Miscarriage of Chief Justice

Judicial Power and the Legal Complex in Pakistan under Musharraf

Shoaib A. Ghias

INTRODUCTION

General Pervez Musharraf’s authoritarian regime in Pakistan faced an unexpected political crisis in March 2007 when he suspended Chief Justice Iftikhar Chaudhry on corruption charges, and the police then manhandled Chaudhry outside his home. The media coverage of these incidents sparked an unprecedented mobilization of lawyers to restore Chaudhry to the Supreme Court. The bar protested in the streets, despite the regime’s use of force, making headlines around the world (BBC News 2007; Masood 2007a). Four months later, an emboldened Chaudhry was reinstated – but not for long. When Musharraf stood for reelection as president in October 2007, the Supreme Court blocked the election result in order to review the fact that he was a presidential candidate while still in the army. However, before the Court could announce the decision, Musharraf suspended the Constitution, packed the Supreme Court, and declared emergency rule:

Whereas there has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth, in particular;
Whereas constant interference in executive functions, including but not limited to the control of terrorist activity, economic policy, price controls, downsizing of corporations, and urban planning, has weakened the writ of the government . . . .

1 Chaudhry was on a five-member bench that originally allowed Musharraf to remain the army chief during his first presidential term.

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I hereby order and proclaim that the Constitution of the Islamic Republic of Pakistan shall remain in abeyance. (Proclamation of Emergency 2007)

While Musharraf managed to rein in the judiciary for the moment, the forces unleashed during the confrontation eventually led to his regime’s demise.

In exploring the struggle for judicial power in Pakistan under Musharraf, the chapter focuses on how the Supreme Court expanded judicial power and how the legal complex mobilized for judicial independence. Section I situates my questions in the scholarship on judicial power and the legal complex, and Section II provides the institutional and political context for my case study. To explain how judicial power evolved in Pakistan, Section III employs the framework of judicial functions in authoritarian regimes. I argue that the Chaudhry Court intervened in governance to address the discontents of economic liberalization instead of fostering economic growth. The virtuous cycle of judicial power became more political in the context of supportive media, strategic judges, and regional influences. To explain the extraordinary mobilization of lawyers in defense of Chaudhry, Section IV uses the crucial framework of the legal complex – the relationship between the bar and the bench. I argue that the bench not only protected the autonomy of the bar, but also intervened in bar elections to consolidate a probench legal complex. Section V explains how the judicialization of politics after Chaudhry’s restoration led to Musharraf’s imposition of emergency rule, and Section VI concludes with a description of post-Musharraf developments.

THEORETICAL FRAMEWORK

This chapter uses Pakistan as a historical-interpretive case study in comparative perspective. The primary data sources for my analysis are television programs, newspapers, judicial decisions, executive orders, statutory law, local and international nongovernmental organization (NGO) reports, published affidavits, and autobiographical works. The chapter’s goal is to expand on the theoretical models of judicial power and the legal complex in authoritarian contexts.

Courts in Authoritarian Regimes

Public law scholars have long argued that courts are agents of the political regime (Dahl 1957; Shapiro 1981). Even when the courts are considered independent, the regime maintains significant control through judicial appointments, tenures, patronage, and legal and constitutional change. So how do we explain the global expansion of judicial power (Tate and Vallinder 1995) vis-à-vis the political regime? In democratic and democratizing regimes, scholars have focused on the
role of political parties (Shapiro and Sweet 2002), hegemonic interests (Hirschl 2004), and fragmented power coupled with long time horizons (Ginsburg 2003). In authoritarian contexts, scholars have focused on the functions of courts that expand judicial power and independence (Ginsburg and Moustafa 2008; Helmke and Rosenbluth 2009).

Five basic functions of courts in authoritarian regimes (see Moustafa and Ginsburg 2008) are noteworthy. First, authoritarian regimes need administrative control of bureaucratic agents for removing low-level corruption. The hierarchical structure of courts allows judges to investigate bureaucratic misdeeds that regimes cannot discover (Shapiro 1981). Second, authoritarian regimes, as well as democratic governments, sometimes need to implement controversial policy measures, particularly in the economic domain (Moustafa and Ginsburg 2008). In order to avoid blame for such measures, regimes often delegate the issues to the courts; for example, courts in Egypt were responsible for dismantling rent controls and streamlining privatization (Moustafa 2007b). Third, authoritarian regimes need foreign and domestic investments for economic survival, but the instability of property rights drives investors away. In order to provide credible commitments to investors, authoritarian regimes emphasize declarations of property rights and judicial institutions to enforce them (North and Weingast 1989). For instance, courts in Egypt and Singapore have been responsible for ensuring investor confidence (Silverstein 2003). Fourth, authoritarian regimes use courts to exercise social control over political opponents (Shapiro 1981). In this regard, courts close down opposition groups and imprison dissidents under the pretext of neutral law. Fifth, authoritarian regimes employ courts to provide legal cover for the extralegal activities of the regime (Mahmud 1994; Newberg 2002; Shapiro 2008, 334). Courts develop doctrinal and ideological justification for constitutional deviations in order to lend national and international legitimacy to the regime.

This chapter looks at the extent to which the Chaudhry Court followed these functions and the extent to which the Court diverged from them while expanding judicial power. While the basic political function of the (often reconstituted) bench in Pakistan’s military regimes had been legal legitimation of regime conduct (Kennedy 2005), the Chaudhry Court expanded power by defying expectations about judicial functions. As the public interest litigation to address low-level corruption in urban development became popular, the Court canceled privatization contracts instead of enforcing sweetheart deals (see Root and May 2006); exposed the regime for unpopular deregulation instead of accepting blame; investigated illegal detentions instead of upholding them; and once empowered, threatened the regime’s legitimacy instead of reinforcing it. Based on the case study, I explain the several factors at play in the judicialization of authoritarian politics, emphasizing the perverse role played by economic liberalization, as well as pointing out the role of strategic
judges, regional influences, and supportive media in a “virtuous cycle” (Chavez 2004, 478) of judicial power and independence. The account of judicial power that emerges, on the one hand, challenges the conventional relationship between economic growth and judicial power and, on the other hand, offers a dynamic model for explaining the expansion of judicial power in authoritarian regimes.

Mobilizing the Legal Complex

The emerging research on the legal complex looks at the role of legal professions, centered on the bar and the bench, in transitions toward or away from political liberalism. For this purpose, political liberalism consists of basic legal freedoms (that is, political rights such as due process, habeas corpus, free speech, and so on); a moderate state (that is, an independent judiciary and limits on executive power); and civil society (that is, associational life that is not dependent on the state, and a public sphere that serves as a realm of discourse). Halliday and Karpik (1997) undertook the first wave of comparative research on the legal complex in England, France, Germany, and the United States, and argued that there are certain patterns in the role of the legal profession in the fight for political liberalism. Halliday, Karpik, and Feeley (2007), in the second wave of comparative work, describe some of these patterns:

(i) The autonomy of the judiciary and the autonomy of the bar are the principal conditions for the fight of lawyers on behalf of a moderate state…. Both as condition for this fight and as a distinguishing political feature of liberal political society, the autonomy of lawyers and their ability to mobilise collectively on behalf of the judiciary, suggests a critical interdependence between the bar and the bench.

(ii) The forms of lawyers’ political action are principally reactive and rely on the authority of the public or civil society. (4, emphasis in the original)

This second wave of comparative work has expanded the scope of case studies across continents and regime types, elaborated the variability and continuity in the relationship between the bar and the bench, and incorporated the diversity of legal professions. The authors look at the modes of mobilization in each case vis-à-vis civil society, market, and politics. Their study offers a robust model of the relationship between the legal complex and political liberalism, largely confirming the conclusions in the first wave of research.

The mobilization of the legal complex against the Musharraf regime in Pakistan can make two contributions toward this research. First, the Pakistani case shows how the bench influences the legal complex not only by protecting the autonomy of lawyers and the legal complex (Moustafa 2007a), but also by intervening in
bar politics to consolidate the control of politically liberal and probench factions. Second, the relentless organization and protests of lawyers and judges in Pakistan to restore Chaudhry and to revive democracy demonstrate that the political action of lawyers can not only be reactive and focused on formal politics, but also proactive and comparable to social movements. In this way, a “politics of reciprocity”\(^2\) can emerge between the bar and the bench.

