

JUDGES AND THEIR ALLIES

The Synergy Between the Constitutional Court and Judicial Support Networks in Turkey

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Authoritarian regimes create and empower courts in anticipation of various regime-supporting functions of courts such as sidelining political opponents and establishing legitimacy for the government. Recently, however, many courts in authoritarian regimes around the globe have defied their expected roles as regime-supporting pawns and have instead begun to challenge the interests of their creators. The Constitutional Court of Turkey (CCT) testifies to such a trend. As Turkey gradually evolved to an authoritarian state under Recep Tayyip Erdoğan's rule, the CCT has been on the front line in the battle against the Erdoğan government in moderating state power, especially from 2010 to 2014 when the government threatened individual rights and the independence of the judicial system. However, the battle between the Court and the government was short-lived when the Court suddenly changed its behavior, remaining acquiescent to the government since 2015. What can explain the changes in the CCT's behavior in recent years? What are the sources and conditions that enabled the Court to be active from 2010 to 2014 but passive since 2015? Examining evidence from academic publications, civil society reports, court cases, and online news articles, this paper finds that the ability of an apex court to engage in conflict with an authoritarian regime depends largely on the mobilization of "judicial support networks," which are composed of opposition parties, legal professionals, and civil society organizations.

I. Introduction

With the rise of the Justice and Development Party (Adalet ve Kalkınma Partisi or "AKP") in 2002, Turkey has increasingly deviated from a liberal polity and moved towards an authoritarian state. Over 14 years of rule, the AKP and its leader Recep Tayyip Erdoğan, the former Prime Minister from 2003 to 2014 and the current President, have ferociously secured control over all aspects of the Turkish political and social system, often threatening the three key elements of political liberalism identified by Halliday, Karpik, and Feeley: the independence of the judiciary, the protection of human rights, and the autonomy of civil society.¹

Until recently, the Constitutional Court of Turkey (CCT) has been on the front line in the battle against the AKP government to moderate state power, especially from 2010 to 2014 when the AKP passed several laws and amendments designed to undermine the independence of the judiciary. For example, in 2014, when the AKP-dominated Grand National Assembly of Turkey ("GNAT" or "Parliament") passed Law No. 2802, one of many

¹ Terence C. Halliday, Lucien Karpik, and Malcolm Feeley, "The Legal Complex in Struggles for Political Liberalism," in *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, ed. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley. (Oxford: Hart, 2007), 10-11.

laws in the reform package called the “Law on Judges and Prosecutors” that would have given the Ministry of Justice far-reaching control over the appointment and dismissal of judges and prosecutors, the Constitutional Court ruled in the same year that the law was unconstitutional as it violated the separation of powers between the judiciary and executive branches.² Beginning roughly in 2015, however, the Court became gradually more deferential towards the government, particularly in cases dealing with the “core interest”³ of the regime—that is, the AKP’s continued dominance in the government. In December 2015, for instance, the Court rejected an appeal against Law No. 6572, also passed in 2014 as part of the Law on Judges and Prosecutors, that allows a judge, at the request of prosecutors who are essentially agents of the regime, to restrict defense attorneys’ access to case files in criminal investigations when such access may “endanger” the purpose of the state’s investigation.⁴ Within only one year, the Court’s interpretation of and ruling on the package law changed dramatically.

The examples of the Law on Judges and Prosecutors are reflective of the overall changing levels of “judicial independence,” defined in this paper as the Court’s ability and willingness to rule against the interests of the ruling government, in contemporary Turkey where the Constitutional Court’s judicial independence remained relatively high from 2010 to 2014 but decreased beginning in 2015. What can explain the rise and decline of the Constitutional Court of Turkey’s judicial independence in recent years? What are the sources and conditions that enabled the Court to be active from 2010 to 2014? More importantly, what changed in 2015 that led to the decline of the Court’s judicial independence? This paper unfolds the puzzling behavior of the Constitutional Court of Turkey by explicating the sources and conditions that are behind the varying degrees of judicial independence in Turkey.

In what follows, I argue that the degree of legal mobilization on the part of judicial support networks—comprised of opposition parties, legal professionals, and civil society organizations—is what drives the level of judicial independence in Turkey. In other words, when judicial support networks engage in an active legal mobilization under the same cause and provide support to the Court through a series of campaigns or protests, the Court exhibits a rise of judicial independence; conversely, a passive legal mobilization from judicial support networks results in a decline of judicial independence. In the years when the AKP regime displayed increasingly authoritarian tendencies by consolidating the government’s control over all aspects of the Turkish political and social system, the Constitutional Court remained one of the only effective avenues for opposition parties, legal professionals, and civil society organizations to challenge the AKP government. Recognizing the Court’s potential threat to its power, the AKP government strived to decrease the independence of the judicial branch through a series of political and institutional attacks on the Court. In light of these government attacks, judicial support networks mobilized to protect the Court that they deemed to be the only remaining effective avenue for challenging the government. In turn, the active legal mobilization of judicial support networks enabled the Court to rule against the government’s interests between 2010 and 2014 in spite of the inhospitable condition of Turkey’s hybrid regime—an authoritarian regime where “the existence of formally democratic political institutions, such as multiparty electoral competition, masks (often, in part, to legitimate) the reality of authoritarian domination.”⁵

However, the ability of judicial support networks to defend judicial independence began to decrease in 2015 when the AKP government shifted the target of its attacks from the Court to the judicial support networks themselves. In order to sever the synergy between the Court and the judicial support networks, Erdoğan launched a crusade of media censorship, excessive police force, restriction of freedom of speech and association, and illegal detention practices. As a result, judicial support networks became unable to actively mobilize to protect judicial independence. Without the networks’ backing, the CCT lost a key source of its judicial independence.

In this study, I present empirical evidence to trace the causal relationship between the active legal mobilization of judicial support networks and the rise of judicial independence from 2010 to 2014 and between

2 Wendy Zeldin, “Turkey: New Amendments to Laws on Judiciary,” *Library of Congress*, March 10, 2014, accessed May 1, 2016, <http://www.loc.gov/law/foreign-news/article/turkey-new-amendments-to-laws-on-judiciary/>.

3 Tamir Moustafa, “Law versus the State: The Judicialization of Politics in Egypt,” *Law & Social Inquiry* 28, no. 4 (2003): 904, accessed February 10, 2016, doi: 10.1111/j.1747-4469.2003.tb00826.x.

4 Wendy Zeldin, “Turkey: Constitutional Court Rulings on “Reasonable Suspicion” in Criminal Procedure Code and on 2014 Changes to Internet Law,” *Library of Congress*, December 30, 2015, accessed May 1, 2016, <http://www.loc.gov/law/foreign-news/article/turkey-constitutional-court-rulings-on-reasonable-suspicion-in-criminal-procedure-code-and-on-2014-changes-to-internet-law/>.

5 Larry Diamond, Juan J. Linz, and Seymour Martin Lipset, *Democracy in Developing Countries: Latin America, Volume Four* (Boulder: Adamantine Press, 1989), xviii.

the passive legal mobilization of judicial support networks and the decline of judicial independence after 2015. The first section overviews the puzzling changes in the level of judicial independence in Turkey with a focus on the Constitutional Court's increasing deference to the AKP government in recent years. The second section places Turkey in the larger theoretical framework of courts in authoritarian regimes. I also address the existing literature on the Constitutional Court of Turkey, which has been centered on the ideational model, and argue that the ideational model does not provide a satisfactory explanation for the varying degrees of the CCT's judicial independence in recent years. The third section introduces the Supreme Court of Pakistan as a comparative case, justifies the logic of the comparison between Turkey and Pakistan, and describes the data collection methods used to trace different levels of judicial independence. The fourth and fifth sections closely analyze the causal relationship between judicial independence and the legal mobilization of judicial support networks in Turkey and Pakistan, respectively. The paper concludes with a general discussion of the implications of the Turkish case for the wider context of the relationship between courts and judicial support networks in hybrid regimes.

II. Changing Levels of Judicial Independence in Turkey

The conflicting decisions on the Law on Judges and Prosecutors in 2014 and 2015 reflect the overall changing levels of the CCT's judicial independence. It is indeed incredible to observe that the Court has ruled in vastly different ways in cases dealing with the very legislation that could determine its ability to act independently of the government. The Court struck down Law No. 2802 which would have given the Ministry of Justice far-reaching control over the appointment and dismissal of judges and prosecutors, but that same Court refused to rule on the legality of Law No. 6572 which puts the entire justice system into question by giving prosecutors the authority to restrict defense attorneys' access to case files in criminal investigations.

