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ACCOUNTABILITY AMIDST FRAGILITY, CONFLICT, AND VIOLENCE: LEARNING FROM RECENT CASES

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Notes on Contributors	iii
Introduction: Accountability Amidst Fragility, Conflict, and Violence: Learning from Recent Cases Anuradha Joshi	1
Myanmar's Top-Down Transition: Challenges for Civil Society David Brenner and Sarah Schulman	17
Youth-Led Anti-Corruption Movement in Post-Conflict Guatemala: 'Weaving the Future'? Walter Flores	37
Empowerment without Accountability? The Lawyers' Movement in Pakistan and its Aftershocks Maryam S. Khan	53
Localising National Accountability Claims in Fragile Settings: The Right to Food Campaign in India Anuradha Joshi and Aheli Chowdhury	73
Civilian Action in Conflict Settings: The Case of Colombia Patricia Justino	95
Glossary	113

Empowerment without Accountability? The Lawyers' Movement in Pakistan and its Aftershocks¹

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Abstract This case study on the Pakistan Lawyers' Movement and its aftermath aims to add to our knowledge of judicial empowerment processes, particularly the role of lawyers in mobilising for an independent judiciary, and the conditions for political lawyering as an effective pathway to judicial empowerment. In exploring these processes and conditions of empowerment, the study also examines their relationship with the longer-term outcomes of empowerment as well as the nexus between judicial empowerment and accountability of legal institutions. The study marshals evidence from multiple sources – including 35 qualitative interviews with movement leaders and participants, and a representative survey of active litigators in the Lahore District judiciary – to show, firstly, that the conditions that create successful mobilisation for judicial empowerment can significantly limit the systemic benefits of such mobilisation and, secondly, that the conditions for and the pathway to empowerment may deeply constrain the accountability of the empowered actors and institutions.

Keywords: Lawyers' Movement, political lawyering, legal mobilisation, judicial empowerment, accountability, Pakistan bar, legal complex, legal professions, sociology of lawyers, social movements.

1 Introduction

The 'Lawyers' Movement' in Pakistan – that began in early 2007 and culminated two years later in the restoration of judges removed by a military regime – prompted worldwide interest in the potential for political lawyering. The movement offers an unparalleled example of professional mobilisation in support of the judiciary. Triggered by the unconstitutional removal of the Supreme Court Chief Justice Iftikhar Chaudhry by then military dictator General Pervez Musharraf, the movement sustained for two years through rapidly evolving political circumstances. It had two palpable outcomes: the downfall of the

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Musharraf regime and a transition to electoral democracy; and the reinstatement of the Chief Justice and other illegally deposed judges from the Supreme Court and the provincial High Courts. Rule of law and independence of the judiciary were hailed as legacies of the movement (Kausar 2012).

This case study aims to address the deficit in our knowledge of judicial empowerment processes, particularly the role of lawyers in mobilising for an independent judiciary, and the conditions for political lawyering as an effective pathway to judicial empowerment. As a singular example of political action by lawyers, the movement eludes existing typologies of legal mobilisation, such as 'cause lawyering' (Sarat and Sheingold 1998), 'political lawyering' (Minow 1996), or 'lawyering for social movements' (McCann 2006; Sarat and Sheingold 2006). Lawyers were the principal movement activists and deployed diverse forms of political action – both within and without the courtroom, involving subversive strategies such as street mobilisation and court boycotts – to restore the judiciary. Much as Pakistan's example demonstrates that 'political lawyering' can be a major determinant of judicial empowerment, it also presents sobering findings about the long-term effects of political lawyering as a pathway to achieving an independent judiciary.

The study offers two such findings, both of which are grounded in the interaction of the larger political context on the one hand with the processes and conditions of mobilisation on behalf of judicial empowerment on the other, the latter including mechanisms and strategies of political lawyering. One fundamental finding is that the movement heavily circumscribed the scope, as well as the impact, of judicial empowerment. It projected judicial power within a very narrow sphere of judicial-executive competition and mega-politics, and limited the benefits of judicial autonomy to an elite and unaccountable group of judges and lawyers.

Another major finding is that just as the movement strengthened judicial autonomy, it created political opportunities for the judiciary to simultaneously enlarge its political power and insulate itself from external checks (Kalhan 2013; Khan 2014; Siddique 2015). In other words, the context and conditions of lawyers' mobilisation set in motion parallel processes of judicial empowerment, and judicial self-preservation. Far from creating an impetus for redistributing power and resources within the judicial system or making the system more responsive to litigants, the movement produced downstream constraints for the political and institutional accountability of both lawyers and judges, the very actors who mobilised against an unaccountable military regime.

Abstracting from Pakistan's experience, the study points to two general observations on empowerment and accountability of broader relevance to political development in transitional contexts. Firstly, the context, conditions, and pathways that create successful mobilisation on behalf

of judicial empowerment have a significant bearing on the outcomes, and may indeed have the effect of inhibiting structural changes in the judicial system despite some immediate gains in autonomy. Secondly, the move towards judicial empowerment may or may not coexist with or stimulate a broad-based mobilisation for more responsive and accountable legal institutions. Paradoxically, the context, conditions, and pathways that produce judicial empowerment may create an impulse in the higher judiciary to insist on self-governance, sealing itself off from external accountability. Anchored in these two findings – the incongruence between empowerment and its outcomes, and the tensions between empowerment and accountability – this Pakistan case study tells a cautionary tale about the complex, contingent, and non-linear trajectory from judicial empowerment to an accountable and responsive judicial system.

The study is structured as follows. The first section provides a brief historical context to the Lawyers' Movement, and underlines the lawyers' political action as the key movement mobiliser. This analysis is based on a combination of qualitative sources, including news reports and legal archive material, as well as 35 stakeholder interviews with a cross-section of lawyers representing both movement leaders and participants. It seeks to explain the conditions in which the 'legal complex' – i.e. legal institutions in the aggregate, particularly the core inter-institutional network between lawyers and judges (Halliday, Karpik and Feeley 2007, 2012) – mobilised and sustained the movement. The second section shifts focus from the movement to post-movement bar politics and examines the nexus between the two, especially in relation to accountability. In addition to other sources, it presents original data from a mixed representative survey of 654 active litigators in the Lahore District courts concerning their perceptions and actions *vis-à-vis* the bar and the judiciary. The article concludes with the main findings of the study and their implications for empowerment and accountability.