In order to explain the relationship between the bar and the bench in Pakistan, it is valuable to focus on the explanatory value of the legal complex (Halliday, Karpik, and Feeley 2007), an approach that examines variation in the relations of lawyers and judges across issues and time in a single country. The bar and the bench may be unengaged, cooperative, oppositional, or detached. Often the relationship is cross-cutting; that is, “one faction of lawyers and judges aligns against another faction of lawyers and judges” (8). For example,

a country may be classified in one period as an example of lawyers-only mobilising for political liberalism, at another period as an instance of the legal complex mobilising for political liberalism as a whole, and at yet another as a situation in which lawyers and the legal complex failed to mobilise, at another period as an instance of the legal complex. (9)

The Pakistani case demonstrates how the relationship between the bar and the bench can move from unengaged to oppositional to cooperative in a short period of time when cross-cutting factions change political opportunities and institutional support. As the chapter shows in Section IV, in 2005 the bench was aligned with the ruling regime while the Supreme Court Bar Association (SCBA) was divided along pre-Musharraf party lines. After the 2005 bar elections, the SCBA moved toward the regime as the bench moved away. In the controversial 2006 bar elections, however, the Chaudhry Court intervened and consolidated the control of a cooperative bar against the regime, demonstrating how the relationship between the bar and the bench can explain the historic mobilization of the legal complex. As Chaudhry confronted the regime, the lawyers were not only ready to support him individually but also had the institutional capacity of bar associations to defend him collectively. The politics of reciprocity produced a mutually reinforcing struggle for political liberalism.

INSTITUTIONAL AND POLITICAL CONTEXT

According to the Pakistani Constitution of 1973, the Supreme Court has the power of constitutional and statutory judicial review. The original jurisdiction of the Court

\(^2\) I should thank Terry Halliday for suggesting this name.
extends to questions of fundamental rights of public importance. The number of Supreme Court justices is determined by the Parliament, and it was seventeen during Musharraf years. Based on case law before the recent 18th amendment, judges were nominated by the chief justice and appointed by the president (Al-Jehad Trust v. Federation of Pakistan 1996); and the most senior judge was elevated to chief justice (Asad Ali v. Federation of Pakistan 1998).

The Constitution states that the president can remove a judge from the bench only if the Supreme Judicial Council finds him guilty of misconduct or incapable of performing his duties. However, the Constitution does not explicitly give any power to the president to suspend a member of the Supreme Court until the Council’s inquiry is completed. (Musharraf attempted to suspend Chief Justice Chaudhry before the inquiry process was complete.) The council consists of the chief justice of the Supreme Court, the next two most senior justices of the Supreme Court, and the two most senior justices of the four high courts. Should one of the council members (including the chief justice) be investigated, another member would replace him on the council, based on seniority.

Cases are generally heard by the Supreme Court in a one-member bench, a three-member bench, or a nine-member bench (in cases of national importance). In a few very important cases, a larger bench may also convene. The justices and cases are assigned to benches by the registrar of the Supreme Court with the approval of the chief justice. As the assignment of cases to particular justices can shape the outcome, the chief justice plays a defining role in the jurisprudence of the Court. The chief justice can also approve *suo motu* actions taken by Supreme Court justices.

Since the chief justice plays an important role in shaping the jurisprudence of the Supreme Court, the judicial philosophy and political history of Chief Justice Chaudhry is important for understanding the constitutional crisis. Chaudhry is from the province of Baluchistan, the most underdeveloped of the four Pakistani provinces. Before joining the provincial bench, he practiced law for eighteen years. During this period, he was elected as the president of the Quetta High Court Bar Association; twice elected as the vice-chairman of the Baluchistan Bar Council; and was appointed as a judge to the Quetta High Court in 1990, becoming the chief justice of the high court in 1999 (Supreme Court Report 2006, 10–11).

After the 1999 coup overthrowing Prime Minister Nawaz Sharif, Chaudhry was among Musharraf’s handpicked judges appointed to the Supreme Court, replacing the six judges who refused to take an oath under the martial law’s Provisional Constitution Order (PCO). Chaudhry was on the twelve-member bench that validated the coup on grounds of necessity (Zafar Ali Shah v. General Pervez Musharraf

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3 A *suo motu* action allows the Court, instead of a petitioner, to initiate investigation and to render judgment on a matter falling within its jurisdiction.
the nine-member bench that upheld Musharraf’s extraconstitutional referendum to become the president (Qazi Hussain Ahmad v. General Pervez Musharraf 2002); the five-member bench that upheld Musharraf’s amendments to the Constitution (Watan Party v. Chief Executive of Pakistan 2003); and the five-member bench that allowed Musharraf to retain the role of army chief during his first presidential term (Pakistan Lawyers Forum v. Federation of Pakistan 2005). Chaudhry was elevated to chief justice in June 2005. While Justice Chaudhry went along with the expected judicial functions in authoritarian contexts, Chief Justice Chaudhry would carve out a new role for the Court. The next section explains this paradox.


How did proregime judges expand judicial power leading to a confrontation with the regime? I argue that while the Pakistani Supreme Court has traditionally legitimized military regimes, economic liberalization under Musharraf opened the space for public interest litigation in urban development, deregulation, and privatization. In this context, a supportive media encouraged the strategic judges, who were already influenced by expansive regional jurisprudence, to employ judicial power toward political liberalization. The backlash against Chaudhry was a consequence of this expanding virtuous cycle of judicial power and independence.

Public Interest Litigation and Judicial Functions

When Chaudhry became the chief justice in 2005, he started an ambitious program of public interest litigation. The practice involving the Court’s original jurisdiction, suo motu powers, and relaxing standing in matters of public interest was not new in Pakistan (Menski, Alam, and Raza 2000). But Chaudhry institutionalized the exercise by establishing the Human Rights Cell at the Supreme Court. A careful examination of the chronology of public interest litigation illustrates how the Court deviated from the judicial functions expected in authoritarian contexts.

Construction Safety and Urban Planning

Economic growth under Musharraf’s rule had increased the demand for high-rise office space and urban housing, but the enforcement of safety regulations and urban planning had not improved. In October 2005, an earthquake hit Pakistan that claimed the lives of seventy-five thousand people. In this context, the Supreme Court heard a petition from the residents of a collapsed high-rise residential tower in Islamabad against the Capital Development Authority (CDA) and the construction companies. The petitioners argued that the CDA had failed to protect the life, liberty, and property of the residents by ignoring repeated complaints about material
defects in the tower. The Supreme Court ordered the CDA to provide accommodation to the residents and to find who was responsible for the defective construction (Saad Mazhar v. Capital Development Authority 2005). Two months later, the Court converted the petition into a large-scale judicial investigation of the earthquake damage, ordering provincial officials to provide a report on the government schools, colleges, and universities that had collapsed and what action had been taken against the officials responsible for the substandard construction.

The quake provided an opportunity for the Supreme Court to aggressively intervene in construction safety in general. In April 2006, the Supreme Court took a case on appeal from the Lahore High Court, which had refused to stop the Lahore Development Authority (LDA) from allowing construction of high-rise buildings without adequate safety standards. The Supreme Court's investigation revealed that not a single structural engineer was working with the LDA to ensure structural stability. In May 2007 (while the chief justice was suspended), a two-member bench would stay the construction of all buildings over three stories, affecting more than one thousand structures in Lahore.

As the Court was expanding its role in construction safety, it also moved toward the enforcement of urban planning regulations. The Court accepted a petition against the CDA to prevent the lease of a public park in Islamabad for the construction of a miniature golf course. In February 2006, the Court held that the lease agreement violated the fundamental right of access to public spaces established in Article 26 of the Constitution (Moulvi Iqbal Haider v. Capital Development Authority 2006). Relying on the Islamabad precedent, the Court also took suo motu action in a series of cases involving commercial projects in public spaces in Karachi and Lahore.

The construction safety and urban planning cases were instances of administrative control of low-level corruption. But the jurisprudence in those cases was also an unprecedented expansion of the Court's fundamental rights jurisdiction. The space for judicial intervention in construction safety and urban planning was opened by both economic development and the earthquake. When the Court froze projects that civil society groups were unable to stop, the media started taking notice.

Deregulation of Price Controls

After the construction safety and urban planning cases, the Chaudhry Court intervened in oil and sugar price controls. Both cases involved market shocks in the context of deregulation and high-level corruption. In the case of oil, the international price shock of 2004–5 provided the context. The Ministry of Petroleum had delegated the power to set the price of petroleum to a consortium of oil companies called the Oil Companies Advisory Committee (OCAC), with no parliamentary oversight. When the international oil price rose to US $70 per barrel in the beginning of August 2005, the OCAC increased the petroleum price, but when the oil
price dropped to US $62 per barrel at the end of the month, the OCAC did not correspondingly decrease the petroleum price (Daily Times 2005). In May 2006 a three-member bench of the Supreme Court, headed by Chaudhry, heard the petitions challenging the oil hike, and asked the National Accountability Bureau (NAB) to investigate (Goraya 2006). After the initial hearings, this bench sent the case to a larger bench to investigate whether the OCAC collaborated with corrupt officials from the Ministry of Petroleum to fix an unreasonable petroleum price (Business Recorder 2006).

In the case of sugar, the country faced a national crisis in 2005–6. The price of sugar more than doubled in less than a year, from Rs. 21 (US 35¢) per kilogram (2.2 lbs.) in February 2005 to Rs. 45 (US 75¢) per kilogram in January 2006. A Supreme Court bench headed by Chaudhry took *suo motu* notice of the price hike in 2006 and asked the NAB to investigate. Their report implicated eight current ministers (as well as Nawaz Sharif, the exiled prime minister, and Asif Zardari, Benazir Bhutto’s husband) and claimed that the government’s “soft policy” was responsible for the sugar crisis (Business Recorder 2007). Even though the oil and sugar cases were not decided before March 2007, when Chaudhry was suspended, cooperation from the NAB probably made the Court confident about compliance, and the media encouraged the Court to do more.