However, these decisions are only part of the picture. Between 2010 and 2014, the Constitutional Court engaged in several conflicts with the AKP government, often ruling against the government's interests through actions such as annulling the maximum imprisonment term for crimes involving terrorism⁶ and overturning a law allowing the prosecution of military personnel in civilian courts⁷. The Court was also responsible for releasing high-profile detainees who had been sentenced to extremely long prison terms for their alleged relations with the Ergenekon coup plot that purportedly exists to overthrow the Erdoğan government. In these cases, the Court argued that the detainees suffered unlawful detention and violation of the right to a fair trial and concluded that the prison terms themselves were unreasonable and unlawful.⁸

On the other hand, since 2015, the Court has become increasingly deferential to the Erdoğan government and its core interests, most notably evidenced by the Court's refusal to lower the ten percent electoral threshold for parliamentary representation which has traditionally served to sideline small minority parties in favor of AKP domination (Kandemir 2015). In another instance, when the AKP-majority parliament temporarily suspended immunity for members of the parliament in May 2016 as a way of prosecuting opposition party members for their alleged ties with the Kurdish movement, the Court rejected the petition to strike the immunity bill⁹. Overall, the Court avoided direct conflict with the Erdoğan government by either rejecting individual applications in cases challenging the government's core interests or ruling in favor of the government when it decided to place a case on the docket. In sum, the level of the Turkish Constitutional Court's judicial independence remained high from 2010 to 2014 but decreased beginning in 2015.

Unpacking the dynamics behind these varying degrees of judicial independence would help us understand the increasingly prominent roles courts play even in authoritarian regimes, and more generally, the determinants of judicial

6 Wendy Zeldin, "Turkey: Constitutional Court Rules on Reasonable Period of Imprisonment for Certain Crimes," *Library of Congress*, November 4, 2013, accessed May 1, 2016, <http://www.loc.gov/law/foreign-news/article/turkey-constitutional-court-rules-on-reasonable-period-of-imprisonment-for-certain-crimes/>.

7 "Turkish High Court Overturned Civil Prosecution of Military Personnel," *Jurist*, January 21, 2011, accessed April 29, 2016, <http://www.jurist.org/thistday/2011/01/21/turkish-high-court-overturned-civil-prosecution-of-military-personnel.php>.

8 Zeldin, "Turkey: Constitutional Court Rules on Reasonable Period of Imprisonment for Certain Crimes."

9 Mark Casper, "Turkish Constitutional Court Rejects Petition to Strike Down Immunity Bill," *Jurist*, June 2016, accessed June 5, 2016, <http://www.jurist.org/paperchase/2016/06/turkish-constitutional-court-rejects-petition-to-strike-down-immunity-bill.php>.

independence. Under which circumstances do courts in authoritarian regimes become important sites of political resistance? What are the sources that secure judicial independence in inhospitable conditions of authoritarian states?

III. Theoretical Framework: Courts in Authoritarian Regimes

Until recently, courts in authoritarian states were generally regarded as nothing more than pawns of their regimes that lack any meaningful influence in political life.¹⁰ However, a surge of new research on judicial branches in authoritarian regimes in the past two decades has challenged this long-standing presumption, documenting the important and complex roles courts play in authoritarian regimes.¹¹ The above discussion of the varying degrees of judicial independence in Turkey is one of many examples in which courts, especially the “apex court” or the highest judicial body in a given political system, can and do play important roles in authoritarian politics, sometimes as sites of political resistance against the ruling government (e.g. the CCT from 2010 to 2014) and other times as institutions quiescent to authoritarian rule (e.g. the CCT since 2015). Hence, the vastly different behaviors displayed by the Constitutional Court of Turkey beg the question: what can explain the changing levels of judicial independence of the CCT, a court functioning in an authoritarian regime? To answer this question, I begin by looking at the general framework used to study the unique nature of courts in authoritarian states.

Moustafa and Ginsburg provide what is arguably the most useful framework for understanding the complex roles of courts in authoritarian regimes.¹² According to Moustafa and Ginsburg, five basic functions of courts can be articulated in authoritarian regimes. First, authoritarian regimes use courts to establish social control and sideline political opponents. For example, courts help authoritarian rulers stay in power by closing down opposition parties and imprisoning political dissidents.¹³ Second, courts can create an image of legitimacy for authoritarian regimes because judicial institutions are considered to be capable of imposing constraints on arbitrary rule.¹⁴ Third, courts can be used to discipline administrative agents within state institutions.¹⁵ Fourth, courts can facilitate trade and investment.¹⁶ By establishing and empowering courts as neutral institutions that can challenge government action in the economic sphere, an authoritarian state can make credible its promise not to take away private property.¹⁷ Finally, authoritarian regimes can delegate controversial policy measures to judicial institutions so as to blame courts for such unpopular measures.¹⁸ In short, what all of these functions have in common is that authoritarian regimes use courts to advance their interests under the pretext of law.

Ironically, however, it is the need for these regime-supporting functions of courts that transforms courts into an important site of political resistance, precisely because the success of these regime-supporting

10 Tamir Moustafa, “Law and Courts in Authoritarian Regimes,” *Annual Review of Law and Social Science* 10 (2014): 282, accessed February 10, 2016, doi: 10.1146/annurev-lawsocsci-110413-030532.

11 See Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge: Cambridge University Press, 2002); Elisabeth Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007); Moustafa, “Law versus the State,” 883-930; Tamir Moustafa, “Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa. (Cambridge: Cambridge University Press, 2008); Mark Osiel, “Dialogue with Dictators: Judicial Resistance in Argentina and Brazil,” *Law & Social Inquiry* 20, no. 2 (1995): 481-560, accessed March 8, 2016, doi: 10.1111/j.1747-4469.1995.tb01069.x; C. Neal Tate and Stacia L. Haynie, “Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme court, 1961-1987,” *Law & Society Review* 27, no. 4 (1993): 707-740.

12 Tamir Moustafa and Tom Ginsburg, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa. (Cambridge: Cambridge University Press, 2008).

13 Tamir Moustafa and Tom Ginsburg, “Introduction: The Functions of Courts in Authoritarian Regimes,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa. (Cambridge: Cambridge University Press, 2008), 4-5; Shoaib Ghias, “Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf,” *Law & Social Inquiry* 35 no. 4 (2010): 988, accessed February 26, 2016, doi: 10.1111/j.1747-4469.2010.01211.x.

14 Moustafa and Ginsburg, “Introduction,” 5-6; Moustafa, “Law and Courts in Authoritarian Regimes,” 286.

15 Moustafa and Ginsburg, “Introduction,” 7.

16 Moustafa and Ginsburg, “Introduction,” 8-9.

17 Moustafa, “Law versus the State”; Gordon Silverstein, “Singapore: The Exception that Proves Rules Matter,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa, (Cambridge: Cambridge University Press, 2008).

18 Moustafa and Ginsburg, “Introduction,” 10; Moustafa, “Law versus the State.”

functions of courts in authoritarian regimes depends on real judicial autonomy. For example, a government's promise to keep its hands off private property is not credible unless neutral judicial institutions have the real power to hold the government accountable for breaking its promise.¹⁹ Likewise, the mere existence of courts will not help an authoritarian regime claim legitimacy unless courts are truly perceived to be independent from government control.²⁰ As such, once authoritarian states empower courts for the sake of using them for support, courts often become a "double-edged sword" that open new avenues for Gyuactivists to challenge the regime.²¹

This study places contemporary Turkey in the above theoretical framework, specifically looking at the extent to which the Constitutional Court defied expectations about the first and foremost function of courts in authoritarian regimes—establishing social control and sidelining political opponents. The puzzle lies in that the CCT refused to aid the AKP regime in consolidating power by establishing social control and sidelining political opponents from 2010 to 2014, but has generally shied away from helping opposition parties since 2015. While this puzzle is something Moustafa and Ginsburg acknowledge in the potential use of courts as a "double-edged sword," the existing framework does not fully explain exactly how and why the CCT exhibited different levels of judicial independence in such a short timespan. Hence, a reappraisal of the sources and conditions of judicial independence in Turkey is in order.

IV. The Ideational Model: Judges as Advocates of Kemalism

This paper argues that the active (or passive) legal mobilization on the part of judicial support networks—comprised of opposition parties, legal professionals and civil society organizations—is what really drives the rise (or decline) of judicial independence in Turkey. Before presenting the empirical evidence to support this claim, I address the existing literature on the judicial independence of the Constitutional Court of Turkey, which has been exclusively centered on the ideational model.