2 Revisiting the Lawyers' Movement – what the evidence shows

2.1 Historical and political context

The Pakistani bar inherited its structure from colonial times (Schmittthener 1968). Apart from the Pakistan Bar Council (PBC) and its five provincial off-shoots – the regulatory bodies for lawyers – lawyers are voluntarily organised into bar associations at every tier of legal practice: from *tehsil* bar associations at the sub-district level, to district bar associations, to High Court bar associations at the provincial level, and finally to the Supreme Court Bar Association (SCBA) at the apex. There are an estimated 200 bar associations across the country. These are the loci of associational politics as well as social capital for lawyers, enabling them to engage in annual elections, coordinate activity across and within regions, and lobby for professional issues. The SCBA is a federal body composed exclusively of Supreme Court lawyers and provides the anchor for the bar's collective action at the national level. The decentralised and locally embedded network of bar associations across the country heightens the mobilising potential of lawyers (Munir 2012).

In the post-independence era, the bar retained substantial autonomy over its internal politics. In contrast, the judiciary's alignment with the increasingly militarised state deepened as Constitutional Courts became instrumental in legitimating extra-constitutional regimes (Khan 2016). Lawyers were at the forefront of two major social movements against military dictators – the first, against General Ayub Khan in the 1960s and the second, against General Zia-ul-Haq in the 1980s (known as the Movement for the Restoration of Democracy (MRD)). In both cases, the judiciary played the role of regime legitimisation, only to be heavily restrained through martial law or virtually ousted by military courts.

However, much as it is tempting to view lawyers and judges through a historical binary of pro- and anti-democracy forces, past examples of lawyers' mobilisation (or lack of it) show it is always contingent on political conditions. For instance, lawyers were active in a movement to dislodge the civilian Pakistan People's Party (PPP) government in 1977, resulting in General Zia's military coup. Lawyers have proven similarly inconsistent in mobilising for judicial empowerment. For instance, when General Zia forced then Chief Justice, Yaqub Ali, to vacate his office soon after the coup, Justice Ali's resistance provoked little reaction from the bar.

Similarly, when General Musharraf purged the judiciary after his military coup in October 1999, the refusal of 13 Constitutional Court judges to take a fresh oath barely attracted any notice. The bar's muted reaction was consistent with the general political atmosphere in favour of Musharraf (Khan 2016). Musharraf was able to further fragment political opposition by holding general elections in 2002 and creating a façade of parliamentary politics. Coordinated action within the bar built up only gradually after these elections when, in August 2002, the regime proposed amendments to the Constitution – known as the Legal Framework Order (LFO) – for entrenching the military executive.

The LFO spurred an 'anti-LFO movement' (Malik 2008; Khan 2016). Bar leaders demanded that the Constitution be restored to its pre-LFO status, and that extensions to the retirement age of regime judges – known as 'PCO judges' on account of taking oath under Musharraf's 'Provisional Constitutional Order' (PCO) in 1999 – be revoked. PCO judges, consistently loyal to Musharraf, were a major obstacle to declaring the LFO unconstitutional. In early 2003, bar representatives established a 'National Action Committee' (NAC) – comprising executives of all bar organisations – as a channel for coordinated decision-making and mobilisation across the country. The NAC was instrumental in organising anti-LFO protests over the next two years.

The highlight of the NAC-led movement came in late 2003 when the Musharraf government withdrew the judicial tenure extension. Simultaneously, however, parliament approved Musharraf's controversial Seventeenth Constitutional Amendment ('17th Amendment'), taking the steam out of the bar's advocacy on issues of general importance such as

restoration of the Constitution and regime change. Nonetheless, many anti-regime lawyers continued to agitate on these issues, and prominent players among them later became the vanguard (Halliday *et al.* 2012) of the Lawyers' Movement (Jaffrelo 2015).

Viewed together, the anti-Zia mobilisation in the 1980s and the anti-LFO movement underscore lawyers' capacity to mobilise against extra-constitutional regimes in the absence of political party mobilisation. In both instances, lawyers' action preceded political party involvement. However, there is an important qualifier: while political lawyering may be highly effectual in matters directly affecting the institutional and corporate interests of the legal profession, it is unlikely to be successful on broader political issues without a convergence with constituencies outside the bar. Hence, although anti-LFO lawyers were successful on narrow grounds – halting the proposed extension to judicial tenure – they could not thwart the 17th Amendment without political party cooperation.

2.2 The Lawyers' Movement

When Iftikhar Chaudhry became the Supreme Court Chief Justice in June 2005, the relationship between anti-regime lawyers and judges was largely oppositional. As a Supreme Court judge, Chaudhry had decided in favour of the Musharraf regime in political cases between 2000 and 2005. As Chief Justice he took cognisance of several cases involving government corruption and human rights violations (Khan 2014). Some of his judgments had elements of anti-regime judicial activism, but much as some lawyers may have perceived them as a brewing challenge to the military establishment (PILDAT 2007), influential sections of the bar leadership maintained an oppositional posture towards the Supreme Court, not least because of Chaudhry's reputation as a close aide of Musharraf and what interview respondents describe as his brusque, at times even hostile, courtroom demeanour.

On 9 March 2007, Musharraf summoned the Chief Justice and, in the presence of senior military and intelligence officials, pressured him to resign over multiple allegations of misconduct. The Chief Justice courageously refused. Almost immediately, the media broke news of the incident, repeatedly televising images of Chaudhry flanked by military personnel. The same day, a hastily convened Supreme Judicial Council (SJC) – the body with exclusive powers for removing Constitutional Court judges – suspended the Chief Justice pending adjudication of a Presidential Reference against him (Iqbal 2007). A few days later, lawyers swarmed onto the streets in a show of angry resistance, triggering a larger mobilisation in the ensuing weeks of lawyers, civil society activists, and political party workers.

