushnet and Madhav Khosla eds., (Cambridge University Press, 2015)

\(^{587}\) Ibid
quite stable in the months following this meeting. The only real problem facing the regime seemed to be coming from the Supreme Court, which had assumed an activist posture much before this meeting was held. Even if one agrees that a meeting of this sort brings a “normative” impact on politics, this is hardly sufficient to bring down a highly resourceful military regime, which is supported by the largest political party in the parliament. To argue that the signing of the Charter in London, without it translating into any real mobilization on the ground, led to authoritarian breakdown is, to borrow a phrase from Einstein, ‘spooky action at a distance.’ This is especially so because, on the other hand, we have observable country-wide street mobilization triggered by the removal of the top judge in the country, which continued for several months and contributed to the reinstatement of the judge. And, subsequently, buoyed by the popularity, when the Court challenged Musharraf directly, judges were removed again and the street mobilization erupted once again. With private electronic news media completely preoccupied with the movement, and the regime going as far as destroying offices of the media houses, it appears that the legal mobilization was certainly a greater concern for Musharraf than the meeting between two exiled leaders in London. Indeed, a prominent foreign newspaper noted that the Supreme Court judgment that led to the reinstatement of the Chief Justice was “a major blow to Musharraf’s standing and probably the biggest challenge to his dominance since he seized power in a coup in 1999.”

There are additional problems with the idea that the London meeting between PPP and PML-N spurred the transition. Both leaders remained outside the country until the end of 2007, with Bhutto returning in October 2007 and Sharif in November 2007. It was only at this point that the leaders began to effectively mobilize their constituents in preparation for the 2008

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588 Ibid
parliamentary elections. But, by the time they arrived, the transition had nearly occurred, with Musharraf resigning from his position as Army Chief in November 2007. In addition, it is crucial to point out that even Sharif’s return to Pakistan can be attributed to legal mobilization, since he was able to return only after the empowered second Chaudhry Court (July-November 2007) ruled against Musharraf’s stated position that Sharif should not be allowed to return to Pakistan. In addition, the claim that the Charter created a new “normative” environment is difficult to sustain given the fact that soon after signing the pact with Sharif, Bhutto began negotiating a power deal with Musharraf, which was against the very *raison d’etre* of the Charter.

Hence, it is naïve to claim that a meeting in a far off land and the signing of a charter, without additional mobilization, could lead to the breakdown of a powerful military regime. Had this been the case, opposition politicians and dissidents from authoritarian countries could simply assemble in foreign cities and sign charters to bring about democratic change. However, as noted above, the transition to democracy requires direct and tangible costs to be inflicted on the authoritarian regime, of the kind that legal mobilization caused to be inflicted on the Musharraf regime.\(^{591}\)

An alternative formulation that attempts to salvage the role of political parties concerns the autonomy of the lawyers movement from party politics. Given the unprecedented mobilization of lawyers in Pakistan, some commentators have presented the argument that the

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591 Other scholars have also noted the principal role played by legal mobilization in Pakistan’s transition to democracy. See Tom Ginsburg, “The Politics of Courts in Democratization,” in Heckman, J., Nelson, R., and Cabatingan, L. (eds), *Global Perspectives on the Rule of Law* (Routledge 2009, 186-188) (arguing that mobilization by the legal community acted as a “trigger for a return to democracy” which led “ultimately to the fall of the regime of General Pervez Musharraf.”); Shahid Burki, “Muslim World’s Democracy Experiment” *Express Tribune*, October 27, 2013 (arguing that “in Pakistan, the movement towards the establishment of a new and more representative order began with the lawyers’ movement of 2007.”)
movement was in fact orchestrated by political parties. Since political parties officially joined in the second long march, which was the last event of the movement, a recency bias may lead one to consider the entire movement as a political party effort. As a corrective to this bias, I offer four reasons to reject the claim that this movement was initiated or sustained by political parties.

First, as data from the protest event analysis discussed in chapter 4 shows, political party workers did not participate in most of the movement events. Given there is strength in numbers, it seems odd that political parties would orchestrate a movement without supporting the core aspect of mobilization. Second, on both occasions when the Chief Justice was reinstated, the movement demobilized. Contrary to the agendas of political parties, which are multifarious, the lawyers’ movement was a single-issue movement closely aligned with the corporate interests of the legal complex. Third, my data shows that second highest protest activity occurred in Karachi. However, Mutihida Qaumi Movement (MQM), the most popular party in the city, was strongly opposed to the lawyers struggle. Fourth, the two largest parties that could possibly have sponsored the movement were not supported by the lawyers at key junctures. In August 2007, lawyers protested against Musharraf’s National Reconciliation Ordinance (NRO), which would have given blanket immunity against corruption charges to the leader of Pakistan Peoples’ Party (PPP). Soon after the ordinance was passed, the recently restored Chief Justice blocked its passage. In 2008, the leaders of the PPP themselves became the targets of the movement, as they failed to restore the judiciary. Moreover, PPP did not participate in either of the two long marches. As for the PML-N, a striking incident is the return of Nawaz Sharif, the party’s leader, from exile in September 2007. Although the Supreme Court had ruled that Sharif had an “inalienable right” to return to Pakistan, the military regime was opposed to his return. Sharif was