Instead of helping the regime to deflect blame for the unpopular deregulation measures, the price controls cases exposed the regime and targeted high-level corruption. The space for judicial intervention in price controls, welcomed and encouraged by the media, was opened by the discontents of economic liberalization.

**Privatization of Public Enterprises**

After price controls, the public interest litigation reached Shaukat Aziz, Musharraf’s hand-picked prime minister. Aziz was a Citibank vice president in New York before Musharraf appointed him finance minister in 2000 to spearhead economic liberalization. Aziz became prime minister in 2004, but retained the position of finance minister and chairman of the Privatization Commission to oversee the sale of state enterprises such as Pakistan Telecommunication Corporation Ltd. (PTCL), Pakistan State Oil (PSO), and Pakistan Steel Mills (PSM). PTCL was privatized in 2005 with the help of Citibank, amid labor union protests. When the government refused the union’s demands, the workers threatened to bomb the telecom facilities, and the army had to secure the infrastructure.

In this political context, PSM was privatized in April 2006, also amid labor union protests. The opposition parties and labor unions raised charges of corruption against the Privatization Commission. They argued that the enterprise was sold for a price lower than its land value, not to mention the inventory and the equipment. On a petition filed by the union in May 2006, the Supreme Court heard the case.
The union had relied on a famous Indian case, *S. P. Gupta v. Union of India* (1981), to assert standing. In an exceptionally bold decision in August 2006, the Court annulled the Share Purchase Agreement and the Letter of Acceptance of the deal, effectively reversing the sale (*Watan Party v. Federation of Pakistan* 2006). After the PSM case, the Chaudhry Court also accepted petitions against the privatization of PSO and PTCL.

The PSM case is considered the principal factor behind the regime’s confrontation with the Court. But the case needs to be seen as part of a pattern of expansionary rulings of construction safety, urban planning, and price controls. Furthermore, instead of enforcing contracts and supporting foreign direct investment, the Supreme Court was expanding power by reviewing contracts and canceling them based on corruption concerns. Once again, the space for judicial intervention had been opened by the regime’s economic liberalization agenda.

**Missing Persons (Illegal Detentions)**

The public interest litigation response to corruption, used so far to combat the effects of economic liberalization, was now applied to questions of basic legal rights. During the course of the US “war on terror,” the Musharraf regime had started the practice of secretly detaining people. However, human rights groups argued that the missing persons were mostly political adversaries from Baluchistan, as opposed to members of the Taliban or al-Qaeda. The regime had been involved in a conflict with the Bugti tribe in Baluchistan over provincial autonomy and natural gas revenues. Musharraf saw the “war on terror” tactics useful in this context as well.

Some estimate that as many as 6,000 persons had been missing, whereas the Human Rights Commission of Pakistan had documented only 400 persons. Being a Baluchistan native, Chaudhry took particular notice of the disappearances. In November 2006, the Supreme Court took the case of 41 missing persons and demanded the Ministry of Interior to produce them (Human Rights Commission of Pakistan 2006). At first the regime denied any knowledge, but one month later officials informed the Supreme Court that 20 persons had been found. The Supreme Court ordered the authorities to trace all the other disappearances (Asian Center for Human Rights 2007). In March 2007, the Human Rights Commission of Pakistan supplied another list of 148 missing persons to the Court, alleging that the intelligence agencies were detaining these people as well. A bench headed by Chaudhry took the petition and sent notices to provincial and federal governments. The next day, Chaudhry was suspended.

Pakistan’s intelligence agencies are the most important institution within the military, serving as the backbone of the army’s domestic and regional politics.

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4 The case upheld that the lawyers as a group may have standing in matters of judicial transfers.
expanding the reach of judicial power to intelligence agencies, the Chaudhry Court had gone too far. Instead of the social control over dissidents and political opponents, the Court was expanding its power by taking up the popular cause of missing persons. The media was enthusiastic about this role, and encouraged the Court to move toward further political liberalization.

**Presidential Election**

The most significant threat to the Musharraf regime came not from what the Court had done, but what it could potentially do in the October 2007 presidential election. As the Supreme Court was continuously expanding its reach, the media and civil society were demanding that the Court address the constitutional question of Musharraf’s eligibility to run for election while still in military service. Musharraf had obtained a one-time exception for dual office in 2002 when he “amended” the Constitution, and the Supreme Court upheld the amendment. But with the Supreme Court taking an activist posture, Musharraf could no longer trust the bench to perform another constitutional maneuver to legitimize his eligibility for presidential election. The Supreme Court had shown the ability to confront vital regime interests and policies and to challenge higher regime officials in each successive public interest case. There were reports that Chaudhry would be willing to move forward with the media’s demands in deciding Musharraf’s eligibility as well. It was in this context that Musharraf suspended Chaudhry on March 9, 2007.

**THE DETERMINANTS OF JUDICIAL POWER**

I have argued that the Chaudhry Court intervened in economic policy through public interest litigation and changed the Court’s political function from regime legitimization to political liberalization. The factors that triggered the demand for this change included neoliberal economic and illiberal political directions of the Musharraf regime. The factors that supplied the support for this change included Chaudhry’s strategic leadership and regional jurisprudential developments. In the process, explained below, the media played the role of channeling public sentiment to the Court.

**Economic Liberalization and its Discontents – Creating Demand**

Pakistan underwent rapid economic growth under Musharraf, particularly after September 11, 2001, based on foreign direct investment (FDI) and US military and economic aid (A. Shah 2006) (see Figure 9.1). In this period, Musharraf’s finance minister and later prime minister, Shaukat Aziz, was aggressively implementing
economic liberalization policies (Husain 2003; Musharraf 2006, 181–96; Burki 2007). However, economic growth and economic policies were encouraging corruption and creating new governance challenges: the scale of unsafe high-rise construction was proliferating dangerous buildings; the scramble for prime real estate was bringing an increase in violations of zoning regulations; the deregulation of price controls was pressuring oil and sugar prices to skyrocket; and the privatization of state enterprises was generating scandals such as those around PSO, PTCL, and PSM.

Public law scholars suggest that economic liberalization expands judicial power since independent courts are useful for targeting low-level corruption, enforcing contracts, attracting investors, and accepting blame for unpopular economic measures. The regime tolerates independent courts because of the judiciary’s economic function of fostering growth. In Pakistan, while courts targeted low-level corruption, they also canceled contracts, scrutinized investors, and exposed the regime for unpopular economic outcomes. The regime tolerated the Chaudhry Court because of the judiciary’s political function of regime legitimization. But once empowered, the Court began to dismantle the regime’s social control and became unreliable for regime legitimization.

Supportive Media

Since the Pakistani Supreme Court, as an institution, has almost always performed the function of legitimating political authority, the public image of the judiciary has rarely been positive. However, when Chaudhry started expanding public interest
litigation, public and media distrust of the judiciary started decreasing. Editorials in major newspapers began to hail the Supreme Court, in general, and Chief Justice Chaudhry, in particular (S. Shah 2006). As noted in an op-ed by Ayaz Amir, a prominent journalist:

There is much with which the judiciary can be charged and no one is saying it is a perfect institution. But the trend under the present chief justice to take note, often suo motu, of issues affecting the public interest, issues that seldom claimed the attention of the Supreme Court before, is setting a powerful new precedent. . . . It shows that provided the will is there derelict and largely moribund articles of the Constitution can be infused with new life and made relevant to the people. It also demonstrates that at its best the judiciary can indeed become a guardian of the people’s interests and, who knows, in time even of their liberties. . . . There is, however, a conundrum at play in this suo motu activism in that it sheds a bad light on other institutions, including the lower judiciary. If other institutions were functioning well, if the rule of law was being enforced, if public officials were doing their job, there would be no need for matters such as those relating to park spaces and the cutting of trees to come before the Supreme Court. . . . Someone has to pick up the slack. It goes to the credit of Chief Justice Iftikhar Mohammad Chaudhry that he is doing exactly this and not hiding behind the excuse, that would have been readily available to anyone less energetic, that the Supreme Court was meant for “higher” things (such as, I suppose, the doctrine of necessity). (Amir 2006b)

Chaudhry showed a keen interest in the Court’s media image. The Supreme Court Report in 2006 included a section called “Supreme Court and the Media,” consisting of eighteen press reports on the achievements of the Chaudhry Court (Supreme Court Report 2006). Lawyers critical of Chaudhry called his tactics a “media circus” (Bokhari 2007) and argued that Chaudhry was using *suo motu* action for self-aggrandizement.