A large majority of interview respondents suggested that the decay that had set in the Musharraf regime and the larger political context of growing anti-regime sentiment were critical to the mobilisation. Many also viewed this incident as an attack on the legal fraternity as a whole.

These sentiments seem to point less to Chief Justice-centred motivations for the movement and more to institutional ones of preserving bar and bench autonomy against an extra-constitutional regime.

The movement evolved through shifting political conditions over the two years that followed. In the first phase, lawyers mobilised to reinstate the Chief Justice. They used a combination of street mobilisation – involving weekly strikes and protests, and countrywide circuits of bar associations with the Chief Justice himself – and strategic litigation, forcing a transfer of the Presidential Reference from the SJC to the Supreme Court for open proceedings. The media spontaneously allied with the protestors, reporting on the protests around the clock and publicising instances of police force. The factor that imparted a deep sense of cohesion and purpose to what was otherwise spontaneous collective outrage was the strategic action of bar representatives who quickly emerged as movement leaders. In a matter of days, these leaders brought mobilising lawyers under their control and organisation, catapulted the legal fraternity into the media spotlight, and adopted the Chief Justice as a rallying symbol for their anti-Musharraf struggle. A few months later, an emboldened Supreme Court dismissed the Reference and reinstated the Chief Justice.

In the post-reinstatement phase, lawyers once again deployed a combination of tactics both within and without the courtroom to buttress the court's growing anti-regime activism in a bid to block Musharraf's re-election as President and to force a transition to civilian politics. While the first phase was largely about *lawyers empowering judges*, this second phase set in motion a cycle of *mutual empowerment*.

In the third phase, the movement suffered a major setback when Musharraf imposed emergency rule in November 2007 to block the court's ruling against his dual office of President and army chief (Qureshi 2010). The regime backlash against the court's activism resulted in a massive judicial purge – over 60 Constitutional Court judges were dismissed and put under house arrest (Human Rights Watch 2007). A newly installed Supreme Court, with new PCO judges headed by a new Chief Justice, swiftly validated the emergency (Khan 2016). After the emergency was lifted in December 2007, lawyers launched the movement afresh and re-defined their objective in terms of restoring the judiciary to its pre-emergency status, making a conscious choice to eschew court-centred strategies in favour of street mobilisation and subversive activities such as court boycotts.

The movement's fourth phase began with the electoral transition in February 2008. The newly elected coalition government headed by the PPP ordered the release of all detained judges and lawyers, with a commitment to restore the judges in the near future. Movement leaders immediately rallied around the deposed judges and assimilated them into their street mobilisation. This led to a unique legal complex configuration outside the formal institutional space, with lawyers

and judges pursuing a harmonised agenda. For the next few months, movement lawyers and deposed judges were locked in a relationship of mutual support, as the government repeatedly reneged on its commitment to restore the judges. The first ‘long march’ of June 2008 – in which lawyers were joined by civil society actors in an overwhelming show of support and strength – marked the apogee of the movement. However, differences among bar leaders and between them and young lawyers over continuing a sit-in outside the Supreme Court at the conclusion of the long march threatened to disintegrate the internal command of the movement.

This led into the movement’s fifth phase, a period of flux in which the ruling coalition of the PPP and the Pakistan Muslim League-Nawaz (PML-N) sought to regain political control by leveraging international support to impeach President Musharraf. Musharraf pre-empted impeachment by resigning in August 2008, allowing the PPP to consolidate its position by electing its own co-chairperson as President. Movement lawyers attempted to directly lobby the government for restoration of the remaining judges (Haq 2008), thus actively pursuing political party cooperation while continuing with street-based politics. However, with the resurgence of political party control, the legal complex crumbled as a large majority of deposed judges returned to the bench after taking a new oath (Abbas and Jasam 2009). In March 2009, a second ‘long march’, supported by the PML-N and allegedly backed by a negotiated political agreement involving the new army chief, culminated in the restoration of the remaining deposed judges (Khan 2016).

2.3 What made the movement possible? Analysing the enabling conditions

The Lawyers’ Movement, while sharing some commonalities with past examples of lawyers’ political action in Pakistan, is truly unprecedented. One key distinction is its *immediate impact*: the movement restructured the bargaining positions of the regime *vis-à-vis* political parties, fomented the political space for a transition to civilian rule while forcing out the incumbent dictator, and succeeded in restoring illegally deposed judges (Munir 2012). Moreover, the *mechanisms and strategies* deployed by lawyers also stand out in three important ways. Firstly, lawyers were the *principal movement activists*; as such, they eclipsed the role of political parties and other actors at crucial points in the movement, and mobilised more intensely and consistently than any other group. Secondly, the *forms of political action* that the lawyers used were unconventional and highly tactical. Though lawyers in Pakistan have previously relied on street mobilisation, the strategic way in which they switched from one action to another, or adopted parallel methods when the situation necessitated, or made voluntary coalitions for achieving short-term goals, gave the movement a very different character.

Finally, the bar’s *insistence on autonomy* was also something new. Lawyers claimed to represent causes independent of what they viewed as the parochial agendas of political parties. Thus, lawyers did not perceive their role as auxiliaries to political parties as was the case in past social

movements such as the MRD in the 1980s. Instead, they pushed for their own goals as well as their own narrative, even as they sometimes welcomed parallel support from political parties and civil society groups.

What were the broader conditions that made this kind of political action for judicial empowerment possible? The evidence suggests that the movement was predicated on six interlocking conditions: (1) a historically organised bar with high mobilising potential; (2) deepening political consensus within the bar in opposition to the incumbent military regime; (3) broad anti-regime convergence of political constituencies within and without the bar; (4) absence of a united political opposition and/or low potential for a political party-led mobilisation; (5) functional courts with judicial review powers; and (6) a visible cause-generating event linked to the institutional interests of the bar.

