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# **A Long March to Justice:** A report on judicial independence and integrity in Pakistan

**September 2009**

An International Bar Association  
Human Rights Institute Report

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# A Report on the Independence of the Judiciary in Pakistan and Related Matters

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# Executive Summary

The International Bar Association's Human Rights Institute (IBAHRI) undertook a mission to Pakistan from 19 March to 3 April 2009, funded by the Foundation Open Society Institute, to examine the independence of the judiciary in Pakistan. This was particularly in response to the events surrounding the removal and later reinstatement of the Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry,<sup>1</sup> but also of concern were the reactions of the judiciary and lawyers to these events, the government response to them, and the legacy of the state of emergency on constitutional provisions relating to fundamental rights. In addition, systemic issues such as the process of appointment and removal of judges, the accountability of the judiciary, shortcomings in court infrastructure, tenure provisions, the training of the legal profession, the Islamisation of the legal system, and endemic corruption are relevant to such an analysis. The IBAHRI delegation met with judges, lawyers, politicians, academics, law students, journalists, human rights activists, bar associations, NGOs, and members of civil society. The delegation also reviewed relevant domestic and international legal documents.

Pakistan has had a history of governments toppled by military coups, after which the Supreme Court of Pakistan was called upon to justify the abrogations of democracy on grounds such as 'state necessity' or 'revolutionary legality'. The need and expectation of military dictators to have their actions sanctioned by the apex court progressively weakened the independence of the judiciary. Moreover, in order to secure greater compliance of the courts, military rulers frequently changed the oath of office of the judges, swearing them to the emergency regime rather than the Constitution, and removing those who refused to do so.

A change in this situation began in 2006 when the Supreme Court struck down the government's attempt to privatise a major state industry, Pakistan Steel Mills. The decision marked the beginning of a series of cases in which the Supreme Court and the provincial High Courts began to question the actions of the regime of President Musharraf, who needed compliant courts because of imminent elections and the controversy as to whether he could stand again for the presidency and, in particular, retain concurrently the position of Chief of Army Staff. On 9 March 2007, the Chief Justice was summoned to Army House and accused of judicial misconduct. The proceedings surrounding this were declared unconstitutional by the Supreme Court in July 2007. This restored Chaudhry as Chief Justice, but he was again removed following a declaration of a state of emergency on 3 November 2007.

Chief Justice Chaudhry formally resumed his office on 21 March 2009, almost 18 months after being dismissed and having been kept for that time in home detention with his family. However, the restoration of the Chief Justice ameliorates only one of many problems which beset Pakistan's justice system. The composition of the judiciary itself has been in disarray since the 2007 coup because three different classes of judges had been created in the superior courts: those sitting judges who swore the new oath; those judges who refused to swear the new oath and were removed (later to be reinstated); and those judges newly appointed to the bench during and immediately after the emergency. On 31 July 2009, the Supreme Court itself addressed this problem by holding that all appointments to the superior courts made since 3 November 2007, were unconstitutional and void *ab initio*, and those

<sup>1</sup> This was the subject of the IBAHRI Report *The Struggle to Maintain an Independent Judiciary: A Report on the Attempt to Remove the Chief Justice of Pakistan*, July 2007 ([www.ibanet.org/Human\\_Rights\\_Institute/HRI\\_Publications/Country\\_reports.aspx](http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx))

judges who swore the new oath would be subject to proceedings under Article 209 of the Constitution for misconduct.<sup>2</sup>

However, the entire procedure for the appointment and removal of judges, in both the superior and subordinate courts, needs review and improvement. Despite Supreme Court decisions requiring meaningful and effective consultation in the appointments process, and clear constitutional provisions as to independence and removal, the subversion of these requirements has created a need for greater transparency in the process in order to reduce political manipulation. The procedures and role of the Supreme Judicial Council with respect to charges of judicial misconduct need to be clarified, particularly in the light of the treatment of Chief Justice Chaudhry, to safeguard against abuses and ensure effectiveness. Although there is a Code of Conduct for judges, this is not enforced and it also needs reforming. The procedures of the National Accountability Bureau have never been applied to judges, although they were originally meant to do so, and there are currently plans to abolish the Bureau altogether. There is also no performance management for judges of an organised kind in any courts. All of these factors indicate a need to address (and to some extent they explain the existence of) the allegations of corruption in the subordinate judiciary and the history of political bias in judges of the superior courts. The *National Judicial Policy 2009* does address many of these issues and should be fully implemented.

Other systemic issues affecting the proper functioning of the judiciary include the lack of sufficient security for judges and their families (particularly when a judge is hearing a controversial case), lack of adequate physical infrastructure in the courts, appropriate and proportionate salary scales and related benefits for judges, and security of tenure.