According to the ideational model, judges' willingness (or lack thereof) to assert their authority against political actors is best explained by their own professional role conceptions—that is, judges' attitudes and ideas about the judicial role in a democratic system.²² While the exact nature of judges' professional role conceptions and ideologies can vary significantly across time and space, in most cases judges can be identified as either deferential judges or activist judges. On the one hand, deferential judges believe that their professional role is not to engage in conflicts with the executive and legislative branches but rather to defer to political actors in cases involving public law and to adjudicate only on private law matters.²³ On the other hand, activist judges perceive that their role is to question the decisions of political actors and engage in constitutional adjudication in favor of individual rights.

Existing literature on the Turkish judiciary has exclusively, albeit implicitly, relied on the ideational model to explain everything about the Constitutional Court, portraying judges as advocates of Kemalism, the founding ideology of Turkey that includes principles of secularism and national unity.²⁴ Scholars studying the CCT have argued that judges share the motive to protect the regime and preserve the status quo by deferring to political actors.²⁵ In other words, judges of the CCT share a deferential professional role conception and ideology. According to these scholars, the Court has regularly considered whether the predefined regime under the principles of Kemalism was under threat and responded to this threat by making decisions to ensure the sustenance of the regime. For example,

19 Moustafa, "Law versus the State," 286.

20 Moustafa and Ginsburg, "Introduction," 13.

21 Moustafa and Ginsburg, "Introduction," 11.

22 Javier Couso and Lisa Hilbink, "From Quietism to Incipient Activism: The Institutional and Ideological roots of Rights Adjudication in Chile," in *Courts in Latin America*, ed. Gretchen Helmke and Julio Rios-Figueroa. (Cambridge: Cambridge University Press, 2011); Lisa Hilbink, "The Origins of Positive Judicial Independence," *World Politics* 64, no.4 (2012): 587-621.

23 Couso and Hilbink, "From Quietism to Incipient Activism," 100.

24 Hootan Shambayati, "Courts in Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa. (Cambridge: Cambridge University Press, 2008), 296.

25 See Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law and Society Review* 40, no. 3 (2006): 653-692.; Cenap Cakmak and Cengiz Dinc, "Constitutional Court: Its Limits to Shape Turkish Politics," *Insight Turkey* 12, no. 4 (2010): 69-92; Ergun Ozbudun, "Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and the European Court of Human Rights," *Democratization* 17, no. 1 (2010): 125-142, accessed April 15, 2016, doi: 10.1080/13510340903453807; Shambayati, "Courts in Semi-Democratic/Authoritarian Regimes."

Belge demonstrates that the CCT has banned dozens of minor political parties as a way to preserve the ideological and political hegemony of the Kemalist elites.²⁶ In a few cases when the Court was active, it had been so because the core interests of the regime were not at stake.²⁷ Cakmak and Dinc similarly argue that the Court has served to advance the benefits of the state, even by ignoring democratic standards on some occasions.²⁸ In sum, scholars claim that judges of the CCT have uniformly behaved with a deferential ideology and rarely ruled against the interests of the regime.

I argue that the ideational model does not explain why the levels of judicial independence have differed in recent years. At first glance, it does seem logical to expect that sitting judges of the CCT between 2010 and 2016 would have continued the past tradition of judicial deference based on the composition of the Court which was heavily influenced by the AKP. Until 2010, the composition of the Court's judges has been in favor of minority parties, with the majority of sitting judges having been appointed by Presidents Ozal, Demirel, or Sezer, who were not members of the AKP. In September 2010, however, the AKP successfully pushed a constitutional referendum that increased the number of judges of the CCT from eleven to seventeen, of which the president would appoint fourteen judges and the Grand National Assembly of Turkey would appoint three. As a result, President Gül, a member of the AKP, was able to appoint six additional judges to the Court in 2011, significantly altering the balance of the bench in favor of the AKP. Ever since then, the number of AKP appointments, either by the president or the National Assembly, has continuously increased (see Table 1).

Year	Number of sitting judges appointed by:				Total number of AKP appointments
	Ozal, Demirel, or Sezer	Gul	Erdoğan	GNAT	
2010	7	4	0	0	4
2011	7	10	0	0	10
2012	6	11	0	0	11
2013	6	11	0	0	11
2014	6	10	0	1	11
2015	4	10	1	2	13
2016	3	10	1	3	14

Source: The Constitutional Court of Turkey, <http://www.constitutionalcourt.gov.tr/>.

As such, if the existing explanation about the CCT's shared ideology to protect the regime is correct, judges of the CCT should have displayed a low level of judicial independence over the years since 2011. However, the Court did the quite opposite as it remained active from 2010 to 2014, frequently ruling against the AKP government's interests. Of course, it may be that the newly appointed judges since 2011 were exceptions to the Kemalist (or more accurately, deferential) ideology and thus perceived their role as activists who should curb excessive state power. Yet if these judges have indeed held activist role conception and ideology, and chose to behave solely based on their activist ideology without any restraint from external factors, the sudden reversal in the course of the CCT's behavior in 2015 without a significant change in the overall composition of the Court requires explanation. I offer an alternative, and more fulfilling, explanation to the puzzling behavior of the Court. In particular, I argue that the legal complex model comes closest to explaining the changing levels of judicial independence of the Constitutional Court of Turkey.

V. The Legal Complex Model: Agents of Political Resistance

The legal complex model suggests that a key variable that determines the role of courts in moderating state power is "the system of relations among judicial institutions, legal occupations and legal academics."²⁹ The legal

26 Belge, "Friends of the Court."

27 Ibid.

28 Cakmak and Dinc, "Constitutional Court: Its Limits to Shape Turkish Politics."

29 Halliday, Karpik, and Feeley, "The Legal Complex," 6.

complex is centered on lawyers and judges, but may extend to all legally-trained professionals practicing as private lawyers, judges, civil servants, and legal academics or participating in bar associations. Together, these legal professionals can work to bolster judicial independence in both democratic and authoritarian regimes.

While I rely on the legal complex model to explain the judicial independence of the CCT, I take a step further and examine how legal professionals cooperate with opposition parties and civil society organizations to counter the increasingly authoritarian tendencies of the AKP government. Indeed, when legal professionals mobilize for political liberalism, they establish or join social networks to not only strengthen the social movement for political liberalism but also to protect judges from regime backlash.³⁰ Following Moustafa, I collectively refer legal professionals, opposition parties and civil society organizations as “judicial support networks” which actively use courts as an avenue for contestation against the government by initiating litigation and bolster judicial independence by defending judicial institutions if they come under attack.³¹

Given the important role judicial support networks play in utilizing the Court and protecting judges, the degree of judicial independence depends on the depth and breadth of judicial support networks and the strength of the legal mobilization of these networks. For example, Epp demonstrates that a necessary condition for a “rights revolution” is the ability of judicial support structures to initiate efficient and repeated litigation campaigns for rights demands.³² Though Epp’s study is concerned with “rights revolutions” in democratic regimes, it can also be applied to understanding judicial independence in authoritarian regimes. Just as rights revolutions rely on the ability of judicial support structures to engage in rights litigation, judicial independence relies on the capacity of judicial support networks to mobilize and use courts as a site of political resistance and protect judges from regime backlash. Because of the interdependent nature of judicial independence and support network mobilization, it can be expected that the more active the legal mobilization of support networks, the higher the judicial independence.

VI. Data Collection and Methodological Approach

In line with the refined version of the legal complex model presented above, I argue that the activeness (or passiveness) of mobilization of judicial support networks is precisely what has determined the rise (or fall) of judicial independence of the Constitutional Court of Turkey. Data was primarily collected through academic publications, civil society reports, court cases, and online news articles, which were used to trace the process by which support network mobilization resulted in an increase in judicial independence from 2010 to 2014 and the government’s incapacitation of support networks decreased judicial independence after 2015.

To further strengthen my argument, I compare the Turkish case with the Pakistani case, where the active mobilization of the Pakistani legal community helped the Supreme Court of Pakistan to not only regain its lost judicial autonomy under the Musharraf regime but also to rule against the government’s core interests. On the one hand, in comparison with the CCT from 2010 to 2014, the Pakistani Supreme Court offers an additional example of the important role judicial support networks, particularly the legal community, can play in protecting judicial independence. On the other hand, in contrast to Turkey after 2015 when the incapacitated judicial support networks were unable to support the judicial independence of the Constitutional Court, the Pakistani case shows that the active legal mobilization of judicial support networks empowers judges to be independent.