The first two conditions – namely, an organised bar with high mobilising potential, and an intra-bar political consensus against unconstitutional regimes – are common to most instances of political mobilisation by lawyers in Pakistan (Rizvi 2015). Parallels between the Lawyers' Movement on the one hand, and the MRD and anti-LFO movements on the other, testify to the institutional capacity of the bar to engage in collective action, and to do so through unconventional techniques, including disruptive and subversive practices such as strikes, boycotts, and mass street mobilisation. The historical parallels also point to a broad oppositional consensus within the bar against military rule. However, this consensus has seldom been immediate and spontaneous. In the 1980s as well as the 2000s, the consensus against military government within the bar deepened only gradually and was contingent on active bar politics. The passage of time helped the cause of politically motivated lawyers as the negative consequences of military rule became more apparent, and as the initial euphoria that characterised the coups turned to ambivalence, if not antagonism.

The third condition – a broad convergence of anti-regime constituencies – is also apparent in all successful mobilisations. In both the MRD and the Lawyers' Movement, at least some if not all mainstream political parties supported the bar's anti-regime political action at crucial moments. When this broad convergence thinned out, the mobilisation too experienced a downturn.

In addition to historical similarities, differences between the Lawyers' Movement and past mobilisations also shed light on other conditions of mobilisation. One major difference lies in the nexus between the political action of lawyers and political party opposition. For instance, in the 1980s, the goal of lawyers' mobilisation was to facilitate a revival of political activity on behalf of political parties that were deeply suppressed under martial law. Lawyers played a central role in unifying anti-regime parties under the common platform of the MRD, with the parties building on the efforts of the lawyers to foment a mass social movement.

In contrast, in the early 2000s, anti-regime lawyers had to contend with a divided political opposition. Unlike Zia, Musharraf made good on his promise of holding elections within three years of his coup, ensuring that there was less incentive for political parties to create a strong opposition coalition. As parties sought opportunities for reconciliation with the military regime, not only did lawyers come to view them with circumspection, they also capitalised on the political space open to them to define and execute their own agendas. This allowed lawyers to maintain institutional autonomy even as they engaged in unprecedented strategies for judicial empowerment. From this, one may surmise that the nature of political party opposition pre-mobilisation significantly determines the degree of autonomous agenda-setting in political lawyering.

Another major difference in the Lawyers' Movement was the status of the judiciary. Unlike General Zia's clampdown on Constitutional Courts and indefinite suspension of their fundamental rights jurisdiction in the 1980s, Musharraf's government initially tolerated the courts as part of its international rhetoric on 'guided democracy' and 'rule of law' (Talbot 2002), and took a calculated risk in permitting them to exercise their inherent judicial review powers. Moreover, while the Constitution remained suspended for seven years under Zia, Musharraf revived it within three years as a prelude to elections. This early revival of the Constitution allowed the courts much greater agency and kept open the possibility of lawyers pushing legitimacy-seeking judges into mounting a more effective challenge to the regime. In other words, it created an arena for judges to cooperate with anti-regime lawyers. In the absence of a united political opposition, a mutually supportive legal complex emerged.

Finally, the extraordinary and mutually empowering alliance between lawyers and judges may not have materialised had it not been for the media-driven spectacle of the Chief Justice's defiance at a time when political opposition to Musharraf was high, and an organisational machinery already in place for coordinated action by anti-regime lawyers. The 'pre' mobilisation greatly enhanced the likelihood that an incident of this nature could be used to coalesce an otherwise politically diverse, and at times divided, bar. So, although the removal and bold insubordination of the Chief Justice were cause-generating factors, the fact they happened within the context of a larger political consensus against the military regime was a necessary condition for successful mobilisation.

3 Post-movement politics – whither accountability?

3.1 From movement to post-movement politics

The larger political context, combined with the mechanisms and strategies of activist lawyers, created downstream constraints in the aftermath of the movement for the accountability of both judges and lawyers. Firstly, the military regime's assault on the judiciary perpetuated a binary in the movement narrative between judicial empowerment and regime accountability. Lawyers viewed empowerment and accountability as inhabiting two different and

competing spheres: the judiciary on the one hand and the executive on the other. Especially from the third phase onwards, when the large-scale dismissal of judges made their restoration synonymous with judicial independence, it was impossible for the movement narrative to simultaneously accommodate the goals of judicial empowerment and accountability. This binary carried over into the post-election period because of the civilian government's reluctance to restore the judges. Thus, there was an inevitable delay in the emergence of constituents within the bar for judicial accountability as well as of a general discourse on accountability in the bar and the bench.

Secondly, lawyers' strategies of popularising the judges, and particularly Chief Justice Chaudhry, created a cult of personality. Chaudhry's self-projection as a populist judge was evident in the zeal with which the post-restoration Supreme Court deployed its *suo motu* powers and mounted challenges to the civilian government (Khan 2014).

Thirdly, the delays in and the modality of the final restoration of the judges in March 2009 – through a long march supported by PML-N against the reluctant PPP-led government – created an environment of distrust between the restored judges and the government. In order to ensure fidelity to their agenda of judicial independence, the restored judges, led by the Chief Justice, embarked on a plan to reorganise Constitutional Court membership. In their view, the courts needed to be purged of 'illegitimate' judges: namely, PCO judges who took oath under Musharraf's emergency law in 2007, as well as those who took oath under Chief Justice Dogar after the emergency and, again, after the ousting of Musharraf in August 2008. The chasm between the core group of judges and the government, and by extension the wider circle of judges legitimised by the ruling government, largely explains the Chief Justice's motivation for the purge (Kalhan 2013). Arguably, this reshuffling was a form of judicial accountability, but only in the very narrow sense of removing judges ostensibly loyal to the Musharraf regime (Gazdar 2009). Indeed, sections of the bar, including many former supporters, accused the Chief Justice of vendetta, and of stacking the courts with his own loyalists (Walsh 2013).