The development of judicial activism, through public interest litigation and the use of the *suo moto* power, was a result of the government's failure to protect fundamental rights. These are powerful tools and constitute a considerable enhancement of judicial powers. There has been no systematic study of the use of these powers in recent years. Attention needs to be directed to the capacity of the judiciary to respond effectively to the rights claims at stake in these cases and to define appropriate and legally enforceable remedies. The dividing line between appropriate and inappropriate judicial activism needs to be better defined.

The legal profession itself formed the vanguard of the popular movement to restore the Chief Justice, bearing the brunt of the attacks when protests were stifled by the authorities. However, while lawyers appear to have been united in their opposition to the way in which the Chief Justice was treated, it may be questioned whether the lawyers' movement itself was united, whether it was exploited by political parties, and whether some lawyers have in fact been prepared to achieve their aims by any means. Activism should not be accompanied by an unacceptable lowering of professional standards. Also, the quality of legal education in Pakistan is uneven and requirements for admission to practise in the legal profession are vague. In particular there is a lack of training in ethics, procedure, human rights, gender and minority perspectives, and skills-based training. Assessment procedures lack rigour and are sometimes corrupt.

The Islamisation of the legal system generally since the time of President Zia, and the relinquishment of constitutional rule as a political compromise in parts of Pakistan such as the Swat Valley in recent

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<sup>2</sup> *Sindh High Court Bar Association v Federation of Pakistan; Nadeem Ahmed v Federation of Pakistan* (unreported).

times, mean that access to justice, which is a fundamental human right, may be denied on the basis of geographical location. Related to this is the treatment generally in the justice system of women and minorities. Pakistan is a party to both the *Convention on the Elimination of all Forms of Discrimination Against Women* and the *International Convention on the Elimination of all Forms of Racial Discrimination*, yet it has not fully implemented their provisions and is consistently late in submitting periodic reports under them to the relevant UN committees. There is also an urgent need for reform of the police, particularly with respect to sensitisation training and human rights.

Pakistan's Constitution has undergone many amendments designed to entrench orders made during emergency periods. Although recent decisions of the Supreme Court have gone some way to remedying these deficiencies, they have not been completely eliminated and a full-scale constitutional review is needed.

The justice system must no longer be regarded as subordinate to political expediency. Expectations are high that the judiciary in particular, and the legal profession in general, will take a leading role in restoring the rule of law and the protection of human rights in Pakistan. There are no simple means of solving the many challenges facing the justice system. Purely cosmetic changes will no longer be sufficient to ensure that fundamental rights are not only implemented but truly respected in Pakistan.

## **IBAHRI recommendations**

### *With respect to the judiciary:*

1. There should be a review and reform of the existing appointments procedures to ensure greater transparency and independence from political interference. Consideration should be given to the establishment of a Judicial Appointments Commission with specific criteria for its membership to give sufficient input into the process from all relevant federal and provincial stakeholders and preventing domination by political parties. A transparent nominations process should promote judicial appointments made against agreed criteria based on merit. The aims of the Commission should include incorporating gender balance and representation of minority communities in the judiciary, provided candidates are otherwise meritorious.
2. There should be a review of the role, procedures and composition of the Supreme Judicial Council, particularly with respect to allegations of misconduct that may arise concerning the Chief Justice.
3. A review of High Court procedures for the removal of judges in subordinate courts should be undertaken, particularly with a view to standardising the benchmarks for judicial conduct throughout Pakistan.
4. The Supreme Court should take active steps to fully implement the National Judicial Policy's recommendations on the eradication of corruption in the administration of justice and in effective responses to complaints of corruption.
5. The Code of Judicial Conduct should be further developed and enforced, and applied to all levels of the judiciary.

6. A system of performance management of the judiciary and court staff should be introduced and effectively monitored through strengthened inspection mechanisms.
7. The Supreme Court should formulate a judicial policy governing public interest litigation and *suo moto* cases which ensures the balance, and separation, of powers whilst safeguarding the role of the judiciary in the protection of human rights and the rule of law for individuals and groups who are genuinely aggrieved. A careful study and analysis of public interest litigation and the use of *suo moto* powers should be undertaken, together with dialogue between the judiciary, civil society organisations, the legal profession and academia, to examine and reflect on the implications for judicial independence.
8. An urgent review of the security protection provided to members of the judiciary, particularly during controversial or sensitive trials, should be undertaken and deficiencies thus identified should be urgently rectified.
9. The federal and provincial governments should improve the physical infrastructure and financial autonomy of courts, especially of the subordinate courts.
10. A review of current pay scales and remuneration schemes of all judges should be undertaken with a view to ensuring that salary and benefits are commensurate with the status and importance of courts.
11. Security of tenure for judges should be guaranteed by law.