The logic of the selection of a comparative case between Turkey and Pakistan lies in the second point— a change in the independent variable (the mobilization of judicial support networks) leads to a change in the dependent variable (the level of judicial independence). Turkey and Pakistan are “most similar cases”³³ that share many characteristics but vary in the key independent variable: the capacity of judicial support networks to mobilize to defend the judicial independence of the court. The advantage of comparing “most similar cases” is that a researcher is able to control for potential confounding factors and isolate the

30 Onur Bakiner, “Judges Discover Politics: Sources of Judges’ Off-Bench Mobilization in Turkey,” *Journal of Law and Courts* 4, no. 1 (2016): 137.

31 Moustafa, “Law versus the State,” 886.

32 Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998.

33 Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” *The American Journal of Comparative Law* 53, no. 1 (2005): 134.

effect of the key independent variable in determining variation in the dependent variable.³⁴ Turkey after 2015 and Pakistan between 2005 and 2009 share many characteristics that can have potential explanations for different levels of judicial independence (the dependent variable) with a notable exception in the extent of judicial support network mobilization (the key independent variable). According to the “most similar cases” logic, the different extents of judicial support network mobilization, the only variable on which Turkey and Pakistan differ, should be able to explain the different levels of judicial independence in these two countries.

Table 2: Comparison of the Turkish Constitutional Court and the Pakistani Supreme Court		
	Turkey	Pakistan
Democracy Index ¹	5.12 (Hybrid regime)	4.40 (Hybrid regime)
Percent of Muslim Population ²	98.6%	96.4%
Court Size ³	17	17
Appointment ³	President appoints 14; National Assembly appoints 3	President appoints 17
Term Length ³	Non-renewable 12-year term; retirement age of 65	Life-tenure until retirement age of 65
Control over Docket	Yes	Yes
Access	Special bodies, any court, and individual petition	Special bodies, any court, and individual petition
Judicial Support Networks	Active (2010-2014) <i>Passive (2015-present)</i>	<i>Active (2005-2009)</i>
Judicial Independence	High (2010-2014) <i>Low (2015-present)</i>	<i>Moderately high (2005-2009)</i>
Source: 1. The Economist Intelligence Unit. http://www.yabiladi.com/img/content/EIU-Democracy-Index-2015.pdf 2. Pew Research Center. http://www.pewforum.org/2015/04/02/muslims/pf_15-04-02_projectionstables74/ 3. Central Intelligence Agency. https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html		

Turkey and Pakistan are both hybrid regimes where Islam is the dominant religion. Because both the type of regime and culture can have a significant impact on the ability of courts to act independently from the government, holding these constant is important. Following Ginsburg³⁵, I also examine several dimensions of the institutional design relevant to judicial power. While there is no exact number of apex court judges optimal for judicial independence, dominant parties tend to prefer smaller courts because the balance among the membership of small courts often shifts in favor of the dominant party.³⁶ However, this does not mean that larger courts would always be better than smaller ones because once the number of judges in a court rises beyond a certain size, the quality of decision-making decreases.³⁷ The Turkish Constitutional Court and the Pakistani Supreme Court have the same number of judges (17) who are appointed by the president and must retire by the age of 65, so the level of judicial independence of these two courts should not differ based on the number of judges.³⁸

Both courts also have control over the docket, indicating that they have the power to strategically

³⁴ Id.

³⁵ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, (Cambridge: Cambridge University Press, 2003).

³⁶ Ginsburg, *Judicial Review in New Democracies*, 48.

³⁷ Richard A. Posner, “Is the Ninth Circuit Court too Large? A Statistical Study of Judicial Quality,” *Journal of Legal Studies* 29, no. 2 (2000): 711.

³⁸ Central Intelligence Agency, “Judicial Branch,” *The World Factbook*, accessed May 5, 2016, <https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html>.

pick and choose cases depending on their willingness to rule against the government. In terms of access to court, arguably the most important ingredient in judicial power,³⁹ both courts allow special bodies, any court, and individuals to bring cases to the court, allowing actors of judicial support networks—opposition parties, legal professionals, and civil society organizations—to use the court as an avenue for contestation. Indeed, the legal complex model may be difficult to apply to a court where only special bodies such as government agencies can bring a case to court, as was the case for the Supreme Court of Austria from 1920 to 1929 and the Court of Cassation of France before 1974.⁴⁰ On the other hand, a court that has wide and open access for any litigant including special bodies and individuals, such as the United States Supreme Court, would open itself as an avenue of contestation for judicial support networks. Regarding this important potential independent variable, both the Turkish Constitutional Court and the Pakistani Supreme Court have equal access.

This comparison illustrates that the potential determinants of judicial independence are held constant between the Turkish Constitutional Court and the Pakistani Supreme Court. Holding various independent variables constant with the exception of the degree of judicial support network mobilization, I analyze how the difference in judicial support network mobilization influences the level of judicial independence.

VII. Turkey: The Target of Government Attack Matters

As the AKP regime consolidated the government's control over all aspects of the Turkish political and social system, the Constitutional Court remained one of the last institutions for the government to conquer. Beginning with the constitutional referendum of 2010 that changed the size of the CCT, the government strived to decrease the independence of the judicial system through a series of political and institutional attacks on the Court. Most notably, a complete restructuring of the Supreme Board of Judges and Prosecutors (Hâkimler ve Savcılar Yüksek Kurulu or "HSYK"), which approves the nomination of new judges and state prosecutors and oversees their promotion, dismissal, and investigation, increased the number of members from seven to twenty-two, four of whom, including the president of the Board, were to be directly appointed by the president. The amendment also opened up the possibility that the Ministry of Justice, controlled by the president, could freely investigate the members of the HSYK. In addition, the size of the Constitutional Court was expanded from eleven members to seventeen members, ultimately allowing AKP President Gül to pack the court.

Perhaps not surprisingly, the constitutional amendments spurred a wide opposition from the Court, opposition parties, and the legal community. The AKP claimed that the amendments were attempts to bring Turkey closer to European Union standards, but opponents of the AKP and the judiciary criticized the amendments for indirectly giving the AKP greater power over state institutions. Justice Gecceker stated in an interview that these provisions threatened the separation of powers and the judicial system's independence.⁴¹ More importantly, the anti-AKP union of judges known as the Judges and Prosecutors Association (YARSAV) engaged in an off-bench mobilization to appeal to the legal community in support of the Constitutional Court's movement against the AKP government and the rival pro-AKP association of judges and prosecutors known as Demokrat Yargı.⁴²

In turn, the legal community led by bar associations and legal academics began to initiate litigation campaigns and demand political reform by filing an influx of court cases dealing with basic legal and political freedoms. The Court ruled against the government's interests on these cases primarily between 2013 and 2014—the two year span that marks the highest degree of judicial independence that Turkey has witnessed during its 14 years under AKP rule, most notably in the area of individual rights. The role that opposition parties, lawyers and civil society organizations played during this two year period in helping the Court address unreasonably lengthy detentions and imprisonment terms is emblematic of its judicial independence. For example, when lower court sentenced main opposition Republican People's Party (Cumhuriyet Halk Partisi or "CHP") deputy Mustafa Balbay for charges related to the Ergenekon coup plot (the alleged clandestine

39 Ginsburg, *Judicial Review in New Democracies*, 37.

40 Ginsburg, *Judicial Review in New Democracies*, 38.

41 Wendy Zeldin, "Turkey: Controversial Amendments to Constitution Proposed by Ruling Party," *Library of Congress*, March 29, 2010, accessed May 1, 2016, <http://www.loc.gov/law/foreign-news/article/turkey-controversial-amendments-to-constitution-proposed-by-ruling-party/>.