All these factors – the movement's focus on judicial empowerment, the rise of judicial populism, the re-entrenchment of the Chief Justice in the Supreme Court, and the judiciary–government conflict in the post-Musharraf era – collectively contributed to a hyper-activist apex court asserting its newfound normative authority over a fragile civilian government during Chaudhry's tenure from 2009 to 2013 (Kalhan 2013). This post-movement period of judicial assertion opened up rare opportunities for the judiciary to arrogate to itself executive powers, notably the power of judicial appointments in the Constitutional Courts (Ijaz 2014; Oldenburg 2016). The power to select judges was a major arena of contestation between the judiciary and the executive as well as the legislature. Originally, the Constitution authorised the President to appoint and promote judges in consultation with the Chief Justice.

In 2010, the new civilian government introduced a two-tiered participatory process involving the judiciary, bar, and parliament to minimise judicial–executive conflicts and court-packing. However, the Supreme Court overrode this amendment by extinguishing parliamentary oversight from the appointments process (Kalhan 2013). The result was a hegemonic role for the Chief Justice in Constitutional Court composition, as he presided over the selection, promotion, and removal of judges (Rahman 2017). Hence, far from creating conditions for making the judiciary more inclusive and accountable, the political transition to civilian rule in the aftermath of the movement enhanced the power of the Supreme Court while concurrently allowing the judiciary to insulate itself from external accountability (Kalhan 2013; ICJ 2013; Khan 2014; Siddique 2015).

In the five years since Chief Justice Chaudhry’s retirement in 2013, five Supreme Court Chief Justices have peacefully completed their tenure. During this period, the court has decided many major political cases – the most recent being a series of judgments between 2017 and 2018 disqualifying the incumbent Prime Minister, Nawaz Sharif, on corruption charges (Bhatti 2018). Thus, it appears that the Lawyers’ Movement has had enduring judicial empowerment outcomes in the form of security of tenure for judges. At the same time, the litany of criticisms against the judiciary, and especially the Supreme Court, has expanded.

The gravamen of these criticisms is that while the court’s political impact and autonomy have increased, it has not only deliberately eschewed questions of judicial accountability but also failed at deeper institutional reform and a fairer distribution of resources to the district courts, the backbone of the judicial system. Litigants who frequent these lower courts continue to suffer as before from neglect and reform inertia (Siddique 2013). Thus, the gains in judicial independence appear to be limited in two ways. Firstly, they relate to a very narrow sphere of governmental accountability on mostly political and governance-related matters, with the Supreme Court acting as an arbiter of mega-politics and the fate of elected governments (Kalhan 2013; Khan 2014; Siddique 2015). Secondly, empowerment gains have not cascaded down to the district judiciary, notwithstanding the Supreme Court’s posturing on judicial reform through the 2009 National Judicial Policy (Siddique 2013).

3.2 Bar politics and accountability bottlenecks

Many of the Supreme Court’s critics are erstwhile leaders and active movement mobilisers. Why, then, has the bar not engaged in effective collective action for judicial accountability? The following analysis shifts the focus to post-movement bar politics to explore why Pakistan’s lawyers are weak pro-accountability actors and whether there is any scope for their political action on accountability-related issues.

It is important to highlight at the outset that just as the judiciary suffers from an accountability deficit, the bar is riven by its own problems

which appear to be heightened in the aftermath of the movement. One key issue is the rapid decline in lawyers' moral social standing. In just a few years, lawyers' public image has gone from heroes to 'hooligans' (Leiby 2012; Mir 2017). Lawyers are increasingly violent and disruptive both inside and outside the courtroom, against other lawyers, police, litigants, and even judges – a phenomenon described in local parlance as '*wukala gardi*'. It is widely felt that the movement has emboldened lawyers, particularly younger lawyers, to use their 'newly-discovered power of defiance' to undermine the legal system (Rizvi 2015).

Interview respondents speculate that the 'hooliganism' is a result of incompetent lawyers rising to prominence based on their fidelity to the movement, or because generally lawyers have become emboldened about agitating against judges, or both. *Wukala gardi*, although perceived as normalised only among a minority of the legal community, raises serious doubts about lawyers' agency for judicial accountability and also lawyers' own discipline and accountability.

Be that as it may, the bar is not devoid of a constituency for judicial accountability. The first post-restoration bar association elections – held in the SCBA in October 2009 – demonstrated an even split between support for and opposition to veteran lawyer and movement leader Hamid Khan and his 'Professional Group' on the question of judicial accountability. This intra-bar split emerged, partially, in reaction to Chief Justice Chaudhry's decision to purge the judiciary and wrench control of judicial appointments from parliament. The main contention of the Professional Group was that the bar must strive to consolidate movement gains by buttressing the restored judiciary's powers despite the democratic transition. That Khan's presidential candidate for the SCBA secured a marginal victory not only signalled shifting alliances at the bar's highest levels, but also a return to ordinary politics for the bar.

In 2010, Asma Jahangir – a lawyer and social activist who rose to eminence in the 1980s for her anti-Zia resistance and human rights advocacy – defeated Khan's candidate to become the first female SCBA President (Dawn 2010). Since then, elections in the SCBA as well as bar associations across Punjab have been dominated by two factions: Hamid Khan's pro-judiciary Professional Group and Asma Jahangir's pro-accountability 'Independent Group'. The latter has argued against judicial arbitrariness and pushed for greater accountability in the wider context of the struggle for civilian political supremacy (*Express Tribune* 2011).

Despite the existence of a pro-accountability constituency, it appears that lack of cohesion in the bar leadership is an important factor inhibiting effective political action, especially because of the nature of the cleavage. The fact that the split was grounded in the very issue of judicial accountability with an entrenched 'pro-judiciary' group in favour of the *status quo*, impeded political action to address the accountability deficit. In addition, the pro-accountability group

was seen to have its own accountability deficit insofar as it claimed to represent the interests of PCO judges removed by Chief Justice Chaudhry (Sheikh 2012), fuelling the impression that the group's primary agenda was to settle scores with Chaudhry and his allies.