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592 Interview (2008) with a former Chief Justice of the Supreme Court of Pakistan, who had been in office before the Court assumed an activist posture in 2005.
counting on popular mobilization on his behalf. However, the street did not rise in his favor, and he was sent back to Saudi Arabia. Most important, lawyers, who had recently mobilized throughout the country, did not protest against Sharif’s deportation, which would be odd if Sharif’s party had patronized their movement.

Hence, opposition political parties were neither strong enough to trigger a transition to democracy, nor did they have a significant role in initiating and maintaining legal mobilization.593 The second alternative explanation focuses on the idea that the transition was triggered by a split within the authoritarian regime itself. One possibility that can be rejected is that even before the lawyers’ movement began, there were signs of a rift within the military. However, one may posit that judicial activism by Chief Justice Iftikhar Chaudhry was an indication of the splitting of the Musharraf regime. As the top judge in the country, according to such an argument, Chaudhry signaled the erosion of the Musharraf regime. This argument, however, improperly conceptualizes the nature of an authoritarian regime. Consistent with the transitions literature,594 the Musharraf regime is appropriately characterized as consisting of leading officers in the military. Hence, a split in the regime would have to mean a split within the military establishment. Taking a broader view of a regime in an authoritarian context, such as inclusion of judges and parliamentarians, goes against the very conception of such a government,  

593 Hence, it seems highly unlikely that political parties orchestrated the lawyers’ movement. What about labor unions? After all, Musharraf’s tenure had seen the privatization of large scale public enterprises, which had been highly contested by the labor unions. The discontent had been particularly strong in the case of Pakistan Telecommunications Corporation (PTC) and Pakistan Steel Mills. The latter’s sale agreement had actually been annulled by the Supreme Court following a petition submitted by the union. However, labor unions were notably absent in the mobilization against the Musharraf regime. In the lawyers’ movement in particular, their role was almost negligent. Only in the later stages of the movement, when opposition parties joined the movement, did traders’ union also express support for the lawyers’ struggle.
in which power is concentrated in a few hands. Hence judges can hardly be considered central actors in the governmental structure of authoritarian regimes.

Finally, I discuss two further alternative explanations, which cannot explain the democratic transition because the causal events they posit appeared only after the first set of episodes of the lawyers’ movement had already considerably weakened the regime. First, it can be argued that international factors were critical, such that the United States, which had supported the Musharraf regime, withdrew its support. Second, and related to the first, it can be argued that Musharraf was unable to deal with the war on terror being fought in the tribal areas of Pakistan. While there may be some truth to these propositions, they are neither significant in themselves nor can their timing explain the breakdown of the regime. At the time the lawyers’ movement began, the Bush administration in the United States was quite favorably disposed toward the Musharraf regime. Even with regard with the engagement with the tribal areas in Pakistan, the regime had been engaged in the war for some time, and it is difficult to see why a there would be a credible threat to the regime from the militants. Once legal mobilization began to divert the regime’s attention, however, the regime was unable to handle the insurgency threat as effectively.

To sum up, the principal actors that triggered the transition to democracy in Pakistan belonged to the legal community. Starting with activism within the court, and subsequent engagement in high-risk street activism throughout the country, legal mobilization became the main source of contention for the Musharraf regime during 2007. The boycott of courts as well as direct mobilization created a climate of instability which the Musharraf regime struggled to control. It most likely contributed to a rift within the military regime following repression of lawyers at the hands of the regime. The regime’s plummeting legitimacy motivated the soft-
liners to argue in favor of the military’s return to the barracks, and for a power-sharing deal with Bhutto. In an attempt to stay in power, Musharraf enacted the National Reconciliation Ordinance (NRO) in October 2007, providing immunity to Bhutto’s party against corruption charges. It was only at this point the role of the political parties became significant in the transition. However, the authoritarian regime had already been undermined by the direct and tangible costs inflicted by legal mobilization, as discussed above.

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