42 Bakiner, "Judges Discover Politics," 147.

movement of political dissidents to overthrow the government), opposition parties, lawyers and civil society organizations appealed to the Constitutional Court to invalidate the imprisonment.⁴³ Furthermore, diverse actors of the judicial support network including The Shift is Ours Platform, Union of Turkish Bar Associations, and lawmakers from the CHP protested in the streets against the government to challenge Balbay's imprisonment.⁴⁴ In late 2013, the CCT eventually overruled a lower court's decision on the grounds of unlawful detention, violating the right to a fair trial and Balbay's constitutional immunity right as an elected deputy.⁴⁵

The judicial support networks worked to repeal GNAT's new stringent imprisonment laws which targeted their political opponents in a corrupt manner. Lawyers from the Turkish Bar Association challenged Law No. 6352, a piece of legislation which allowed the courts to give life sentences to those who are indicted for crimes involving terrorism and organized crime. Lawyers argued that the law was designed to target the Kurdish dissidents and political opponents, and that it violated articles 10 and 13 of the Constitution on equality before law and the restriction of fundamental rights.⁴⁶ The Court agreed, stating that life imprisonment was unreasonable for the crimes concerned.⁴⁷ Using the Court's decision as the basis for their actions, bar associations moved on to challenge the life imprisonment of former general Ilker Basbug, who was also charged with his role in the Ergenekon coup plot. Metin Feyzioglu, the head of the Turkish Bar Association, appeared on CNN Turk to criticize the government for depriving Basbug of fair trial and freedom and called on the Court to reverse the sentence.⁴⁸ The Court finally ordered a release of Basbug in March 2014, to which the government reluctantly complied.

Meanwhile, in February 2014, the government attempted to attack the Court again by passing an omnibus law (Law No. 2802 as part of the Law on Judges and Prosecutors) that would have given the Minister of Justice the authority of direct control over all three chambers of the HSYK and the ability to freely initiate an investigation against the members.⁴⁹ Perceiving this law as a threat to the independence of the judiciary, the judicial support networks quickly and vigorously mobilized to protect the Court. The Nationalist Movement Party (Milliyetçi Hareket Partisi or "MHP"), as well as bar associations and professors joined the CHP's movement to repeal the law. For example, Professor Mehmet Altan, a prominent academic and journalist of Istanbul University, publicly criticized the law as an additional movement of the AKP to turn Turkey into a security state.⁵⁰ Furthermore, various bar associations published statements on their websites criticizing the omnibus law, publicizing the potential dangers the law posed to the Turkish democracy.⁵¹ On March 2, 2014, the CHP filed suit at the Court for the annulment of this omnibus law. The Court, supported by the networks, quickly responded to the suit and decided on April 11, 2014 that the law was unconstitutional because its purpose was to undermine the independence of the judiciary in respect to the executive branch.⁵²

In summation, the government's attacks on the judiciary ignited judicial support network activism because opposition parties, legal professionals, and civil society organizations perceived the Constitutional Court as one of the few avenues available for challenging the AKP regime. Backed by the support networks, the Court did not shy away from ruling against the government's interests, even on sensitive issues dealing with

43 Semih Idiz, "Turkey's Highest Court Boosts Credibility by Watershed Ruling," *Al-Monitor*, December 3, 2013, accessed May 10, 2016, <http://www.al-monitor.com/pulse/originals/2013/12/turkey-sledgehammer-verdict-journalist-akp-chp-ergenekon.html>.

44 Id.

45 "Turkey's Constitutional Court Rules Long Imprisonment of CHP MP as 'Violation of Rights,'" *Hurriyet Daily News*, December 4, 2013, accessed April 29, 2016, <http://www.hurriyetdailynews.com/turkeys-constitutional-court-rules-long-imprisonment-of-chp-mp-as-violation-of-rights.aspx?pageID=238&nID=59020&NewsCatID=339>.

46 Zeldin, "Turkey: Constitutional Court Rules on Reasonable Period of Imprisonment for Certain Crimes."

47 Id.

48 "Turkey's Former Chief of Staff Ilker Basbug Released from Jail After Top Court Ruling," *Hurriyet Daily News*, March 7, 2014, accessed April 29, 2016, <http://www.hurriyetdailynews.com/turkeys-former-chief-of-staff-ilker-basbug-released-from-jail-after-top-court-ruling.aspx?pageID=238&nID=63321&NewsCatID=338>

49 Zeldin, "Turkey: New Amendments to Laws..."

50 Faheim Tastekin, "Is Turkey Reverting to a 'Muhaberat' State?" *Al-Monitor*, April 17, 2014, accessed April 29, 2016, <http://www.al-monitor.com/pulse/originals/2014/04/erdogan-mit-interference-authoritarian.html>.

51 "Civic Freedom Monitor: Turkey," *International Center for Not-for-Profit Law*, December 17, 2015, accessed April 29, 2016, <http://www.icnl.org/research/monitor/turkey.html>.

52 Tulin Daloglu, "Turkey's Top Court Upholds Separation of Powers," *Al-Monitor*, April 11, 2014, accessed April 29, 2016, <http://www.al-monitor.com/pulse/originals/2014/04/turkey-courts-power-separation-justice-akp-erdogan.html>.

the Ergenekon coup plot or the Law on Judges and Prosecutors. In essence, the result was the emergence of a synergy between the Court and its support networks, through which the Court provides the support networks with a meaningful site of political resistance while the support networks defend the Court from regime backlash.

Roughly beginning in 2015, however, this synergy started to diminish as the government shifted the focus of its attacks from the Court to the support network itself. In its realization that opposition parties, legal professionals, and civil society organizations could empower the Court to rule against its own interests, the AKP government began to directly incapacitate the support network. The AKP majority of the Parliament passed a security law in March 2015 to broaden police powers, thereby allowing the police to use firearms against demonstrators.⁵³ In June 2015, when demonstrators began shouting slogans criticizing Erdoğan during an annual LGBT pride parade, the police fired water cannon and rubber pellets at the protestors. Prior to this point, rallies and political protests had been held for 13 years without police intervention, but the new security law enabled the police to restrict protest activities through the use of force.⁵⁴ Thereafter, the government began to frequently use the police force to forcibly crush protests against the government.

The government also focused on constraining the activities of legal professionals by attacking the bar associations. For instance, in January 2015 a prosecutor successfully convicted the Tunceli Bar Association head Ugur Yesiltepe and sentenced him to six years in jail on terrorism charges, making Yesiltepe the first chair of a Turkish bar association to be sentenced to prison since the 1980 military coup.⁵⁵ In May, Tahir Elci, the president of Diyarbakir Bar Association, was detained for allegedly spreading PKK propaganda until he was released in October and assassinated in November.⁵⁶ When Elci was sentenced, a group of 50 lawyers, including prominent figures from the AKP's opposition party like Pervin Buldan and Levent Tuzel, appeared at the courthouse to protest, but faced obstruction by police harassment.⁵⁷

Moreover, the government tightened its grip on the legal academy to further assert its invasive control of judicial support networks. In late 2015, the National Assembly adopted new laws on higher education to give the Council of Higher Education (Yükseköğretim Kurulu or "YÖK") the authority to close the private universities that became epicenters of activity against the state's "indivisible integrity."⁵⁸ The law was indeed effective in undermining the ability of academics to speak against the government. For instance, Professor Laciner from Mart University was removed from his position of rector for criticizing the government. When a group of scholars calling themselves "Academics for Peace" signed a letter calling on the government to end its violence in Kurdish provinces, the YÖK demanded that university rectors undergo disciplinary investigations or face the alternative of universities affiliated with the Academics for Peace being shut down.⁵⁹ Numerous suspensions, dismissals and imprisonments of professors followed thereafter.

The most serious blow to support networks came in the area of freedom of speech and press. The government banned the AKP's largest opposition newspaper, *Today's Zaman*, in March 2016, an event mourned by many. Even after the Constitutional Court nullified the provisions of the so-called "Internet Law" that requires content providers to deliver data to the Telecommunication Transmission Directorate, the government implemented a de

53 Johnny Hogg and Gulsen Solaker, "Turkey Passes Tough New Security Law, Raising Fears of Election Crackdowns," *Reuters*, March 27, 2015, accessed April 28, 2016, <http://www.reuters.com/article/us-turkey-parliament-security-idUSKBN0MN0WD20150327>.

54 "Water Canon Used to Disperse Istanbul Gay Pride Parade," *Al Jazeera*, June 28, 2015, accessed April 28, 2016, <http://www.aljazeera.com/news/2015/06/water-cannon-disperse-istanbul-gay-pride-parade-150628150318097.html>.

55 Ismail Saymaz, "Bar Head Sentenced to Six Years for Participation in Rallies," *Hurriyet Daily News*, January 20, 2015, accessed April 29, 2016, <http://www.hurriyetdailynews.com/bar-head-sentenced-to-six-years-for-participation-in-rallies.aspx?pageID=238&nID=77175&NewsCatID=341>.

56 "Turkey: Human Rights Lawyer Murdered," *Human Rights Watch*, November 28, 2015, accessed May 3, 2016, <https://www.hrw.org/news/2015/11/28/turkey-human-rights-lawyer-murdered>.