*With respect to the legal profession:*

12. The Legal Practitioners and bar councils (Amendment) Ordinance 2007 should be repealed.
13. The system of unrepresentative bar councils, the *ex officio* Chairmen of which are the Attorney General or an Advocate General, should be phased out and replaced by a system of fully independent bar associations, established by legislation, to govern the legal profession.
14. Codes of conduct for lawyers should be re-examined with respect to the boundaries of proper professional conduct, with particular attention paid to addressing corruption within bar associations, especially with respect to election of officers. In the meantime, bar associations should investigate allegations of unprofessional behaviour, particularly those involving resort to violence, and discipline those responsible.

*With respect to legal education:*

15. The following measures should be introduced into legal education curricula: training on professional ethics, practice and procedure should be strengthened; greater emphasis should be placed on skills-based training and clinical legal education methodologies; training on international human rights law should be integrated into programmes; clinical legal education programmes with links to civil society and judicial monitoring programmes should be established; gender and law programmes/courses should be available in law faculties and gender equality perspective integrated into the curriculum.

16. Law schools should undertake an extensive revision of their assessment policies and procedures to guarantee appropriate scholastic standards, eliminate cheating, and better equip law students for the rigours associated with bringing Pakistan up to an acceptable international standard regarding the rule of law.
17. Law schools should endeavour to establish their own high quality law journals and, if university or government funding for this purpose is not forthcoming, to seek funding from international donor organisations.
18. Bar councils and bar associations should consider introducing a compulsory system of continuing professional development for all advocates, to include both substantive law training and updating of skills (including case management, information technology and electronic legal research skills).

*With respect to civil society:*

19. The government and the media should take steps to strengthen the right to freedom of expression and the independence of the media, in particular by enhancing the capacity to conduct investigative journalism on issues pertaining to human rights and the rule of law, and to monitor violations of media freedom.
20. Civil society organisations should seek funding and take on a more prominent role in monitoring and reporting on the independence of the subordinate judiciary.

*With respect to Pakistan's international obligations:*

21. Domestic implementation of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women should be undertaken. In particular the recommendations made by the UN Committee on the Elimination of Discrimination Against Women in its Concluding Comments made in June 2007, on Pakistan's periodic reports should be implemented and any declarations seeking to limit the scope of Pakistan's obligations should be withdrawn.
22. Domestic implementation of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination should be undertaken.
23. Pakistan should ratify the UN Covenant on Civil and Political Rights and domestically implement its provisions.
24. Legislation should be passed addressing the role of jirgas and other forms of traditional justice and regulating their use and their relationship to the formal justice system.
25. Police training should be reformed to include more sensitisation to the issues affecting women and minorities and also to include fundamental rights in an effective manner.
26. The exemption for police in Article 8(3) of the Constitution should be removed.
27. Further comprehensive studies should be undertaken on the relationship between international human rights standards, Islamic law and domestic law in Pakistan.

28. Pakistan's adherence to its obligations under the United Nations Convention Against Corruption should be investigated by a well-established civil society organisation such as the Pakistan Human Rights Commission.
29. Efforts should be made by the courts and the government to give those who do not speak English full access to the legal system, for example by providing translations of reported judgments and laws, and better interpretation facilities.
30. An independent investigation into the role of the functioning of the Anti-Terrorism Courts, their rates of conviction and their adherence to international human rights standards and the rule of law, is urgently required. The continued operation of these courts should be reviewed, with due consideration given to ceasing their operation and transferring their functions to the ordinary criminal justice system, with necessary protections and security ensured.
31. The amendments made in November 2007 to the Pakistan Army Act 1952 should be immediately repealed and a judicial review should be held of all cases involving civilians heard by military courts under those amendments.

*With respect to access to justice:*

32. The government should restore access to the ordinary court system in areas such as the Swat Valley, in order to ensure the right of all persons to access to justice and the rule of law in accordance with the Constitution.
33. The courts should urgently review their costs regulations.
34. The short-term measures proposed in the National Judicial Policy to address the backlog of cases in the courts should be implemented immediately.
35. The government should establish a permanent body of eminent jurists to analyse the Constitution and its implementation in the light of accepted standards of fundamental rights and the rule of law, and to make appropriate recommendations for constitutional amendment to the National Assembly.

# Chapter 1 – Introduction

This report is the result of a mission to the Islamic Republic of Pakistan carried out by the International Bar Association’s Human Rights Institute from 19 March to 3 April 2009, under funding from the Foundation Open Society Institute.

The International Bar Association (IBA) is the world’s largest lawyers’ representative organisation, comprising 30,000 individual lawyers and over 195 bar associations and law societies. In 1995, the IBA established the Human Rights Institute (IBAHRI) under the Honorary Presidency of Nelson Mandela. The IBAHRI is non-political and works across the IBA, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

The IBAHRI had sent a delegation to Pakistan in 2007 (also funded by the Foundation Open Society Institute) in response to the events relating to the treatment of the Chief Justice, Iftikhar Muhammad Chaudhry.<sup>3</sup> The present Report is also principally concerned with judicial independence in Pakistan, but is a wider analysis considering the factors which have been significant in developments in Pakistan in the last two years: the wide-ranging demonstrations of lawyers and others, and the government reaction to these; the appointment and removal of judges during this period; the resignation of President Musharraf; the legacy of the state of emergency on the provisions in the Constitution and on fundamental rights; the reactions of the courts, particularly with respect to the use of *suo moto* actions; issues of accountability in the judiciary; endemic corruption; and systemic issues such as infrastructure shortcomings, tenure provisions, the training of the legal profession, and the Islamisation of the legal system.