Since Chaudhry had been a regime loyalist, his sensitivity to public and media image can provide an explanation for the transformation of the Court’s political function. As the Chaudhry Court delivered on public interest cases, the media embraced it as the people’s court and encouraged it to address pressing constitutional and political issues as well. Amir wrote,

The Supreme Court, mercifully, has stepped in [to the PSM privatization scandal], doing what the government should have done in the first place: scrutinising the deal thoroughly. . . . A strange situation we are witnessing: the Supreme Court under Chief Justice Iftikhar Mohammad Chaudhry slowly picking its way through the ruins and retrieving some of its lost honour and credibility. People have lost faith in other institutions. They have lost faith in leadership. The very desperation this situation creates is making people look to the Supreme Court as the last station on the line, the only forum capable of providing relief. . . . We are heading into
uncertain times. All sorts of questions are likely to come to the fore in the next year and a half: the president’s uniform, the question of his re-election, from fresh assemblies or the present ones, etc. . . . Who then will be the nation’s compass to guide it through the raging storms which lie ahead? I think when that time comes all eyes will be on the Supreme Court. Let us pray it is able to live up to the heavy burden of expectations placed on its shoulders. (Amir 2006a)

Strategic Judges – Offering Supply

The presence of strategic judicial leadership often becomes a significant factor in judicial power. As Martin Shapiro (2008) states,

no effective judicial protection of rights may occur unless one or more judges combine significant leadership in moving their fellows in the right direction with a sufficient sense of political strategy. . . . A sense of when and where and how more or less incrementally a particular court can move to restrain a regime without triggering damaging or devastating reprisal is even essential in liberal democracies and all the more so in authoritarian states. (332)

In Pakistan, Chaudhry’s leadership was perhaps a necessary condition for the emergence of an expansive judicial role in public interest litigation. A chief justice has substantial institutional powers in Pakistan, but it was only Chaudhry who was able to utilize these powers. In addition, Chaudhry’s sensitivity to the media was responsible for extending judicial power from public interest to political questions. While his expansion of judicial power would trigger a reprisal from the regime, his sense of political strategy would permit him to confront the regime even after he was taken off the bench.

Regional Influence

The Supreme Court may also have been inspired by its Indian counterpart, which has a long-standing tradition of public interest litigation. The Pakistani petitioners were pushing the scope of jurisprudence by using Indian case law in public interest litigation. The use of Indian precedents, for example, S. P. Gupta in the PSM case, points toward this development. During this period, the two governments were also taking a series of confidence-building measures in an effort to resolve tensions. Exchange programs from various levels of government, including the judiciary, were under way. In 2005, delegations of high court judges from Pakistan visited India and met with Chief Justice Y. K. Sabharwal of the Indian Supreme Court. These exchange programs may have fostered an epistemic community and provided an impetus for or affirmation of public interest litigation in Pakistan. In
addition, the role of the Indian Supreme Court in urban issues was reported in the Pakistani media. On the issue of public interest litigation, a columnist stated in the cultural context of Pakistan’s obsession with comparison to India, “What India can do, perhaps Pakistan now, with enlightenment and moderation to the fore, can do even better” (Cowasjee 2006). Criticizing the Supreme Court’s backlog of cases, another commentator stated, “India, with seven times the population, no less criminal or litigious than ours, has only 26 [justices] but the cases on its roster are fewer” (Idris 2006).

**Regime Compliance**

An important factor at play in expanding judicial power is regime compliance. To be sure, not every case was decided before Chaudhry moved to the next. But the regime’s cooperation in preliminary measures gave the Court a signal of compliance. But why did the regime comply? The core function of courts in Pakistan during authoritarian periods has been to provide legal legitimacy to the reigning regime. But in the process, courts carve out some judicial power as well (Lau 2006, 75–94; Newberg 2002). The regime knows that a court that validates everything legitimizes nothing. So the regime complies with court orders to enhance judicial credibility. In Musharraf’s case, judicial credibility was particularly valuable in legitimizing his forthcoming presidential reelection. Furthermore, expansionary rulings do not threaten a military regime in the same way as they threaten a democratic regime since ultimate power depends not on some constitutional balance but on the armed forces. So the Musharraf regime could comply with the judicial decisions without fearing a judicial coup. Moreover, Musharraf did not see judicial activism as a threat until the prime minister was implicated in the PSM case, and the intelligence directors involved in illegal detentions convinced him that Chaudhry was threatening core regime interests. Even so, Musharraf was confident that he could simply force the chief justice to resign.

THE VIRTUOUS CYCLE OF JUDICIAL POWER

How does a Court that was handpicked by Musharraf and ruled loyally in his favor in every extraconstitutional measure until 2005 become a threat to the regime in two years? We need to look at the sequence of Supreme Court cases and who was implicated in them to understand judicial empowerment (see Table 9.1). The

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5 For example, if one considers Dahl’s (1957) ruling regime thesis, one would expect that judges appointed by the regime would vote consistently with their preferences, but these preferences would happen to be aligned with regime preferences.
construction safety and urban planning cases starting in late 2005 implicated city or provincial officials. The price control cases in early 2006 implicated federal ministers. The privatization cases in mid-2006 implicated the prime minister. The illegal detention cases in late 2006 implicated the army and intelligence agencies. Finally, the presidential election issue that emerged in early 2007 implicated the president. With each step, the Chaudhry Court was acting against a government official more powerful than the official in the previous step, moving sequentially from city officials to federal ministers to the prime minister to the Pakistan army, and ultimately to Musharraf. The Chaudhry Court was becoming confident because of encouragement from the media and society.

Figure 9.2 shows the cycle of judicial power in which media coverage encourages the judiciary to act; judicial action forces the regime to comply; and regime compliance signals the media to continue the cycle. As the cycle continues, the media coverage expands from economic to political issues, and the judicial response targets high-level instead of low-level officials. This model can be compared to Manoj Mate’s (2008) model of the Indian Supreme Court expanding and consolidating its power through a cycle of public interest litigation (see also Stone Sweet 2002). However, the key factor that distinguishes Pakistan under Musharraf is that in each iteration through the cycle, the Supreme Court confronts a stronger political force. As Mate shows, the Indian Supreme Court expanded its powers horizontally (over areas of governance) in each cycle and constrained its powers vertically (over the basic structure

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Table 9.1. Evolution of judicial functions under Musharraf
doctrine). The Pakistani Supreme Court, however, expanded its powers horizontally and vertically (over state actors implicated). This difference also explains why the Indian Supreme Court has been successful in avoiding direct regime backlash, whereas the Pakistani Supreme Court soon confronted a constitutional crisis.

CONSTITUTIONAL CRISIS AND THE LAWYERS’ MOVEMENT

For the first time in Pakistan’s history a chief justice stared a general in the eye and did not blink. This gave the people the strength to protest in defense of the law and the most basic tenets of democracy.

Syed Fakhar Imam, former Speaker of the National Assembly (quoted in Usher 2007).

On March 9, 2007, Musharraf met with Chief Justice Chaudhry for a planned meeting in the military headquarters. The general, dressed in his military uniform, informed Chaudhry of a complaint against him of unlawful interference with the Quetta High Court. When Chaudhry dismissed the complaint as baseless, Musharraf said that there were other complaints as well. During this meeting, the directors of intelligence agencies, the president’s chief of staff, and the prime minister entered the room. When Chaudhry was asked to resign with dignity or face the Supreme Judicial Council, he said, “I wouldn’t resign and would face any reference since I am innocent; I have not violated any code of conduct or any law, rule or
regulation; I believe that I am myself the guardian of law. I strongly believe in God who will help me” (The News 2007). Chaudhry was detained in the room while the intelligence directors tried to convince him to resign, adding charges of nepotism to the complaints lodged against him. During this meeting, Musharraf sent a presidential reference against Chaudhry to the Supreme Judicial Council. When Chaudhry was allowed to leave and returned to his car, the official flag had been taken off his vehicle. He was escorted to his official residence and kept under surveillance.

The government released the video of Chaudhry’s meeting with Musharraf in uniform in a routine manner, not realizing the potential inflammatory effect. In addition to this mistake, the regime made a second tactical error. After Chaudhry’s suspension on Friday, March 9, the Supreme Judicial Council convened on Monday, setting the hearing for Chaudhry on Tuesday. When Chaudhry left his home for the council’s hearing, police officials ordered him to ride with them instead of taking his own car. When he resisted, an officer pushed Chaudhry’s head into the police car and the press captured this image. The video and the image would become the catalyst for summoning public opinion against the regime and mobilizing the lawyers in support of the chief justice.

PRESIDENTIAL REFERENCE AGAINST CHAUDHRY

When Musharraf sent a presidential reference against Chaudhry to the Supreme Judicial Council, he wanted Chaudhry off the bench immediately. Despite having no explicit powers to suspend the chief justice, Musharraf made a presidential decree restraining Chaudhry from acting as the chief justice and appointed Justice Javed Iqbal as the acting chief justice. When the president’s authority to suspend the chief justice was challenged in the media, Musharraf responded by issuing another order sending Chaudhry on enforced leave. But the media framed the order as a question of Musharraf’s authority to suspend the chief justice as opposed to the question of Chaudhry’s alleged misconduct.