57 "Turkish Bar Association Head Released in Istanbul," *Anadolu Agency*, October 20, 2015, accessed April 28, 2016, <http://aa.com.tr/en/turkey/turkish-bar-association-head-released-in-istanbul/448407>.

58 "New YÖK Regulation to Pave Way for Arbitrary Closure of Universities," *Today's Zaman*, November 27, 2015, accessed May 3, 2016, http://www.todayszaman.com/anasayfa_new-YOK-regulation-to-pave-way-for-arbitrary-closure-of-universities_404913.html.

59 Mehmet Ugur, "Academic Freedom Under Threat in Turkey," *Times Higher Education*, April 14, 2016, accessed May 3, 2016, <https://www.timeshighereducation.com/features/academic-freedom-under-threat-in-turkey>.

facto ban on popular social media networks, including YouTube and Twitter.⁶⁰ A Report on Twitter censorship from Statistica shows that of 1,003 requests from government agencies to remove content from Twitter in 2015, a whopping 72% of them came from Turkey, while only 7% (the second most) came from Russia.⁶¹ Turkish judge Isli Karakas, who was recently elected as the new vice president of the European Court of Human Rights, correctly points out that Turkey's most serious problem is no longer illegal detention or torture practices, but rather the threats to its freedom of press, for without such freedom all aspects of political liberalism suffer.⁶² Until 2014, judicial support networks were able to help the Court in addressing illegal detention or torture practices, but they appear powerless in protecting the media—their primary means of publicizing the wrongdoings of the government.

As a result of these blows dealt to their freedom of speech and spaces for organization in universities, incapacitated judicial support networks became incapable of protecting the judicial independence of the Court. While illustrating the passivity of networks is more difficult than showing their activeness, as it is more difficult to document inactivity than it is to document activity, closer study suggests that the government's attacks on various aspects of the support networks undermined judicial independence. One instance of such passivity leading to damaged judicial independence is the Court's rejection of an appeal against the Law on Judges and Prosecutors, which allowed lower courts and prosecutors to deny access to case files to defense attorneys. Only the CHP actively pursued the appeal while major bar associations like the Ankara Bar or the Turkish Bar remained silent. Similarly, even when a People's Democratic Party (Halkların Demokratik Partisi or "HDP") member of the National Assembly filed a petition to the court against the newly imposed curfews in the eastern and southeastern parts of the country, bar associations and civil society organizations were noticeably absent from the fight. The Court rejected the HDP's appeal, simply stating that the applicant, a resident of the capital city of Ankara, was not affected by the curfew in other parts of the country.⁶³

In line with its decision to uphold the law that denies access to case files to defense attorneys, the Court has avoided impinging on the AKP's dominance by refusing to lower the ten percent threshold for political parties to enter the parliament, with 14 judges voting against to lower the threshold. Minority parties, whose votes hover around the ten percent threshold, have consistently called for the lowering of the threshold. If a party fails to reach the threshold, their votes are redistributed proportionally, meaning that the AKP almost certainly remains the majority, if not supermajority, party controlling the parliament.⁶⁴ The decision to refuse the lowering of the ten percent threshold came less than a week after the Chief Justice ominously said in an interview that members of the Court were under "intense pressure" from the government to not upset the status quo that ensures the AKP's dominance.⁶⁵ While opposition parties including the CHP and the HDP initiated the litigation to lower the threshold, there was a lack of visible mobilization on the part of the general legal community and the academy due to the increasingly hostile environment discouraging public protests and critique of the government. Without strong mobilization from the judicial support networks, the judges under "intense pressure" succumbed to the government, allowing the AKP to remain the dominant party.

With the legal professionals and civil society organizations debilitated by police oppression and media censorship, the AKP fired a final blow to the judicial support networks by targeting their most influential players—the opposition parties. In May 2016, the AKP-majority parliament passed two amendments designed to suspend immunity for members of the parliament as a means of removing opposition party members from the assembly.⁶⁶ As previously discussed, in 2014 the court had ordered a release of CHP deputy Mustafa Balbay who was charged with his alleged role in the Ergenekon coup plot, stating that Balbay's constitutional immunity right as an elected

60 Zeldin, "Turkey: Constitutional Court Rules..."

61 "Turkey Dominates Global Twitter Censorship," *Statistica*, August 14, 2015, accessed May 7, 2016. <https://www.statista.com/chart/3727/share-of-all-twitter-content-removal-requests/>.

62 Ipek Yezdani, "Turkey's Key Problem Now Freedom of Press Instead of Torture, Judge Says," *Hurriyet Daily News*, September 28, 2015, accessed May 3, 2016, <http://www.hurriyetdailynews.com/turkeys-key-problem-now-freedom-of-press-instead-of-torture-judge-says.aspx?pageID=238&nid=89052&NewsCatID=339>.

63 "Turkey's Top Court Refuses HDP MP's Appeal Against Curfews in East, Southeast," *Hurriyet Daily News*, December 23, 2015, accessed May 3, 2016, <http://www.hurriyetdailynews.com/turkeys-top-court-refuses-hdp-mps-appeal-against-curfews-in-east-southeast.aspx?pageID=238&nID=92912&NewsCatID=341>.

64 Kandemir, "Turkey's Top Court Declines..."

65 Id.

66 Casper, "Turkish Constitutional Court Rejects Petition..."

deputy had been violated.⁶⁷ But in June 2016, when the political climate was such that the Court received less support from the judicial support networks, the Court rejected the CHP's petition to strike down the immunity amendments passed in May 2016.⁶⁸ Shortly after the amendments passed, the state prosecutors pursued an investigation of 138 deputies in the 550-seat GNAT.⁶⁹ Of those deputies, 101 were from opposition parties, primarily the HDP and the CHP.⁷⁰ The staggering disproportion of party affiliations of the deputies under investigation strongly suggested that the amendments were crafted for the purpose of reducing the number of political opponents from the assembly. One can construe the Court's decision to reject the petition as a strategy of survival. The core interest of the AKP is to maintain its dominance, and the Court understood that the amendments were a convenient tool for the AKP to protect this core interest. Aware that the ability of its allies, namely legal professionals and civil society organizations, to engage in an extensive, public campaign against the government had been weakened, the Court decided to avoid challenging the government's core interest for the sake of its own survival in the political arena.

This strategic decision to allow the AKP to attack the opposition parties for the sake of the Court's own survival conversely enabled the AKP to renew its attacks on the entire judiciary. Shortly after the amendments to strip deputies of the parliament of their legislative immunity from prosecution passed, the HSYK issued a decree that reorganized the positions of more than 3,700 sitting judges and prosecutors.⁷¹ The decree was primarily, if not entirely, used to punish judges who ruled against the AKP and to reward prosecutors who joined the AKP's push for consolidation of powers. For example, the head of the Sixth Ankara Heavy Penal Court who ruled that the Gendermarie Intelligence Organization, a government intelligence agency, was responsible for the assassination of Kuridsh dissident and political activist Musa Anter, was demoted from his position to a local magistracy.⁷² On the other hand, Prosecutor Mehmet Demir, who had subpoenaed the main opposition CHP leader Kemal Kılıçdaroğlu to testify in a case involving the AKP, was promoted as the deputy chief prosecutor in Istanbul.⁷³ Beyond the reorganization of positions of judges and prosecutors, the decree went as far as to exile some of the most respected judges. For example, Judge Murat Aydın, who made several rulings against the AKP during his tenure and had once appealed to the Constitutional Court for the annulment of controversial Article 299 of the Turkish Penal Code—the article that made the act of making statements insulting the president crime—was exiled from the bench to the Trabzon Office of Judges.⁷⁴ This retaliatory reorganization of the judiciary signaled that the AKP, having successfully undermined the mobilization and power of the judicial support networks, was ready to refocus his attack on the judiciary, the only bulwark left for Erdoğan to conquer.

In summation, the government has incapacitated the judicial support networks through a series of attacks, including the new security law allowing police force to crush protests, harassment, imprisonment of bar association leaders and lawyers, suppression of the legal academy and the media, and removal of opposition parties from power. By actively monitoring, intimidating, and suppressing various aspects of judicial support networks, which are critical determinants of judicial independence, the AKP-government has effectively re-launched its attack against the judiciary, ultimately bludgeoning the Constitutional Court into submission.