The terms of reference for the mission were to:

- examine the independence of the judiciary in Pakistan;
- identify the issues, including systemic issues, affecting the independence of the judiciary in Pakistan;
- consider the contribution of the legal profession of Pakistan to the issue of the independence of the judiciary;
- examine any related matters, including the responsibilities of the stakeholders; and
- make recommendations.

## 1.1 Delegation members

The IBAHRI is grateful to the delegation members who accepted the invitation to take part in the mission. The delegation members were:

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<sup>3</sup> *The Struggle to Maintain an Independent Judiciary: A Report on the Attempt to Remove the Chief Justice of Pakistan*, July 2007 ([www.ibanet.org/Human\\_Rights\\_Institute/HRI\\_Publications/Country\\_reports.aspx](http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx)) (accessed 22 August 2009).

### **Dr Martin Lau**

Dr Martin Lau is a Barrister at Essex Court Chamber and a Reader in Law at the School of Oriental and African Studies (SOAS), University of London, where he teaches courses on South Asian law at both postgraduate and undergraduate level. He was Head of the SOAS Law Department from 2002 until 2005, the Director of the Centre of Islamic and Middle Eastern Law at SOAS from 1995 to 1998, and is currently the programme convenor of the LLM and Chief Examiner for Islamic Law in the External LLB of the University of London. He holds academic qualifications in law and in South Asian history from the University of Heidelberg and the University of London. In his legal practice, Dr Lau focuses on the provision of expert opinions on Pakistani, Indian and Afghan law and he regularly appears as an expert witness before English courts and tribunals as well as international arbitrations. Dr Lau has also worked as a consultant for a number of international organisations, including UN bodies, the International Commission of Jurists and the European Commission. He has published extensively on Pakistani and modern Islamic law and he edits, with Professor Cotran, the Yearbook of Islamic and Middle Eastern Law. His recent publications include *The Role of Islam in the Legal System of Pakistan* (Brill, 2006) and 'Twenty Five Years of Hudood Ordinances – A Review', *Washington and Lee Law Review*, vol 64:4, 2007.

### **Justice Aly Mokhtar**

Justice Aly Mokhtar is a judge with the Egyptian Ministry of Justice. Previous appointments include Deputy Resident Representative of the International Development Law Organisation (IDLO) in Afghanistan and Vice President of SUNSGLO Associates (the Centre for Studying the United Nations System and the Global Legal Order). Judge Mokhtar received his LLB from Cairo University and his LLM from the Irish Centre for Human Rights. He is also the holder of a Baccalaureate for Police Sciences and prior to elevation to the bench he was a Criminal and Tax Evasion Prosecutor as well as a police officer.

### **Dr Siobhan Mullally**

Dr Siobhan Mullally is Senior Lecturer at the Faculty of Law, University College, Cork, where she teaches international human rights law, international criminal law and migration and refugee law. She has been a consultant to the Human Rights Commission of Pakistan and has designed and delivered human rights training programmes at the Human Rights Centre at the University of Peshawar. Dr Mullally was a founding Director of the Centre for Criminal Justice and Human Rights at University College, Cork. She was Chairperson of the Irish Refugee Council, 2006-8. She is Editor of the *Irish Yearbook of International Law*. Dr Mullally received a BCL at University College, Cork, an LLM at the London School of Economics and a PhD at the European University Institute, Florence. Dr Mullally is an expert in human rights, particularly with respect to gender issues, and has justice sector reform experience with the legal systems of Pakistan, Afghanistan, India, Timor-Leste and Kazakhstan, including with international NGOs and UN bodies. Dr Mullally has previously held appointments and visiting positions at the University of Peshawar, Harvard Law School, Cornell Law School and the National University of India Law School, Bangalore. Dr Mullally has published extensively on

issues relating to gender and human rights, most recently *Gender, Culture and Human Rights: Reclaiming Universalism* (2006, Hart Publishing), and 'Multiculturalism and Human Rights', in *The Universal Declaration of Human Rights at 60* (2008, Centre for Human Rights, University of Santiago).