A series of charges against Chaudhry had been written in the reference, alleging nepotism, abuse of power, and misuse of government resources. The directors of intelligence agencies and the president’s chief of staff provided affidavits in support of the charges. Interestingly, one of the charges (section K) accused Chaudhry of co-opting the media:

(K) Self Projection ... High Visibility on Media

(a) The [chief justice], unlike the former chief justices of Pakistan, who generally spoke through their judgments, desired a lot of self-projection and especially employed an officer to arrange special media projection for him. The officer was tasked to ensure prominent reporting of [chief justice]’s activities in all newspapers and the electronic media.
(b) [Pakistan Television] was ordered to ensure that the [chief justice] was given daily coverage in the news prominently. (Daily Times 2007b)

THE BAR AND THE BENCH: CONSOLIDATING THE LEGAL COMPLEX

The legal complex literature argues that the relationship between the bar and the bench has a significant influence on the impact of the legal complex on political liberalism. Except for the cases in which the legal complex shows hostility toward political liberalism, case studies demonstrate that the legal complex, or at least lawyers, generally mobilizes for the independence of the judiciary and the autonomy of lawyers. But considering the failure of the Pakistani legal complex to effectively do so in the past, notably during the previous Sharif government, it becomes important to explain how and why the legal complex mobilized in unprecedented ways to restore Chaudhry. First, the publicized detention of the chief justice in army headquarters and his manhandling by security forces were crucial mistakes. The resulting media coverage of these events marshaled the law profession and public opinion. Second, the uprising of the lawyers must be seen in the context of the increasing distrust of the military regime. When Musharraf came to power in 1999, his promise of establishing a “genuine democracy” had raised expectations. When these expectations were repeatedly dashed through extraconstitutional maneuvers and basic rights violations, the disappointed lawyers were ready for revolt. Third, the bar councils were one of the few institutions with the ability to launch an effective and sustained campaign against the government since the political parties had been decimated by Musharraf. While the first two factors were important, perhaps necessary, to spark the movement, the third one was crucial to maintain it.

But how did bar councils that are often divided along partisan lines take such a largely unified stand against the suspension of the chief justice at such high levels of membership and leadership across Pakistan? Membership of the bar councils was not completely unified. The leadership of the councils was consolidated in its opinion on the issue, but it had to exert strong pressure over Musharraf supporters and apathetic lawyers, with measures including social boycotts (in the bar rooms) and threatening disbarment. Nevertheless, given the structure of bar associations and the role of partisanship in bar politics, it is impressive that at least at first blush the leadership appeared united in its support of the chief justice. However, I demonstrate below that the unified leadership at the national level of the bar was the result of a struggle between 2005 and 2006 in which the bench played a pivotal role.

Divided They Fall

The Pakistan Bar Council (PBC) exists under the Legal Practitioners and Bar Councils Act of 1973. The PBC is responsible for overseeing the Supreme Court
Bar Association (SCBA) and the four provincial bar councils. Each provincial bar council, in turn, is responsible for overseeing the bar associations of provincial courts. The executive committee of the PBC is elected for five years, whereas the executive committee of the SCBA is elected for one year. In 2005, Hamid Khan was the executive committee chairman of the PBC, and he led an antiregime faction of lawyers called the Professional Group. In the October 2005 SCBA elections, two former judges of the Lahore High Court, Malik Saeed Hassan and Malik Qayyum, ran for president. The Professional Group, along with Benazir Bhutto’s Pakistan Peoples Party (PPP), supported Hassan, a longtime PPP member. Sharif’s Pakistan Muslim League (Nawaz) (PML(N)) supported Qayyum, a longtime PML(N) member and a proregime candidate. This division in the bar indicates that in 2005 party politics trumped all other considerations. In the end, Qayyum was elected as SCBA president, but Ali Akbar Qureshi (backed by the Professional Group) was elected as secretary.

Soon after his election, Qayyum led a delegation of SCBA officials to meet the president. In the meeting, Musharraf agreed to allocate Rs. 100 million (US $1.67 million) for a lawyers’ welfare fund. The meeting was criticized by Hamid Khan, chair of the PBC, who stated that “by shaking hands with a man in uniform, who usurped the office of the president and subverted the Constitution, the SCBA delegation has virtually accepted the supremacy of military establishment and military ruler over the Constitution” (quoted in Iqbal 2005).

The Bar between the Regime and the Bench

In October 2006, the SCBA elections were held under the supervision of Qayyum as president. By this time, the PSM case had been decided and the Chaudhry Court’s confrontation with the regime was intensifying. The Professional Group supported the antiregime candidate Munir Malik against proregime Raja Haq Nawaz Khan. Secretary Qureshi, after an unofficial count, declared Malik president-elect by a margin of four votes. As the Musharraf regime was not comfortable with Malik, Qayyum ordered a recount and officially declared Khan president-elect. In response, Malik challenged the recount before the PBC. Chaired by Hamid Khan, the PBC ordered Malik to hold the position until the matter was resolved. On Khan’s appeal, the Lahore High Court reversed the PBC decision, but Malik, in turn, appealed before the Supreme Court.

Chaudhry understood that deciding in favor of Malik meant taking a position against the regime. He assigned the case to a twelve-member bench, generally assembled for cases of utmost national importance, and presided over the bench himself. The bench reversed the decision of the Lahore High Court but did not decide the case on its merits (Munir A. Malik v. Malik Muhammad Qayyum 2007). Instead, the Court ordered the PBC to decide the case on the law and the facts, despite Raja
Haq Nawaz Khan’s objection that Hamid Khan, as the chair of the PBC, had actively campaigned for Malik and was therefore biased. Hamid Khan recused himself and the PBC ordered another election to be held, in which Malik emerged as the SCBA president. In this way, Chaudhry prevented the Musharraf regime from consolidating its hold over the SCBA at a time when the confrontation between Chaudhry and Musharraf was intensifying. Soon after becoming the SCBA president, Malik made an antiregime speech to the bar amid lawyers chanting for Musharraf to resign.

The Chaudhry Court’s decision allowed the consolidated leadership of the PBC and the SCBA to become the bedrock of the judicial support structure. When Chaudhry was suspended, Malik and Hamid Khan led the political mobilization, as well as the legal defense. In contrast, Qayyum appeared as Musharraf’s counsel against Chaudhry and was later appointed attorney general. In this way, the unified leadership of the bar was not simply an outcome of the principled response of elite lawyers to uphold judicial independence, but rested as well on the bench’s support of one faction over the other. The role of the bench in shaping the bar moved the relationship from the worst case, in which “a fault line runs through the segments of the legal complex” (Halliday, Karpik, and Feeley 2007, 17), to the best case in which the bar and bench are led by “an advance guard, or substantial portion of activist lawyers” (17).

The Bar and the Bench in Comparative Context

The legal complex literature focuses on the internal ideological cohesion of legal fraternity as an important factor in advancing political liberalism. Tamir Moustafa (2007a) describes how the Mubarak regime in Egypt influenced the rules for the elections of the Lawyers’ Syndicate to undermine Islamist lawyers, and used the split between the liberals and Islamists for its own advantage (213). The Musharraf regime also used its influence to affect the outcome of the SCBA elections. However, Musharraf did not have to contend with ideological divisions at first. The partisan politics between Bhutto’s PPP and Sharif’s PML(N) allowed Musharraf to push his agenda using Qayyum.

The legal complex literature also describes a wide variety of supportive relationships between the bar and the bench. For example, Moustafa describes how, in Egypt, the Court of Cassation’s president encouraged the resistance against the regime’s new syndicate law in 1993 (199). In addition, the Supreme Constitutional Court prevented the Mubarak regime’s amendment of the Associations Law in 2000 to preserve the human rights movement (207). Pakistan presents a unique example in this regard, and demonstrates that the bench can not only preserve the autonomy of legal professions but can also support factions to shape the legal complex in the struggle for judicial independence.
THE LAWYERS’ MOVEMENT

The legal complex literature also concludes that the complex typically mobilizes for political liberalism based on legal and reactive strategy; that is, the bar is most likely to protect negative rights, such as state abrogation of procedural protections against arbitrary detention, torture, and killing. Lawyers are most effective when they are embedded within social movements, but they themselves do not constitute social movements. However, the case of Pakistan makes it clear that the repertoire of contention (Tarrow 2008) used by lawyers can be as diverse as any social movement. The mobilization to restore Chief Justice Chaudhry had several fronts, including the courts, the media, the bar associations, and street demonstrations. The strategy was masterminded by an advance guard of lawyers including PBC chair Hamid Khan, SBCA president Munir Malik, political leader Aitzaz Ahsan, retired judge and former SCBA president Tariq Mehmood, and activist lawyer Ali Ahmad Kurd. Once Chaudhry was restored, the legal complex continued the proactive struggle for democratization using insurgent methods (see McAdam 1999).