Another factor that has compounded the lack of cohesion in the bar is the nature of coalitions between a cross-section of lawyers and Constitutional Court judges. Of the interview respondents active in bar politics, several criticised what they perceived to be clientelist relationships between judges – ostensibly beneficiaries of the movement – and pro-judiciary lawyers in the movement's immediate aftermath. The judiciary's hegemony over judge selection brought about a wider shift in the way that power and privileges were allocated in the legal complex. Previously, the selection power was shared between the executive and the judiciary, with the former typically trumping the latter. Post-movement, power came to rest firmly with the Supreme Court, incentivising lawyer–judge nepotism (*Express Tribune* 2012) that effectively thwarted political action for judicial accountability, with lawyers vying for leverage in the judiciary and judges maintaining constituencies in the bar for their judicial activism. Equally, the near-unconditional support from strong sections of the bar in the post-restoration period allowed the court to drag its feet on resuscitating the SJC (Niazi 2016).

The accountability bottlenecks in the Constitutional Courts – namely the cleavage in the bar on the question of accountability and the clientelist cooperation between exclusive groups of lawyers and judges – flowed directly from the movement-centred trajectory of judicial empowerment. Almost a decade after the restoration, a majority of survey respondents still echo this view: when asked whether they thought the current dynamic between the bar and the bench was attributable to the movement, 40 per cent said 'highly' or 'very highly' and 34 per cent said 'partially'.

3.3 The 'new' legal complex

The accountability bottlenecks point to an underlying structure within the legal complex that is based on mutuality between segments in the bar and the bench. This structure instantiates a 'cross-cutting' legal complex (Halliday *et al.* 2012) in which, at any given time, a cross-section of lawyers and judges cooperate for mutual entrenchment while the larger bar–bench relationship ranges from unengaged to oppositional. Over time, the divide between the Professional and Independent Groups has become as much about pro-judiciary and pro-accountability as about the politics of entrenchment and elite capture. This is reflected in the near-unanimous opinion of survey respondents (89 per cent) that bar representatives should have a greater role in the judicial appointments process. This configuration is markedly different from the pre-movement legal complex that consisted of a pro-regime and anti-regime cleavage. It is also very distinct from the legal complex underpinning the movement in which, broadly speaking,

the bar cohered around the anti-regime group to build a cooperative legal complex against a third party, the regime. In the present cross-cutting legal complex, cooperative and oppositional segments coexist in tension but are also fluid and contingent on alliances with the evolving locus of power within the higher judiciary.

The mixed survey responses reflect this complexity. When asked to characterise the present bar–bench relationship, 35 per cent said it was ‘highly cooperative’ or ‘cooperative’, while 21 per cent said, ‘highly conflicted’ or ‘conflicted’. A majority (44 per cent) thought that the relationship was ‘neither cooperative nor conflicted’. When asked about the main reasons for the bar–bench conflict, there were varied responses with the most recurrent being, ‘the attitude of lawyers and judges with each other creates conflict’ (25 per cent) and ‘leaders of the bar are to blame for the bar–bench conflict’ (11 per cent). A high 90 per cent of all respondents were in favour of greater bar–bench cooperation.

Nonetheless, this cross-cutting legal complex is not a static configuration and tends to gravitate to oppositional mode under conditions threatening the bar. This typically happens when the judiciary makes a direct attempt at holding lawyers – particularly bar office holders – accountable for misconduct against judges. An example is the recent ‘Multan Bench controversy’, triggered by an altercation between a Lahore High Court (LHC) judge sitting on a bench in Multan and the President of the Multan Bar Association, Sher Zaman Qureshi. Courtroom confrontations between lawyers and judges, often involving threats and violence, are not uncommon and are widely publicised in the media. On this occasion, an allegedly heated exchange between the judge and Qureshi spiralled into a mob-like reaction from Multan district bar lawyers.

In response, the LHC Chief Justice, Mansoor Ali Shah – known for his pro-accountability interventions against both lawyers and judges (Husain 2016) – immediately recalled all judges on the Multan Bench, and constituted a new bench which suspended Qureshi’s licence and issued him a show cause notice for contempt of court. Qureshi refused to appear and lawyers aggressively protested in Justice Shah’s courtroom. Subsequently, when the LHC issued an arrest warrant for Qureshi, lawyers clashed violently with anti-riot police (Malik 2017b).

When asked about their views on these events, survey respondents had remarkably homogeneous reactions against Justice Shah’s interventions: almost 87 per cent disagreed with the recall of Multan Bench judges, and 84 per cent did not support the decision to suspend Qureshi’s licence and issue him a contempt notice. Thus, contrary to the view that bar–bench standoffs are essentially conflicts between pro-accountability judges such as Justice Shah and elite lawyers (Husain 2016), lawyers across the board appear to be strongly opposed to the judiciary taking direct disciplinary action against bar members. Lawyers also believe that the judiciary is sidestepping the rising number of complaints

of judicial misconduct in the SJC. An overwhelming 90 per cent of respondents wished to see the SJC functional again. Taken together, these figures show a strong self-preservation instinct, a clear preference for self-accountability, and a high demand for judicial accountability through the SJC. The politics of self-preservation can be further gauged from the fact that, barring exceptions such as Asma Jahangir, there was little public condemnation by senior bar leaders of the misconduct and violence in the Multan case. This is evidence that lawyers are poor receptors of external accountability interventions, including from the judiciary, and on this axis the legal complex is deeply oppositional.

4 Conclusion

The Pakistan Lawyers' Movement case study and its aftermath presents two salient findings for our understanding of political action and how it relates to judicial empowerment and accountability. Firstly, the conditions, processes, and methods of empowerment may impose significant limits on the outcomes, benefits, and gains that flow from them. In Pakistan, the political context combined with political lawyering as a pathway to judicial empowerment have profoundly shaped both the course and institutional quality of the judiciary's power. In a bid to consolidate its newfound populist authority, the judiciary has expanded its jurisdiction towards routine and arbitrary intervention in political and governance-related questions to the detriment of its ever-spiralling regular caseload (Malik 2017a). The judiciary's hyper-assertion of autonomy in this narrow sphere of judiciary-executive relations has, in turn, led to democracy-weakening outcomes (Siddique, forthcoming). At the same time, the concentration of power within the Supreme Court and its singular focus on political questions has ensured that there is no structural change within the judicial institution itself. If anything, it appears to have become even more hierarchical and stratified than before.