### **Dr Phillip Tahmindjis**

Dr Phillip Tahmindjis is the Deputy Director of the IBA's Human Rights Institute. He was a member of the delegation for the 2007 IBAHRI mission to Pakistan and has conducted similar missions to Nepal, Swaziland and the Russian Federation. His responsibilities have also included the establishment of a bar association in Afghanistan, advising on setting up bar associations in the Maldives and Bhutan, human rights training for lawyers and judges in Iraq, Libya and Palestine, humanitarian law training in the Former Yugoslavia, and compiling a Human Rights Training Manual in conjunction with the UN High Commission for Human Rights. He is also a trustee of the Southern Africa Litigation Centre. Dr Tahmindjis has degrees in Arts and Law from the University of Sydney, a Master of Laws degree from University College London, and a Doctorate from Dalhousie University, Canada. Admitted to the bar of New South Wales in 1978, Dr Tahmindjis was for 25 years a Professor of Human Rights, teaching and researching in Australia, North America and Hong Kong. He was for three years a Member of the Queensland Anti-Discrimination Tribunal and is a trained mediator. He has been a consultant to private industry and government with respect to the implementation of human rights (particularly with respect to anti-discrimination measures) and is the editor of four books and the author of several articles in this area, the most recent being *Sexuality and Human Rights: A Global Overview* (Haworth Pres, 2005).

## **1.2 Interviews and consultations**

The IBAHRI delegation conducted interviews and consultations in Islamabad, Peshawar, Lahore and Karachi. The IBAHRI sincerely thanks the many people who made themselves available for this purpose and for the Pakistani hospitality accorded to the delegation. Most respondents agreed to have their names listed in this Report, but nearly all declined to be quoted directly. These wishes have been honoured.

The delegation attempted to speak with the Attorney-General, the Minister of Law and Justice, and former Chief Justice Dogar, but was unable to arrange interviews with them.

Those consulted by the IBAHRI delegation and who agreed to be named were:

### **Islamabad**

- Advocate Babur Suhail
- Sheila Fruman, Country Director, National Democratic Institute for International Affairs
- Senator Waseem Sajjad, Former President of Pakistan, Leader of the Opposition in the Senate
- Attorney Amna Piracha
- Ms Tahira Abdullah, Women's Action Forum

- Advocate Mohammad Ahmed Shaikh
- Justice Basharat (retired)
- Advocate Athar Minallah
- Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan
- Senior Advocate Aitzaz Ahsan
- Justice Nasser al Mulk, Judge of the Supreme Court of Pakistan
- Professor Ahmed Ali Khan, Higher Education Commission
- Dr M Qasim Jan, Vice Chancellor, Quaid-i-Azam University
- Advocate Baz Mohammad Kakar, President, Balochistan Bar Association
- Senator Akram Zaki, Chairman, Pakistan International Human Rights Organisation
- Habib Malik Orakzai, President, Pakistan International Human Rights organisation
- Atta-ur-Rehman Abassi, Senior Vice President, Pakistan International Human Rights Organisation
- Professor Muhammad Muneer, Faculty of Shari'ah and Law, International Islamic University
- Dr Faqir Hussain, Registrar, Supreme Court of Pakistan
- Senior Advocate Sardar Asmat Ullah Khan, President, Rawalpindi Bar Association
- Advocate Shaharyar Imdad Awan
- Advocate Ahmad Attaur Rehman
- Colonel Mazhar A Azhar

#### **Peshawar**

- Senior Advocate Musarrat Hilali
- Justice Dost Muhammad Khan, Judge of the Peshawar High Court
- Senior Advocate Qazi Muhammad Jamil, Former Judge of the Peshawar High Court and former Attorney General
- Advocate Sher Mohammad Khan
- Senior Advocate M Zahur-ul-Haq
- Senior Advocate Latif Afridi, President, Peshawar High Court Bar Association
- Advocate Arbab Kaleem Ullah
- Advocate Azhar Yousaf Khan
- Advocate Hashim Raza
- Senior Advocate Kamran Arif, Vice-Chairperson, Human Rights Commission, Pakistan

## **Lahore**

- Nawaz Sharif, Former Prime Minister of Pakistan and Leader of PML(N) Party
- Peter Jacob, Executive Secretary, National Commission for Justice and Peace
- Asma Jahangir, UN Special Rapporteur on Freedom of Religion and Belief
- Professor Jawwad S Khawaja, Professor of Law, LUMS, and former Judge of the Lahore High Court
- Professor Ali Qazilbash, Law School, LUMS
- Sadaf Aziz, Lecturer, Law School, LUMS
- M Ahmed Masood, Law Student, LUMS
- Syed M Ghazenzur, Law Student, LUMS
- M. Haider Imtiaz, Law Student, LUMS
- Sundas Hurain, Law Student, LUMS
- Senior Advocate Anwar Kamal
- Senior Advocate Shaukat Umar Pirzada
- Senior Advocate Rana Asadullah Khan
- Advocate Syed Mansoor Ali Shah
- Hasan Askari Rizvi, Journalist, Political and Defence Consultant
- Senior Advocate Shahid Siddiqui, President, Lahore High Court Bar Association and former Judge of the Lahore High Court
- Liaqat Baloch, Naib Ameer Jamaat-e-Islami Pakistan
- Advocate S M Zafar, former Minister for Law and Parliamentary Affairs
- Senior Advocate Khawaja Harris Ahmad
- Justice Sayed Zahid Hussain, Chief Justice of the Lahore High Court
- I A Rehman, Director, Human Rights Commission of Pakistan
- Advocate Salman Akram Raja
- Senior Advocate Ashtar Ausaf Ali
- Advocate Sardar Kalim Ilyas
- Tariq Siyal, television journalist
- Syed Faisal Shakeel, television journalist