VIII. Pakistan: Lawyers Saving Judges and Defending Judicial Independence

The Pakistani case is a remarkable example of how a solid, unified movement of judicial support networks can not only strengthen judicial independence, but also directly save judges from regime backlash. Traditionally, the Pakistani Supreme Court (PSC) has served a regime-supporting role under military regimes. However, as the economy liberalized under Musharraf, more public interest cases came before the Supreme Court,

67 "Turkey's Constitutional Court Rules Long Imprisonment...", *Hurriyet Daily News*.

68 Casper, "Turkish Constitutional Court Rejects Petition..."

69 Gulsen Solaker and Humeyra Pamuk, "Turkish Parliament Strips MPs of Immunity in Blow to Kurdish Opposition," *Reuters*, May 20, 2016, accessed May 27, 2016. <http://www.reuters.com/article/us-turkey-politics-immunity-idUSKCN0YB0VC>.

70 *Id.*

71 Oya Armutcu, "Turkish Gov't Shakes Up Judiciary with Decree Shifting More than 3,700 Judges and Prosecutors," *Hurriyet Daily News*, June 7, 2016, accessed June 8, 2016, <http://www.hurriyetdailynews.com/turkish-govt-shakes-up-judiciary-with-decree-shifting-more-than-3700-judges-prosecutors.aspx?pageID=238&nID=100164&NewsCatID=338>.

72 *Id.*

73 *Id.*

74 *Id.*

which has used the rise in public interest litigation as an opportunity to expand its judicial power.⁷⁵ Similar to the Turkish case, the Musharraf regime attacked the Supreme Court of Pakistan when the government perceived the expansion of judicial power of the Supreme Court as a threat to its authority. The government did not anticipate that an attack against the Court would result in an unprecedented mobilization of judicial support networks, especially lawyers, against the government that eventually cost Musharraf his presidency.

Ghias illustrates the way in which the discontents of economic liberalization opened ways for the Pakistani Supreme Court, led by Chief Justice Chaudhry, to incrementally expand judicial power by intervening in economic policy as a stepping-stone to the greater goal of political liberalization.⁷⁶ Under Musharraf's rule, Pakistan saw a significant improvement in its economy through newly-built high-rise offices. In October 2005, an earthquake destroyed poorly-built skyscrapers, which included residential towers, claiming the lives of 75,000 people.⁷⁷ Survivors of a collapsed high-rise residential tower in Islamabad filed a petition to the Supreme Court, arguing that the government's failure to enforce safety regulations to the newly-built residential tower and refusal to redress residents' complaints of defects in the tower had deprived them of life, liberty, and property.⁷⁸ The Supreme Court ordered the Capital Development Authority (CDA), an administrative bureaucracy responsible for construction safety regulations, to provide shelter for the victims and to find the responsible parties for the defective construction (*Saad Mazhar v. Capital Development Authority* 2005). The PSC followed up with its decision two months later, ordering Islamabad officials to inform the Court what action had been taken against the officials responsible for failing to apply safety regulations. Through the *CDA* decision, the Court essentially expanded its role in the area of construction safety, an area traditionally under the jurisdiction of the executive branch, and alerted the public and the media that the Court could rule against the government.

The PSC further expanded its role in economic policy when it intervened in oil price control. The Oil Companies Advisory Committee (OCAC), appointed by the Ministry of Petroleum, had the authority to set the petroleum price without parliamentary oversight. When the international oil price shock of 2005 increased the international oil price to US \$70 per barrel, the OCAC increased the petroleum price accordingly.⁷⁹ But when the international oil price decreased to US \$62 per barrel in 2006, the OCAC did not provide a commensurate decrease in its previously increased petroleum price.⁸⁰ With public interest lawyers and consumer associations' petitions, the Supreme Court decided to order an investigation of the OCAC members and their potential corruption through their ties with the Ministry of Petroleum. In doing so, the Court once again challenged the government and its corrupted economic policy rather than serving its expected role as the delegate of controversial policy measures (i.e. increased petroleum price) by upholding the price.

The Court's next target in its battle against government corruption in the economic realm was Prime Minister Shaukat Aziz. Before he was appointed as prime minister in 2004, Aziz was a Citibank vice president in New York. Musharraf gave Aziz not only the position of prime minister, but also the positions of finance minister and chairman of the Privatization Commission, making him responsible for overseeing the sale of state enterprises such as Pakistan Telecommunication Corporation Ltd. (PTCL) and Pakistan Steel Mills (PSM).⁸¹ Under Aziz's leadership, both PTCL and PSM were privatized with the help of Citibank, despite fierce opposition from labor unions. Opposition parties to Musharraf and labor unions accused Aziz of bribery and of selling state enterprises to private ownership for a price lower than their value.⁸² Organized under the same cause to challenge Aziz's privatization of state enterprises, the union and public interest lawyers filed a petition in May 2006 to the Supreme Court annul the sale.⁸³ The union argued that they had standing in this petition by relying on a famous Indian Supreme Court case, *S. P. Gupta v. Union of India* (1981), in which the Indian Supreme Court upheld that lawyers, organizations,

75 Shoaib Ghias, "Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan under Musharraf," *Law & Social Inquiry* 35, no. 4: (2010): 992.

76 Shoaib Ghias, "Miscarriage of Chief Justice," 985-1022.

77 Shoaib Ghias, "Miscarriage of Chief Justice," 992.

78 Id.

79 Shoaib Ghias, "Miscarriage of Chief Justice," 993.

80 Id.

81 Shoaib Ghias, "Miscarriage of Chief Justice," 994.

82 Id.

83 Id.

and individuals have the right to bring lawsuits on behalf of the public.⁸⁴ In 2006, the Court annulled the PSM purchase agreement signed by the Privatization Commission. This annulment was one of the first major instances in which the Court directly confronted Musharraf by challenging Musharraf's right-hand man, Prime Minister Aziz.

The most serious conflict between the Court and the government involved Musharraf's potential reelection in 2007. The Pakistani Constitution prohibits the president from holding an office other than the presidency (Article 41, 260). In 2002, a year after Musharraf won the presidential election, the public challenged Musharraf's eligibility by his holding of the offices of president and army-general. However, Musharraf had amended the Constitution to allow himself to hold more than one office, and the Supreme Court had found the temporary amendment constitutional in 2002.⁸⁵ When Musharraf announced his reelection campaign in 2007, the civil society and opposition parties once again challenged his eligibility. Musharraf understood that the Supreme Court was no longer the same Court that it was in 2002, when it was acquiescent to Musharraf's authoritarian rule, as evidenced by the Court's latest rulings against the government in the areas of public policy and economy. The media also reported that Chief Justice Chaudhry would be willing to invalidate Musharraf's candidacy, providing further evidence of the Court's new orientation against Musharraf. Already displeased with the Court for interfering with the executive and the bureaucracy, Musharraf removed Chaudhry from the Court to prevent the Court from moving forward in challenging his eligibility to run for presidential election while still in military service.⁸⁶

The above analysis of the Pakistani Supreme Court's behavior during Musharraf's rule demonstrates that the Court has gradually deviated from its regime-supporting role. They have gradually expanded judicial power by first challenging the city officials in the construction safety case, then the federal ministers in the petroleum price case, and finally the prime minister in the privatization case. In this context, Musharraf could no longer trust the Court, and decided to remove Chief Justice Chaudhry through a presidential decree suspending Chaudhry and appointing Justice Javed Iqbal as the acting chief justice.⁸⁷ Unlike Erdoğan, who first attempted to threaten the Constitutional Court through laws and amendments undermining the independence of the judiciary, Musharraf directly attacked the chief justice, unaware that the removal of chief justice would stir an unprecedented movement among lawyers, civil society, and opposition parties that would eventually restore Chaudhry to the Court, bolster judicial independence, and force Musharraf's resignation.