Secondly, the conditions for empowerment and accountability may be altogether different, especially where the processes leading up to them are structured sequentially or are otherwise temporally distinct. Indeed, the conditions for and pathway to empowerment may produce unintended constraints and perverse consequences for the accountability of empowered actors and institutions. In Pakistan's case, judicial empowerment – despite the strong mutuality between lawyers and judges during much of the movement – has led to new accountability bargains such that there is a deep distrust of and resistance to inter-institutional accountability between the judiciary and the bar, and as a result a clear tendency in both institutions towards self-regulation and self-accountability.

On the one hand, Constitutional Court judges exercise exclusive power over judicial appointments and bestow selective privilege on favoured lawyers to sustain their populism. On the other, bar leaders leverage well-entrenched constituencies within the bar to jockey for judicial patronage or to press the court for desired outcomes in important briefs. In this inward-looking and self-preserving environment, there

are impromptu attempts on both sides to discipline and hold the other accountable, often resulting in either an accountability deadlock or indirect accountability through mechanisms such as judicial appointments and judicial transfers.

Quite apart from the accountability deadlock between the judiciary and the bar, there is another important accountability bargain that has emerged in reaction to the movement that wields a covert, but systemic influence, on the Supreme Court – namely, the ‘military–judicial complex’. While judicial empowerment has ensured *de jure* security of tenure for Constitutional Court judges, it cannot be credited with bringing about a structural transformation in the imbalance of power between military and civilian institutions. Even as the legal complex has championed a narrative of embedding an independent judiciary and ousting military rule, the deep state has mobilised its resources to adapt to the political transitions of the past decade and to accumulate executive and judicial powers without any overt or extra-constitutional political interventions. The most dramatic example of this in the movement aftermath was the constitutional consensus on the transfer of judicial power in a number of vaguely defined terrorism-related offences to the military courts without recourse to fundamental rights-based remedies (Newberg 2016). In the more recent imbroglio involving the forced removal of an elected Prime Minister in the run-up to the 2018 general election, the military publicly supported the Supreme Court’s relentless chastening of the PML-N (Gul 2018) – a historically military-friendly political party that has fallen out of favour with the establishment – raising allegations that the court’s ‘celebrity judges’ are aligned with the military’s interests (Hussain 2018; *The Economist* 2018).

The simultaneous emasculation and propping up of the Constitutional Courts by the military reproduces the old dynamic of judicial collaboration for *de facto* control over the political process, albeit through indirect means. The revival of the military–judicial complex means that while the judiciary may freely assert its autonomy over civilian governments, its institutional survival and accountability is still, as in the past, closely tied to the military’s political agenda. Thus, the sources of judicial empowerment and accountability tend to occupy different, even mutually exclusive, spheres, underscoring the fact that the relationship between the two is highly contingent on the historical, political, and institutional context.

Notes

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References

- Abbas, A. and Jasam, S. (2009) *Ray of Hope: The Case of Lawyers' Movement in Pakistan*, www.boell.de/sites/default/files/assets/boell.de/images/download_de/weltweit/paper_ray_of_hope_Jasam_and_Abbas.pdf (accessed 16 July 2019)
- Bhatti, H. (2018) 'Disqualification under Article 62(1)(f) is for Life, SC Rules in Historic Verdict', *Dawn*, 13 April, www.dawn.com/news/1401362 (accessed 25 May 2018)
- Dawn* (2010) 'Asma Wins to Become the First Woman Head of SCBA', 27 October, www.dawn.com/news/576223/polling-starts-in-scba-presidential-election (accessed 28 December 2017)
- Express Tribune* (2012) 'Judicial Appointments: Lawyers Accuse Judges of Nepotism, Demand Reforms', 15 March, <https://tribune.com.pk/story/350126/judicial-appointments-lawyers-accuse-judges-of-nepotism-demand-reforms/> (accessed 28 December 2017)
- Express Tribune* (2011) 'Asma Slams "Judicial Dictatorship"', 30 March, <https://tribune.com.pk/story/139773/asma-slams-judicial-dictatorship/> (accessed 28 December 2017)
- Gazdar, H. (2009) 'Judicial Activism vs Democratic Consolidation in Pakistan', *Economic and Political Weekly* 44.32: 10–11
- Gul, I. (2018) 'New Battle Lines: Army will Stand By Judiciary if Needed', *Daily Times*, 11 March, <https://dailytimes.com.pk/213316/new-battle-lines-army-will-stand-by-judiciary-if-needed/> (accessed 31 May 2018)
- Halliday, T.C.; Karpik, L. and Feeley, M.M. (eds) (2012) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, Cambridge: Cambridge University Press
- Halliday, T.C.; Karpik, L. and Feeley, M.M. (eds) (2007) *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, Portland OR: Hart Publishing
- Haq, A.T. (2008) 'Interview: Aitzaz Ahsan', *Newsline*, <http://newslinemagazine.com/magazine/interview-aitzaz-ahsan/> (accessed 28 December 2017)
- Human Rights Watch (2007) *Destroying Legality: Pakistan's Crackdown on Lawyers and Judges*, Pakistan: Human Rights Watch
- Husain, W. (2016) 'Pakistan's Lawyers and Judges Clash: Disharmony Intensifies between Pakistan's Judges and its Lawyers', *The Diplomat*, 31 October, <https://thediplomat.com/2016/11/pakistans-lawyers-and-judges-clash/> (accessed 28 December 2017)
- Hussain, Z. (2018) 'The New Power Troika', *Dawn*, 14 March, www.dawn.com/news/1395166 (accessed 30 July 2018)
- ICJ (2013) *Authority without Accountability: The Search for Justice in Pakistan*, Geneva: International Commission of Jurists
- Ijaz, S. (2014) 'Judicial Appointments in Pakistan: Coming Full Circle', *LUMS Law Journal* 1.1: 86–95
- Iqbal, N. (2007) 'CJ Suspended, Escorted Home', *Dawn*, 10 March, www.dawn.com/news/236769/cj-suspended-escorted-home (accessed 30 July 2018)