## **Karachi**

- Muhammad Ejaz Ahsan, Program Coordinator, Human Rights Commission of Pakistan
- Advocate Jawed Iqbal Burqi
- Advocate Naeem Qureshi, General Secretary, Karachi Bar Association
- Senior Advocate Rasheed A Razvi, former Judge of the Sindh High Court and President of the Sindh High Court Bar Association
- Senior Advocate Iqbal Haider, Former Attorney-General of Pakistan
- Advocate Khaled Amin
- Senior Advocate Muneer Malik, Secretary-General, Sindh High Court Bar Association
- Professor Mohammad Farogh Naseem, University of Karachi, former Advocate-General of Sindh
- Senior Advocate Makhdoom Ali Khan, former Attorney-General of Pakistan
- Advocate Nausheen Ahmad, Head of Legal Department, Habib Bank Limited
- Nasir Aslam Zahid, Dean, Hamdard Law School, former Judge of the Supreme Court of Pakistan
- Senior Advocate Kamal Azfar
- Isfandyar Ali Khan, ADR Project Officer, International Finance Corporation
- Navin Merchant, Program Manager, International Finance Corporation
- Advocate Mohammad Ali Abbasi, President, Karachi Bar Association
- Advocate Rafiq A Safi Munshey
- Hasan Kazmi, Senior Producer, Jaag Broadcasting Systems
- Advocate Aziz Ullah Khan
- Advocate K K Javed Khan
- Senior Advocate Zia Ahmed Awan, President, Lawyers for Human Rights
- Advocate Khalid Nawaz Khan Marwat
- Anis Haroon, Director, Aurat Foundation
- Nasreen Latif Siddiqui, Project Coordinator, War Against Rape
- Lala Hassan, Aurat Foundation
- Zehra Khalili, Legal Aid Coordinator, War Against Rape
- Farzana, War Against Rape
- Advocate Asia Munir, Legal Adviser, War Against Rape
- Advocate Rubine Amer, Aurat Foundation

- Shireen Khan, Aurat Foundation
- Malka Khan, Aurat Foundation
- Hina Tabassum, Program Officer, Aurat Foundation
- Advocate Farid, War Against Rape
- Advocate Noer Naz Agha, President, Pakistan Women Lawyers Association
- Advocate Zain Sheikh
- Majida Razvi, former Judge of the Sindh High Court and former Chairperson of the National Commission of the Status of Women
- Uzma Noorani, General Secretary, Panah Shelter Home



# Chapter Two – Historical, Political and Legal Contexts

The independence of British India in 1947, and its subsequent partition, led to the founding of the Islamic Republic of Pakistan, a state that was itself partitioned into two parts, West Pakistan and East Pakistan. Following a civil war, East Pakistan declared independence and became Bangladesh in 1971.

Pakistan's population numbers approximately 165 million people, containing various ethnic groups, the main ones being Punjabi, Pashtun, Sindhi, Baloch, and Mohajir. Pakistanis are nearly all Muslims (97 per cent), with Sunnis the clear majority within this group (77 per cent) and Shiites the minority (20 per cent). Religious minority groups (3 per cent) include Christians, Hindus, and Parsees. Urdu is the official language of Pakistan, but only eight per cent of the population speaks it as their first language. The Punjabi (48 per cent) and Sindhi (12 per cent) languages are more widely spoken. The lingua franca of the Pakistani elite and the state apparatus, including the higher judiciary, is English.<sup>4</sup>

Pakistan borders the Arabian Sea in the south, India in the east, Iran and Afghanistan in the west, and China in the north. It is a federal republic comprised of four provinces, each with its own provincial capital: Baluchistan (Quetta), Punjab (Lahore), Sindh (Karachi) and the North West Frontier Province (Peshawar). Legislative power is distributed between the federation and the provinces by the Constitution.<sup>5</sup> Pakistan's system of courts consists of the Supreme Court of Pakistan, a High Court for each Province, until recently an Islamabad High Court (which was declared unconstitutional in 2009), the Federal Shariat Court and a number of lower courts, including the Anti-Terrorism Court.<sup>6</sup> The Constitution provides that the jurisdiction of the courts is solely derived from the Constitution and that the judiciary is to be separated progressively from the executive within 14 years from the commencement of the Constitution.<sup>7</sup> Thus, in theory, the judiciary should have been a separate institution from the executive by 1987. This report indicates that the political history of Pakistan has militated against achieving this goal. (The powers of the courts, and appointment and dismissal of judges, are discussed in detail in Chapter 3).