The Legal Strategy

When Musharraf suspended Chaudhry, the constitutional power to dismiss him rested with the Supreme Judicial Council. The members of the council included the three senior-most judges on the Supreme Court and the two senior-most judges from the provincial high courts. Musharraf’s advisors made plans that Chaudhry would be dismissed when the independent-minded second-senior-most judge, Rana Bhagwandas, was on leave and traveling for personal reasons to India. The council members in this context, the regime hoped, would give a favorable verdict to the regime. The council did, in fact, comply with the regime’s demands and within four days started the hearings against Chaudhry. During this time, Chaudhry’s lawyers counterbalanced with legal and political tactics6 that prevented the council from delivering a verdict before Bhagwandas returned as the acting chief justice (Malik 2008, 50–68).

Bhagwandas cut his personal leave short and came back to Pakistan. But even with Bhagwandas present, the council’s judgment could swing in the regime’s favor. Therefore, the first step of Chaudhry’s defense team upon Bhagwandas’s return was to file a direct petition to the Supreme Court challenging the authority of the presidential reference and the council’s proceedings against Chaudhry. Bhagwandas accepted the petition and appointed a five-member bench consisting of judges

6 The defense questioned the partiality, integrity, and authority of the council’s members; argued against summary judgment and insisted on applying civil procedure and evidentiary rules; and ensured that chanting protesters are heard inside the courtroom at every hearing.
whose neutrality was not compromised. The five-member bench stayed the council’s proceedings and recommended the constitution of a thirteen-member bench to hear the petition. Chaudhry’s defense team had more room to maneuver in the larger bench. In this way the defense team made sure that Chaudhry’s odds of surviving the presidential attack were maximized.

Bar Associations and Movement Organization

Lawyers in provincial and local bar associations had started mobilizing by protesting against the regime, but in order to sustain the movement, a concerted effort was needed. For this purpose, Ahsan advised Chaudhry to travel across the country to address bar associations. The chief justice was not a natural public speaker, so Ahsan, a veteran political leader and an eloquent public speaker, traveled with him. Chaudhry addressed local bar councils in Rawalpindi, Sukkur, Peshawar, Lahore, and Abbotabad. He also traveled to Karachi on May 12, but was prevented from leaving the airport by the Muttahida Quami Movement (MQM)-led city government, which was allied with Musharraf. Meeting lawyers across the country and using the institutional apparatus of the bar (Waseem 2008) enabled Chaudhry’s political defense team to energize lawyers and sustain the momentum of the movement.

The bar associations also boycotted the regime and refused to appear before lower courts. This move was a significant burden on the lawyers whose income is connected to litigation. Nevertheless, those who persisted on appearing before the courts were shunned by bar associations and threatened that their licenses, issued by provincial bar councils, would be canceled. These formal and informal pressures produced significant compliance with the boycott. At a later stage, the bar did start canceling licenses (Rehman 2008), which prompted Musharraf to amend the Legal Practitioners and Bar Councils Act of 1973 (Legal Practitioners and Bar Councils (Amendment) Ordinance 2007), thereby taking the power to disbar away from the bar and giving it to magistrates.

The Political Strategy: “If it bleeds, it leads”

The most significant role of the lawyers in mobilizing for judicial independence came in the form of street protests. The lawyers went beyond their role as legal

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7 Acts are passed by the Parliament and signed by the president, whereas ordinances are issued unilaterally by the president when the Parliament is not in session. An ordinance expires after four months if not ratified by the Parliament, but in practice, the president reissues the ordinance with cosmetic changes. In this way, the president often exercises a quasi-permanent lawmaker authority, particularly under military regimes in Pakistan.
professionals and used the streets to demand the restoration of Chaudhry. The initial
protests were spontaneous, but the use of violence by the regime – and the media’s
live coverage of bleeding lawyers – made the protests a deliberate tool used by bar
associations. The associations set times and locations of daily protests throughout
the country. Of the eighty thousand or so registered lawyers in Pakistan, only a frac-
tion came out in the streets on a regular basis. But the ranks of lawyers, marching
solemnly in their black coats, gave the public perception that the protests were sig-
nificant events. The lawyers largely remained peaceful while protesting, but in some
instances members of the legal profession initiated violence, though the movement
blamed the regime for planting instigators in such instances. Musharraf, of course,
emphasized the political nature of the movement. In an interview soon after the
protests made headlines, he said that the sale of black coats and ties had skyrocketed
(YouTube 2007), implying that the protesters were largely members of opposition
parties only dressed as lawyers.

The Media and Public Opinion

Chaudhry’s political defense team made sure that pressure was brought to bear on
the Supreme Court to prevent Musharraf’s efforts to induce or coerce the judges.
Malik, as SCBA president, emphasized that the responsibility of the bar is to sen-
sitize the Court to political questions – and the Court was sensitized when public
opinion was mobilized (Malik 2008, 73–9). Bar leaders appeared on television and
in print to argue against Musharraf’s charges against Chaudhry. In this regard, the
job of the bar was relatively easy since the media had been sympathetic to Chaudhry
from the beginning. However, the bar ensured that the regime was unable to pres-
sure the media to tone down the rhetoric against the president. When the media
provided live coverage of protests and the chief justice’s rallies, Musharraf’s approval
ratings plunged. On June 4, he issued an ordinance placing significant restrictions
on television channels and banning live coverage of rallies (Pakistan Electronic
Media Regulatory Authority (Amendment) Ordinance 2007). However, both jour-
nalists and lawyers came out in the streets in force, compelling the prime minister
to rescind the ordinance (Masood 2007b).

In sum, the repertoire of contention used by the lawyers was formal as well
as insurgent. The lawyers organized in traditional ways using legal forums, bar
associations, and support networks with the media. However, the most effective
parts of the movement were the insurgent methods of court boycotts and street
protests. After Chaudhry’s reinstatement, the lawyers would use the same meth-
ods to demand democratization, demonstrating the proactive dimension of the
legal complex.
As the twelve-member bench of the Supreme Court deliberated on the president’s reference against Chaudhry, the political situation deteriorated. The regime cracked down on a vigilante movement that was attempting to implement Islam-inspired public morality on the streets of Islamabad. When the movement members barricaded themselves inside the Red Mosque complex in Islamabad, the military used force rather than prolong the state of siege while negotiations were in progress. After the military operation on July 10, the death toll was in the hundreds and the images were published throughout the media. This tactical blunder significantly weakened an already unpopular Musharraf. In addition, the security situation in the country was worsening. On July 17, a suicide bomber killed fourteen people at a rally of PPP members that Chaudhry was about to address it. The regime blamed the militants for targeting the PPP since Bhutto had endorsed the government’s action at the Red Mosque. Malik, however, blamed the regime for targeting Chaudhry (Masood 2007c).

As the decision in the Chaudhry case became imminent, the lawyers intensified their rhetoric. In a speech, Malik reportedly stated that “lawyers will burn that Supreme Court, which will give the verdict in [the chief justice case] like that of [the] Maulvi Tamizuddin case” (Associated Press of Pakistan 2007). On the day of the decision, Ali Ahmed Kurd stated that if the case were decided in the regime’s favor, “Let me tell you that this will be the darkest day in Pakistan’s history. Neither the lawyers, nor the tens of millions of Pakistani people, will accept this decision. We will fight with all our strength and might against this decision.”

On July 20, ten days after the military operation in Islamabad, the Supreme Court reinstated Chaudhry and dismissed the presidential reference. (Chief Justice of Pakistan v. The President of Pakistan 2007). In addition to the contributing role of Musharraf’s weak political position, the mobilization of the legal complex was primarily responsible for this step toward judicial independence in Pakistan. In this case, the legal complex was centered on the bar and the bench. The lawyers who protested and the judges who decided in favor of Chaudhry had taken significant political risks.

8 In Federation of Pakistan v. Moulvi Tamizuddin Khan (1955), the Federal Court (precursor to the Supreme Court) upheld the governor-general’s dissolution of the Constituent Assembly. The case is considered the first judicial approval of an executive intervention in the constitutional process in Pakistan’s history.

9 Geo News, July 20, 2007. This was from a YouTube video (http://www.youtube.com/watch?v=IuCRpgHSHSw), which is no longer available since the YouTube account associated with the video has been terminated.

10 In addition, students and human rights groups (neither of whom I have had the occasion to address in this chapter) were also an essential part of the legal complex mobilizing for judicial independence.
The members of the lawyers’ movement were focused on the broader, proactive goal of political liberalization. They wanted not only judicial independence but also limits on executive power. When Chaudhry was restored, he could not abandon the movement that had rescued him and enabled him to stand up to Musharraf. The lawyers and the media were now demanding the Supreme Court’s intervention in the forthcoming presidential election in October 2007. Returning the favor to these groups would lead Chaudhry to the second constitutional crisis on November 3, 2007.

**Back to Public Interest Litigation**

After restoration, Chaudhry recused himself from any cases involving Musharraf, but the Court resumed the governance and political functions. Chaudhry focused on public interest litigation, including high-level corruption scandals, and reopened hearings on the sugar and oil price-hike cases. In August 2007, secretaries from the ministries of finance, industries, commerce, and agriculture were summoned before the Court. As noted earlier, the NAB investigation had implicated eight ministers and other leaders for sugar hoarding.