- Jaffrelot, C. (2015) *The Pakistan Paradox: Instability and Resilience*, Oxford: Oxford University Press
- Kalhan, A. (2013) '“Gray Zone” Constitutionalism and the Dilemma of Judicial Independence in Pakistan', *Vanderbilt Journal of Transnational Law* 46.1: 1–96
- Kausar, T. (2012) 'Judicialization of Politics and Governance in Pakistan: Constitutional and Political Challenges and the Role of the Chaudhry Court', in A. Misra and M.E. Clarke (eds), *Pakistan's Stability Paradox: Domestic, Regional and International Dimensions*, New York NY: Routledge
- Khan, H. (2016) *A History of the Judiciary in Pakistan*, Karachi: Oxford University Press
- Khan, M.S. (2014) 'Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization', *Temple International and Comparative Law Journal* 28.2: 285–359
- Leiby, R. (2012) 'Once Hailed as Heroes, Pakistani Lawyers now seen as “Gangsters”', *The Washington Post*, 11 November, www.washingtonpost.com/world/asia_pacific/once-hailed-as-heroes-pakistani-lawyers-now-seen-as-gangsters/2012/11/11/bccbf3a2-2c26-11e2-a99d-5c4203af7b7a_story.html?utm_term=.30b5ee57295f (accessed 28 December 2017)
- Malik, H. (2017a) '100% Rise in Cases Pending with SC', *Express Tribune*, 13 August, <https://tribune.com.pk/story/1480465/101-rise-cases-pending-sc/> (accessed 31 May 2018)
- Malik, H. (2017b) 'Bench-Bar Tiff Assumes Alarming Proportions', *Express Tribune*, 23 August, <https://tribune.com.pk/story/1487724/bench-bar-tiff-assumes-alarming-proportions/> (accessed 28 December 2017)
- Malik, M.A. (2008) *The Pakistan Lawyers' Movement: An Unfinished Agenda*, Karachi: Pakistan Law House
- McCann, M. (2006) 'Law and Social Movements: Contemporary Perspectives', *Annual Review of Law and Social Science* 2.1: 17–38
- Minow, M. (1996) 'Political Lawyering: An Introduction', *Harvard Civil Rights-Civil Liberties Law Review* 31.2: 287–96
- Mir, W. (2017) 'When Lawyers Turn Into Hooligans', *Herald*, 1 November, <https://herald.dawn.com/news/1153884> (accessed 28 December 2017)
- Munir, D. (2012) 'From Judicial Autonomy to Regime Transformation', in T.C. Halliday, L. Karpik and M.M. Feeley (eds), *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, Cambridge: Cambridge University Press
- Newberg, P.R. (2016) 'Pakistan's Constitutionalism in an Age of Terror', *Asian Affairs: An American Review* 43.1: 1–15
- Niazi, A.S.K. (2016) 'The Supreme Judicial Council: Comfortably Numb?', *Pakistan Today*, 10 May, www.pakistantoday.com.pk/2016/05/10/the-supreme-judicial-council-comfortably-numb/ (accessed 28 December 2017)

- Oldenburg, P.J. (2016) 'The Judiciary as a Political Actor', in C. Jaffrelot (ed.), *Pakistan at the Crossroads: Domestic Dynamics and External Pressures*, New York NY: Columbia University Press
- PILDAT (2007) *The Judicial Crisis: March to July 2007*, Pakistan: Pakistan Institute of Legislative Development and Transparency, <https://pildat.org/civil-military-relations1/the-judicial-crisis-march-july-2007> (accessed 23 July 2019)
- Qureshi, T.A. (2010) 'State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan', *North Carolina Journal of International Law and Commercial Regulation* 35.2: 485–538
- Rahman, I.A. (2017) 'The Fallout', *The News on Sunday*, 12 March, <http://tns.thenews.com.pk/fallout/#.WkUGobpuJPY> (accessed 28 December 2017)
- Rizvi, H.A. (2015) 'Lawyers and Politics', *Express Tribune*, 1 June, <https://tribune.com.pk/story/895333/lawyers-and-politics/> (accessed 28 December 2017)
- Sarat, A. and Sheingold, S.A. (eds) (2006) *Cause Lawyers and Social Movements*, Stanford CA: Stanford University Press
- Sarat, A. and Sheingold, S.A. (eds) (1998) *Cause Lawyering: Political Commitments and Professional Responsibilities*, New York NY: Oxford University Press
- Schmitthener, S. (1968) 'A Sketch of the Development of the Legal Profession in India', *Law and Society Review* 3.2/3: 337–82
- Sheikh, W.A. (2012) 'Professional and Independent Groups Intensify Campaigns', *Dawn*, 16 October, www.dawn.com/news/757270 (accessed 28 December 2017)
- Siddique, O. (forthcoming) 'Custodians of Piety: Judicialization of Political Eligibility in Pakistan'
- Siddique, O. (2015) 'The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement', in M. Tushnet and M. Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia*, Cambridge: Cambridge University Press
- Siddique, O. (2013) *Pakistan's Experience with Formal Law: An Alien Justice*, Cambridge: Cambridge University Press
- Talbot, I. (2002) 'General Pervez Musharraf: Saviour or Destroyer of Pakistan's Democracy?', *Contemporary South Asia* 11.3: 311–28
- The Economist* (2018) 'Justice on the Loose: Pakistan's Top Court is Eager to Take on Any Brief', 28 March, www.economist.com/asia/2018/03/28/pakistans-top-court-is-eager-to-take-on-any-brief (accessed 25 May 2018)
- Walsh, D. (2013) 'Pakistan's Chief Justice Leaves a Mixed Legacy', *New York Times*, 13 December, www.nytimes.com/2013/12/14/world/asia/pakistans-chief-justice-leaves-a-mixed-legacy.html (accessed 30 July 2018)

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