In addition to the Provinces, Pakistan also consists of Federally Administered Tribal Areas, Provincially Administered Tribal Areas, the Federally Administered Northern Area, and the Islamabad Capital Territory. Also, the western part of the former princely state of Kashmir (Azad Jammu) is de facto controlled and administered by Pakistan, but the final status of Kashmir has not been determined. Azad Jammu and Kashmir retains its own legal system and hierarchy of courts, albeit that they are closely modelled on their Pakistani counterparts. This report does not cover Azad Jammu and Kashmir.<sup>8</sup>

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4 Source: *The World Factbook*, see [www.bartleby.com](http://www.bartleby.com) (accessed 18 August 2009) (2003 statistics).

5 1973 Constitution, Arts 141,142.

6 1973 Constitution, Art 175(1).

7 1973 Constitution, Art 175.

8 On 25 May 2009 *The News* reported that a petition was moved in the Supreme Court of Pakistan in relation to a challenge to the appointment of the Chief Justice of Azad Jammu and Kashmir. No further particulars were available at the time of writing this report. See *The News International*, 'SC to Take up AJK SC Case Today', 25 May 2009, available at [www.thenews.com.pk/daily\\_detail.asp?id=179361](http://www.thenews.com.pk/daily_detail.asp?id=179361) (accessed 18 August 2009).

## 2.1 Political history: 1947–1999

Pakistan's emergence as an independent state was beset with problems. The country had come into existence as a result of the demands of the Muslim population of British India to be given their own homeland as and when the British colonial rulers granted British India independence. The demands of the Muslim population were met in 1947, when Pakistan was carved out of the Muslim majority areas of British India. The partition along religious lines triggered one of the largest transfers of populations of the 20th century, as Hindus fled the Muslim majority areas of what had become Pakistan, and Muslims escaped from the Hindu majority areas of what had become India.

In addition to the task of integrating millions of refugees, Pakistan also faced challenges in the process of forming a constitutional order. A constitutional framework had to be created which would enable Pakistan's geographically separate parts to share power. In addition, the role that Islam should play in a country which had been created as the homeland of British India's Muslims had to be determined. These issues were difficult to address and as a result the process of drafting a constitution took nine years. The British Indian Government of India Act 1935, with a few amendments, served as the temporary constitutional basis for Pakistan, until its Constituent Assembly had drafted and adopted a constitution in 1956.

The long gestation period of Pakistan's first constitution was marked by tensions and conflicts between the executive and legislature, represented by the Governor General on the one hand and the Constituent Assembly on the other. The first constitutional crisis erupted in 1955, when the Governor General dissolved the Constituent Assembly after it had attempted to remove the Governor General's power to dismiss ministers. The Federal Court, the predecessor of the Supreme Court, when called upon to examine the legality of the Governor General's action, sided with the executive and declared the dissolution lawful,<sup>9</sup> relying on the doctrine of state necessity, which was to become an established feature of Pakistan's constitutional history. (This is described in more detail in Chapter 3).

A second Constituent Assembly drafted and adopted Pakistan's first Constitution, which came into force in 1956. A leading account of Pakistan's constitutional history remarks: 'Adequate provisions were made in the 1956 Constitution to ensure the independence of the judiciary so that "justice could be dispensed in Pakistan in a real and unpolluted form"'.<sup>10</sup> The life of the 1956 Constitution was rather short, being suspended and later abrogated by General Ayub Khan following a military coup. In the infamous *Dosso Case*<sup>11</sup> the Supreme Court declared the coup to have been lawful on the ground that because it had been successful, it had brought into existence an entirely new legal order. The legality of this new legal order could not be judged on the basis of 1956 Constitution, which had for all legal purposes disappeared as a result of the coup (which is referred to as a 'revolution' in the judgment). General Ayub Khan gave Pakistan its second Constitution in 1962. As far as the position of the higher judiciary was concerned, this Constitution followed the precedent set by the 1956 Constitution. There was, however, one important difference. The 1962 Constitution provided for the establishment of a Supreme Judicial Council, consisting of senior judges of the Supreme Court and the high courts, which was given the jurisdiction to investigate complaints of misconduct against judges of the superior judiciary.

9 *Federation of Pakistan v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240 and *Reference by H.E. The Governor General* PLD 1955 Federal Court 435.

10 Hamid Khan, *Constitutional and Political History of Pakistan* (Lahore: Oxford University Press, 2nd edn, 2009), p 285.