After the PSM case, the privatization process of PSO conducted in 2007, with the help of J. P. Morgan, was challenged. A week before restoring Chaudhry, the Supreme Court had issued a stay order in the case (*Federation of Pakistan and Others v. Attock Petroleum Ltd.* 2007). After he returned, Chaudhry headed a five-member bench and extended the stay order indefinitely in order to have time to investigate the matter. He also opened the privatization of PTCL for review, which was completed in 2006 with the help of Goldman Sachs and J. P. Morgan.

But perhaps most importantly, Chaudhry reopened the politically sensitive issue of missing persons (illegal detentions). The Court heard the petition of the Human Rights Commission of Pakistan in addition to forty-eight other complaints. Because of the pressure from the Supreme Court, the regime was forced to acknowledge the detention of more missing people, and to release them. In addition, Chaudhry ordered the regime to release people who were not declared missing but who were being held without trial. In order to avoid appearing before the Supreme Court, the regime even released suspected “terrorists” who had been arrested but never charged. Chaudhry also ordered the release of a high-profile political prisoner, Javed Hashmi, who had been detained since 2003 for criticizing the regime.
Benazir Bhutto had been in exile since 1998 to avoid corruption charges led during Nawaz Sharif’s 1997–9 term. The Musharraf regime had pursued the charges despite eight years of failing to convict her. Musharraf’s military regime had established its legitimacy after the 1999 coup, based on the promise to deliver “true democracy,” as opposed to the “sham democracy” of 1988 to 1999 under Bhutto and Sharif (Musharraf 2006, 164). Musharraf had amended the Constitution to include term limits for the office of prime minister in order to exclude Sharif and Bhutto, each of whom had served two (incomplete) terms as prime minister. But after the Supreme Court dismissed the reference against Chaudhry in July 2007, the regime could no longer expect the Court to serve the political function of providing for its legitimacy. Musharraf was seeking a second term in the October 2007 presidential election, and he turned to Bhutto in desperation. Seven days after the restoration of Chaudhry, on July 27, Musharraf met with Bhutto in Abu Dhabi in the United Arab Emirates to negotiate her return to Pakistan under a power-sharing deal (Bhutto 2008, 225–30). Musharraf offered to drop the charges against her (and her party members) under a so-called National Reconciliation Ordinance (NRO). He also agreed to amend the Constitution to allow her to contest for a third term as prime minister. In return, Musharraf demanded that Bhutto work with him as the president for five more years (225–30).

Since the lawyers were mobilizing to oust Musharraf, they saw Bhutto’s cooperation with him as a betrayal. They rejected the NRO and asked the Supreme Court to invalidate the ordinance. The NRO was enacted on October 5 (National Reconciliation Ordinance 2007), but seven days later the Supreme Court blocked it from going into effect. The judicial review of the NRO cast uncertainty over Musharraf’s power-sharing deal with Bhutto to legitimate the regime. Nevertheless, Bhutto returned to Pakistan on October 18, and she was not arrested despite the existing charges against her.

In a counterbalance move, while blocking the return of Bhutto, the Chaudhry Court encouraged the return of Nawaz Sharif. After the 1999 coup, Sharif had been forced to sign an agreement with the Musharraf regime to go into exile for ten years to avoid incarceration. When the details of the Bhutto-Musharraf deal started to emerge, Sharif filed a petition under the Supreme Court’s original jurisdiction over fundamental rights to return to the country. A seven-member bench, presided over by Chaudhry, concluded that the exile agreement had no legal validity, stating that Sharif and his brother “have an inalienable right to enter and remain in [the] country, as citizens of Pakistan” (Pakistan Muslim League (N) v. Federation of Pakistan 2007).

In order to outpace Bhutto, Sharif came back to Pakistan from London on September 10, 2007. It was clear that the regime would take steps to prevent him
from entering the country, but presumably Sharif was expecting the people to pour into the streets in protest to force the regime to back down. However, Sharif’s return failed to mobilize the masses. Security officials arrested him at the airport and sent him back into exile to Saudi Arabia. In response to Sharif’s deportation, the Court initiated contempt of court proceedings against the government. A four-member bench presided over by Chaudhry held a hearing on September 28 and sent notices to several top officials (Daily Times 2007a). The respondents played dumb and shifted the responsibility from one agency to another. Before the Court could decide the case, Musharraf imposed martial law.

**Presidential Election**

Based on the Constitution, the president is elected by the Electoral College consisting of the Senate, the National Assembly, and the Provincial Assemblies. The last general election had been held in 2002 under Musharraf, and the outcome had been engineered by the military. The terms of the 2002 assemblies were coming to an end in 2007, at the same time as the president’s term. Musharraf wanted to be elected by the 2002 Electoral College in October 2007, before their general elections in January 2008. The opposition in general (with the exception of the PPP), and the lawyers in particular, demanded that the general elections be held before the presidential elections to prevent the president from being elected for another five years by the 2002 Electoral College. In addition, the Constitution provides that the president cannot hold another government office, and a presidential candidate must be retired from any government service at least two years prior to the election. The opposition and its lawyers argued that since Musharraf was still the chief of army, he could not run for president in 2007.

Lawyers, civil society, and opposition groups filed petitions against Musharraf’s eligibility to run for office under the Supreme Court’s original jurisdiction over fundamental rights. When the Court started conducting hearings, Musharraf announced that he would step down as chief of army, if elected, before taking the oath for the second term. In a 6–3 decision, the Court dismissed the opposition’s petitions on procedural grounds, holding that the Court did not have original jurisdiction since no fundamental right had been violated by Musharraf’s candidacy (*Jamat-e-Islami v. Federation of Pakistan* 2008). However, since the Court did not rule on the merits of the case, the decision left open the possibility of exercising appellate jurisdiction over the Election Commission’s decision. By not ruling against Musharraf in the first case, the Court made a strategic move. On the one hand, the Court got the opportunity to calculate the effects of abandoning the lawyers. On the other hand, Musharraf publicly accepted and welcomed the decision to bolster his legitimacy; the Court made it politically difficult for Musharraf
to defy the Court if the case were heard on appeal. This was a classic *Marbury v. Madison* (1803) action.\(^\text{11}\)

The lawyers who had supported Chaudhry were infuriated by the Court’s decision in the first Musharraf case and used two strategies. First, they came out in the streets against the Court in the same way they had come out against the regime to restore Chaudhry (Gall 2007). They decided to protest at every Supreme Court hearing in the days and weeks to come. Second, when Musharraf officially filed his nomination papers on September 27 for the presidential election, the lawyers filed the nomination papers of Wajihuddin Ahmed to run against Musharraf (Gall and Masood 2007). Ahmed was a former Supreme Court judge who had refused to take the oath under Musharraf’s PCO in 1999. His candidacy was designed for the sole purpose of having the standing to challenge Musharraf before the Election Commission (controlled by Musharraf) and then appeal the case to the Supreme Court. As in the case of organizing for judicial independence and restoring Chaudhry, the legal complex not only rallied the legal forum but also revived its methods of insurgent politics.

The Supreme Court accepted the appeal by Wajihuddin Ahmed, and just one day before the presidential election it declared that the election could go forward, but that the winner could not be officially notified until the Supreme Court decided the appeal. The result of the election was a foregone conclusion. The Electoral College, engineered by the army in 2002, reelected Musharraf for another five years on October 6, 2007. The opposition parties, except Bhutto’s PPP, resigned from the assemblies before the election to politically delegitimize the result. The PPP had to walk a tightrope. If it openly supported the regime, it would delegitimize itself. However, if it opposed the regime, it would not receive the special treatment the regime was offering it. The PPP solved this problem by making statements against the regime but taking no action in kind. The party did not resign from the assemblies, but abstained from voting in the presidential election. Musharraf won the election, but he could not declare victory because of the Supreme Court’s stay order.

Because the opposition parties (except the PPP) had rejected the election, Musharraf’s political situation deteriorated. Meanwhile, the lawyers threatened to boycott the Supreme Court – just as they had boycotted the judicial system to restore Chaudhry – if the Court did not disqualify Musharraf. From the Court’s perspective, it seemed strategic to be on the side of the lawyers and of public opinion as opposed to a seemingly dying regime. It was in this context that Musharraf imposed martial law.

\(^{11}\) In *Marbury*, Justice Marshall asserted the power of judicial review but decided the case in favor of the executive. By accepting the decision, the executive also accepted judicial review.
Martial Law and the Crackdown on the Legal Complex

On November 3, 2007, Musharraf suspended the Constitution and declared an “emergency” (Proclamation of Emergency 2007). The emergency was, in effect, martial law designed to crack down on the bench. Musharraf promulgated a PCO stating that “the Supreme Court or a high court and any other court shall not have the power to make any order against the President or the Prime Minister or any person exercising powers or jurisdiction under their authority” (Provisional Constitution Order No. 1, 2007). When Musharraf ordered the ninety-six judges of the Supreme Court and the high courts to take an oath under the PCO, sixty-four judges refused, so Musharraf appointed new judges to replace them. The reconstituted bench, led by Abdul Hameed Dogar as the chief justice, upheld Musharraf’s election as well as the NRO (Wajihuddin Ahmed v. Chief Election Commissioner 2008). The regime cracked down on the lawyers’ movement. The recalcitrant judges were placed under house arrest, and more than five thousand lawyers and activists were detained in jails (National Lawyers Guild and LUMS Rule of Law Project 2008; Human Rights Watch 2007). Musharraf also issued presidential ordinances to curb the electronic and print media (Pakistan Electronic Media Regulatory Authority (Third Amendment) Ordinance 2007; Press, Newspapers, News Agencies and Books Registration (Amendment) Ordinance 2007) and closed down several television stations.