This mobilization to restore Chaudhry resulted from a collaboration of several actors including the lower courts, the media, and the bar associations. When Musharraf attempted to intimidate Chaudhry into resigning from the Court and Chaudhry resisted, police forces pulled Chaudhry by his hair and pushed him into a police car.⁸⁸ The press captured the moment and circulated a picture of the chief justice, the highest symbol of the legal profession and "guardian of law," being oppressed by the police.⁸⁹ The picture publicized the detention of chief justice and galvanized even the most apathetic lawyers into joining the movement for the restoration of the chief justice.⁹⁰

After the suspension, Chaudhry and his team of defense attorneys strengthened the momentum of the movement by traveling to local provinces and giving speeches to bar associations about Musharraf's rule of terror.⁹¹ Headed by some of the most respected and well-known lawyers, including the Pakistan Bar Council chair Hamid Khan, political leader Aitzaz Ahsan, retired judge Tariq Mehmood, and activist lawyer Ali Ahmad Kurd, lawyers around the country engaged in lower court boycotts and street protests to show the Musharraf regime that they would not submit to the authoritarian rule.⁹² As the remaining judges of the Supreme Court deliberated on the legality of Musharraf's decree against Chaudhry, Ali Ahmad Kurd gave the following statement in warning against deciding the case in Musharraf's favor: "Let me tell you that

84 Id.

85 Shoaib Ghias, "Miscarriage of Chief Justice," 996.

86 Id.

87 Shoaib Ghias, "Miscarriage of Chief Justice," 1002.

88 Daud Munir, "From Judicial Autonomy to Regime Transformation: The Role of the Lawyers' Movement in Pakistan," in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, ed. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley, (Cambridge: Cambridge University Press, 2012), 387.

89 "Text of Chief Justice's Affidavit," The News, May 30, 2007, accessed May 7, 2016, "<http://www.thenews.com.pk/updates.asp?id=39768>."

90 Munir, "From Judicial Autonomy to Regime Transformation," 387.

91 Shoaib Ghias, "Miscarriage of Chief Justice," 1007.

92 Shoaib Ghias, "Miscarriage of Chief Justice," 1006.

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."⁹³

Perhaps the most significant role lawyers played in their mobilization for judicial independence was as street protestors. The protests were largely peaceful, but the use of violence by the oppressive regime resulted in the deployment of violence on both sides. The media coverage of lawyers bleeding after being exposed to police violence, marching in black coats, and protesting in front of government buildings spurred a passionate response from the public against Musharraf. As the public witnessed the protests, Musharraf's approval ratings plummeted. A survey by the International Republican Institute revealed that just two months before presidential election 64% of Pakistanis opposed giving Musharraf another term.⁹⁴ In Pakistan's multi-party system, opposition of this magnitude effectively signified a death sentence for a candidate. Public opinion clearly aligned in favor of Chief Justice Chaudhry and lawyers. On July 20, 2007, the remaining judges of the Supreme Court dismissed Musharraf's presidential decree that had disposed Chaudhry.⁹⁵

The restoration of Chief Justice Chaudhry was not the end of the movement. Pakistani lawyers capitalized on the movement to undermine authoritarian rule, with the ultimate goal of moving Pakistan towards political liberalism and limiting executive power. After Chaudhry's restoration and the pressure from lawyers, human rights activists, and the Court prompted the government to release the illegal detention of missing people, including suspected "terrorists" who had been arrested but never charged.⁹⁶ The movement faced an unexpected pause when Musharraf imposed martial law in November 2007 to avoid the Court ruling on the constitutionality of his reelection. However, in spite of the emergency rule that resulted in the disposition of 64 judges who refused to take oath under Musharraf, lawyers persisted in demonstrating and boycotting courts.⁹⁷ In July 2008, for example, a total of 50,000 protestors and lawyers from around the country marched to the capital in demand for restoration of those 64 judges.⁹⁸ It seemed clearer each day that Musharraf's power was eroding, forcing Musharraf to eventually resign in August 2008.

IX. Conclusion

This paper analyzes the complex roles courts and their judicial support networks play in authoritarian regimes. Over the past few years, the Turkish Constitutional Court has displayed vastly different levels of judicial independence—that is, the Court's ability and willingness to rule against the interests of the ruling government. Many scholars have attempted to apply the ideational model to understand the Court's varying degrees of judicial independence. The ideational model suggests that judges' own conceptions and attitudes about their roles in a democratic system best determines whether or not judges will engage in conflict with the government.⁹⁹ According to the ideational model, judges with deferential ideology refrain from challenging the executive and legislative branches and instead defer to political actors in cases involving public law; and judges with activist ideology often question the decisions of political actors and perceive their role as the protector of individual rights.¹⁰⁰ I argue that an observation of the composition of the Court reveals that the ideational model fails to explain the variance in the Court's judicial independence, because (1) most of the appointments of the Court were made by the AKP regime and (2) the same Court displayed different behaviors in the period between 2010 and 2016. An external factor other than judges' ideology influences the Court's behavior. I argue that the active (or passive) legal mobilization on the part of judicial support networks—comprised of opposition parties, legal professionals and civil society organizations—is what drives the rise (or decline) of judicial independence in Turkey.

When the AKP regime attempted to consolidate power and perceived the Court as a threat, the government strived to decrease the independence of the judiciary through a series of political and institutional attacks on

93 Quoted in Shoaib Ghias, "Miscarriage of Chief Justice," 1010.

94 "A Mess in Pakistan," *The Economist*, August 9, 2007, accessed May 5, 2016, <http://www.economist.com/node/9622079>.

95 Munir, "From Judicial Autonomy to Regime Transformation," 387.

96 Shoaib Ghias, "Miscarriage of Chief Justice," 1011.

97 Shoaib Ghias, "Miscarriage of Chief Justice," 1014.

98 Munir, "From Judicial Autonomy to Regime Transformation," 388.

99 Couso and Hilbink, "From Quietism to Incipient Activism"; Hilbink, "The Origins of Positive Judicial Independence."

100 Couso and Hilbink, "From Quietism to Incipient Activism," 100.

the Court. Unexpectedly, however, these attacks on the Court galvanized judicial support networks to mobilize in order to protect judicial independence. With active opposition parties and legal professionals along with civil society organizations backing the Court, judges were able to rule against the government's interests between 2010 and 2014. However, the ability of judicial support networks to defend judicial independence began to decrease in 2015 when the AKP government shifted the target of its attacks from the Court to the judicial support networks. In order to sever the synergy between the Court and the judicial support networks, Erdoğan launched a crusade of media censorship, excessive use of police force, restriction of freedom of speech and association, and illegal detention practices. As a result, judicial support networks were incapable of actively mobilizing to protect judicial independence, which led to a decrease in judicial independence.

The interplay between the Court and judicial support networks leads to several implications regarding the instances when and ways in which the Court exerts a high level of judicial independence. Given the potential use of courts as a site of contestation against the government, authoritarian regimes encounter difficulty in mediating between the potential benefits of exploiting the judicial branch and its converse ability to support the efforts of those resisting oppressive regimes.¹⁰¹ Judicial support networks mobilize to protect the Court when it is threatened by the government in order to preserve a vital space for opposition parties, legal professionals, and civil society organizations to solidify resistance against authoritarian rule. In Turkey, judicial support networks protected the CCT from the government's earlier attempt to change the Law on Judges and Prosecutors, which would have led to an imbalance of power between the judicial and executive branches by giving the Ministry of Justice far-reaching control over the appointment and dismissal of judges and prosecutors.¹⁰² In Pakistan, judicial support networks protected the PSC from the government's attempt to remove the chief justice who had expanded judicial power and challenged the executive branch and the bureaucracy. Judicial support networks strive to protect their apex court, precisely because an attack on the court makes it harder for them to achieve political liberalism in their authoritarian regimes. In contrast, when judicial support networks themselves are attacked, the Court suffers from a gradual loss of judicial independence because it finds itself without a crucial determinant of judicial power—that is, the legal mobilization of judicial support networks.

Hence, the synergy between judicial support networks and apex courts in Turkey and Pakistan reveal a generally predictable pattern of conflicts between an authoritarian regime and an apex court. An authoritarian government seeking to bring an apex court into submission would first attempt to debilitate the court itself, either by punishing judges through court packing, restructuring, impeachment, and removal, or by budgetary cuts. However, a direct attack on the court could stir an unprecedented social movement among judicial support networks against the government, empowering the court to rule against government's interests. Perceiving the active legal mobilization of judicial support networks as the source of the court's judicial independence, the government would then focus on incapacitating judicial support networks rather than directly attacking the Court. By maneuvering through this avenue of achieving dominance, an authoritarian government would seek to keep the benefits of courts while reducing the costs courts can bring to the regime's interests. Conversely, a court in an authoritarian context (assuming that the court's goal is to move its regime toward political liberalism) would fight the regime most fiercely when it attempts to attack the court's allies. Precisely for this reason, the most serious conflicts between courts and authoritarian regimes concern the laws targeting judicial support networks, as was the case in Turkey after 2015.

101 Moustafa and Ginsburg, "Introduction," 18..

102 Zeldin, "Turkey: New Amendments to Laws..."

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