Judicial Power in Theoretical Perspective

The period between Chaudhry’s restoration (June 20, 2007) and martial law (November 3, 2007) provides several theoretical insights about judicial power and the legal complex.

Judicialization of Politics

The Chaudhry Court was interested not only in shaping the electoral politics but also in advancing its own institutional interests. As Bhutto’s return was Musharraf’s response to the empowered bench, the Court blocked the NRO in an attempt to prevent her from coming back. The Court also allowed Sharif to return in order to level the electoral playing field and to entrench the judicial support structures in the event of Bhutto’s return. Similarly, the Court’s refusal to intervene in the first Musharraf case, but its intervention in the second, indicates how the Court strategically picked battles, weighing its political and institutional interests by tracking the direction of the lawyers’ movement and public opinion, as well as employing the Marbury tactic. However, the Court underestimated the regime’s ability to resort to constitutional deviation.
The main force that initiated the judicialization of politics was the public interest litigation in response to the discontents of economic liberalization. However, when the Court survived the regime backlash with the help of the legal complex, it was emboldened to continue the trajectory of transforming its political function to political liberalization. Riding on the wave of the lawyers’ movement, the media, and public opinion, the Court aggressively pursued direct confrontation with the regime. However, since judicial power was not a result of an implicit bargain with the regime, the Court eventually had to face raw political facts in the form of martial law.

The Legal Complex between Legal and Insurgent Mobilization

When does the legal complex use not only legal strategy but also insurgent politics? What are the conditions under which we can expect a mobilization of the legal complex in the streets, in addition to the courts? The organizational capacity of bar associations can marshal lawyers in a systematic way, comparable to political parties. If the lawyers and judges who are willing to struggle for political liberalism are able to consolidate the control of bar associations, then we can expect a well-organized movement of the legal fraternity extending to rallies and protests. However, a consolidated bar leadership alone cannot explain the historic mobilization of lawyers in Pakistan.

From a comparative perspective, there are many instances when the bar leadership in a country coalesces and organizes for political liberalism but does not use the streets. The leadership of protests and rallies remains with opposition parties and human rights groups. In such cases, lawyers often march in the streets, but in their capacity as political party officials and activists rather than legal professionals. For example, Moustafa (2007a) shows that the activist lawyers in Egypt were part of the Muslim Brotherhood, human rights groups, or liberal opposition parties. Similarly, Ginsburg (2007, 52) shows how lawyers in Korea joined academics and student activists, forming the People’s Solidarity for Participatory Democracy in order to mobilize for political liberalism in the 1990s (52). In these cases, the lawyers focused on legal strategy or formal politics, whereas the activists organized the rallies.

What differentiates Pakistan from such cases is the role of its political parties. When Bhutto was planning to return to Pakistan under a power-sharing deal with Musharraf, the PPP was unwilling to sabotage this deal. Sharif’s deportation without any significant protests makes it clear that PML(N) was unable to take action, even when his return was imminent. In Pakistan’s political context, the legal complex assumed the leadership of the protest movement to demand the end of the Musharraf regime and the transition to democracy.
CONCLUSION AND RECENT DEVELOPMENTS

This chapter examines the Chaudhry Court in Pakistan during the Musharraf regime to make two points. First, the expansion of judicial power in Pakistan can contribute to our understanding of courts in authoritarian regimes. The case study demonstrates how courts can expand power by deviating from the expected functions of investor assurance, blame acceptance, social control, and regime legitimation. The expansion of public interest litigation in Pakistan as a response to the pathologies of economic liberalization describes a virtuous cycle of judicial power – one that ended in Musharraf’s suspension of Chaudhry. Second, the lawyers’ movement to restore Chaudhry can contribute to the emerging literature on the legal complex and the struggles for political liberalism through a focus on the politics of reciprocity between the bar and the bench. This case study demonstrates the role of the bench in influencing bar politics at crucial moments to consolidate judicial support structures. The study also demonstrates the capacity of the legal complex to struggle for judicial independence and democracy not only through formal and reactive means but also through insurgent and proactive methods of social movements. If the conditions are ripe, the mobilization of the legal complex (triggered by an attack on the judiciary) can make the bar and the bench crucial forces in the struggle for political liberalism (Halliday 2008). But in the end, judicial power has its limits. As long as the courts follow implicit bargains with the regime, and the benefits of judicial independence outweigh the costs of backlash, the regime tolerates the courts. The erosion of this delicate balance leads to constitutional crises.

Even though the lawyers’ movement and the Supreme Court were first crushed by Musharraf, the mobilization of the legal complex opened the door for democratization in Pakistan. Musharraf’s popularity was decreasing even before the judicial crisis, but the dismissal of Chaudhry developed a political crisis from which Musharraf was never to recover. I now conclude by outlining the developments after the November 3, 2007, declaration of martial law.

In February 2008, general elections were held in Pakistan. After Bhutto was assassinated during the campaign, her widower Asif Ali Zardari emerged as the PPP chairman. The PPP won the plurality of seats in Parliament and decided to form a coalition government with the PML(N). The two political challenges facing the elected parties were the restoration of judges and the removal of Musharraf from the presidency. Zardari and Sharif met in Murree in March 2008, and, as a condition for cooperation, pledged to restore the judges (The News 2008). While the PPP’s Yousaf Gilani became prime minister, the new government ignored the issue of restoring the judges.
In this context, the lawyers’ movement, allied with PML(N) and other political parties, continued to increase the pressure on the PPP. The PML(N) federal ministers resigned from the coalition cabinet. The lawyers organized a march held on June 10, 2008, with an estimated two hundred thousand lawyers and political activists from all over the country converging at the Parliament in Islamabad, demanding Chaudhry’s restoration and Musharraf’s impeachment. When it became clear that Zardari could not ignore the political crisis, he met with Sharif in early August 2008 and agreed to impeach Musharraf, to restore judges within one day of Musharraf’s removal, and to elect a nonpartisan president unless Musharraf-era presidential powers were repealed (Associated Press of Pakistan 2008).

Musharraf, facing impeachment, resigned on August 11, 2008. However, Zardari backed off from his agreement to restore the judges and to elect a nonpartisan president. At this stage, Sharif’s PML(N) formally withdrew from the coalition in the federal government. Zardari contested the presidential election and assumed the office of president on September 9, 2008. In brief, Zardari used the prospect of a consensus government and restoration of judges to sideline the opposition and consolidate control over the federal government.

After Zardari’s election as president, the PPP embarked on dismantling the lawyers’ movement. First, the PPP engineered a countermovement against the lawyers movement. Just as Chief Justice Chaudhry had traveled across the country to address local bar associations, the PPP lawyers invited Chief Justice Dogar to bar associations in interior Sindh, where the lawyers had influence. Second, the PPP broke the solidarity of the sixty-four Supreme Court and high court judges who had stood by Chaudhry and who had refused to take the oath under the PCO; fifty-eight judges accepted reappointment without insisting on Chaudhry’s reinstatement. In the end, the issue of the restoration of judges was reduced to Chaudhry and a few other judges.

In response to the counter-movement, the legal complex went on a public relations tour to the United States, recognizing the American influence on Pakistani policy. Aitzaz Ahsan lobbied in Washington, DC, and New York, and Chief Justice Chauhdry delivered lectures at US law schools. While disappointed by the new government, the movement retained the support of opposition parties, in particular the PML(N). Amid concerns that the opposition was using the lawyers to destabilize the PPP government, the pro-Chaudhry lawyers organized another march on March 15, 2009, for a dharna (sit-in) at Parliament, to last until Chaudhry was restored. Ultimately, a last-minute intervention from General Ashfaq Kayani and US Secretary of State Hillary Clinton pressured the government to restore Chaudhry, thus ending the confrontation.

The lawyers’ movement against the Musharraf regime and the PPP government is one of the few effective struggles against state power at the national level.
in Pakistan’s history. The movement set off events that allowed Bhutto and Sharif to each return from exile; forced Musharraf to resign as the army chief and to hold relatively free general elections; and pushed the Parliament to impeach Musharraf, thereby forcing him to resign from the presidency. Ironically, the bar and the bench had to engage in another struggle against the democratic government of the PPP to restore Chaudhry. The movement allied with opposition parties, lobbied US policy-making circles, and used insurgent methods to finally restore the chief justice. Despite some of the movement’s contradictions, the historic struggle has made the bar and the bench emboldened in completing the transition toward political liberalism in Pakistan.

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STATUTES AND ORDINANCES