11 PLD 1958 SC 533.

In 1969 Ayub Khan resigned as President and handed over power to General Yahya Khan, who immediately declared martial law and abrogated the 1962 Constitution. In December 1970, for the first time since independence, free and nationwide parliamentary elections took place in Pakistan. In East Pakistan, the Awami League took practically all of the 162 available seats, and in West Pakistan Zulfikar Ali Bhutto's Pakistan People's Party won 82 of the 138 available seats. According to the Legal Framework Order of 1970, which had replaced the 1962 Constitution, the Awami League, having won an absolute majority, should have formed the government of Pakistan. However, this proved unacceptable to West Pakistan's politicians. In East Pakistan, which ever since independence had felt dominated by West Pakistan, riots broke out, with the situation eventually degenerating into a bloody civil war. In 1971, East Pakistan ceded from West Pakistan and, naming itself Bangladesh, became an independent country in its own right.

Following the defeat in East Pakistan, General Yahya Khan resigned and Zulfikar Ali Bhutto, the founder and leader of the Pakistan People's Party (PPP), became the President of the new, smaller Pakistan. An Interim Constitution came into force in 1972, replaced a year later by the Constitution of 1973. With respect to the judiciary, the Constitution of 1973 followed the pattern established by the constitutions of 1956 and 1962. In the course of five years of democracy Bhutto's PPP pursued an economic policy aimed at poverty alleviation. This involved nationalisation of key industries as well as a programme of land reforms. In 1977, Bhutto won the elections again but his victory was short lived. His opponents accused him of electoral fraud and large-scale disturbances broke out. In the summer of 1977, with parts of the country slipping into chaos, the army intervened. General Zia-ul-Haq (Zia), the Chief of Army Staff, staged a coup on 5 July. He immediately imposed martial law and suspended the 1973 Constitution.

Zia ruled the country, first as Chief Martial Administrator and later as President, from 1977 to 1988. Zia's most enduring legacy was the Islamisation of the legal system. The Islamisation policy was also a convenient means to retain power, as Zia argued that it was his duty to create a truly Islamic state and that he must realise this task before returning the country to a democratic order.

In 1979, three dramatic events took place. Zulfikar Ali Bhutto was condemned to death in a show trial and hanged, Islamic criminal law was introduced in the form of six ordinances collectively referred to as the Hudood Ordinances and the Soviet Union invaded Afghanistan. The latter offered Zia an opportunity for expanding Pakistan's international influence and toleration of his regime. Pakistan not only became the temporary home of more than a million Afghan refugees but also the principal base for the resistance against the Russian invasion. The Zia regime became an important ally in the cold war against the Soviet Union, receiving substantial military and economic aid from the United States and Saudi Arabia. For the first time in Pakistan's history radical Islamic groups, which had until then been kept at arm's length, received support from the government.

The Hudood Ordinances were the most visible manifestation of the policy of Islamisation. They ostensibly introduced classical Islamic criminal law, and the associated punishments, for a wide range of offences, including adultery and fornication. Courts were also established expressly to review existing laws on the basis of Islam. Initially, Shariat benches were appended to the four existing High Courts. While their primary task was to hear appeals against convictions under the Hudood Ordinances, they were also given the power to invalidate individual laws on the basis of Islam. However, they were dissolved in 1980 because the separate benches could not agree on a common

interpretation of Islam, leading to conflicting judgments. In their place Zia established a new court, the Federal Shariat Court, whose jurisdiction was identical to those of the Shariat benches. Zia also created a Shariat Appellate Bench of the Supreme Court as a final court of appeal.<sup>12</sup>

In 1985 Zia lifted the state of martial law but retained the position of President. In 1988 he was killed in an air crash, the cause of which has never been explained, and new elections were held. In the following decade the two biggest parties, the Pakistan People's Party (PPP) led by Benazir Bhutto (Zulfikar Ali Bhutto's daughter), and the Pakistan Muslim League PML(N) led by Nawaz Sharif, succeeded each other in winning the elections and providing the Prime Minister.

Benazir Bhutto was not able to reverse the legacy of Zia's Islamisation policies. Nawaz Sharif was not willing to do so. The position of vulnerable groups remained problematic throughout the 1990s, especially that of women and religious minorities.

The period of democracy from 1985 until 1999 witnessed the emergence of the Supreme Court as an important player in the political field. Whenever a government was dismissed by the President on the ground that it was unable to govern the country in accordance with the Constitution, it was the Supreme Court which was asked to review the constitutionality of the dismissal. (See Chapter 3).

In 1996, President Leghari, prompted by the army and opposition leaders, dissolved the National Assembly, bringing down the Bhutto Government amid allegations of corruption, financial incompetence and human rights violations. After she was charged, Bhutto fled the country. At the elections in February 1997, the PML(N) won the majority of seats in the National Assembly and Nawaz Sharif became Prime Minister. Article 58(2)(b) from the Constitution, which had been inserted by General Zia in 1985 in order to enable the President to dissolve the National Assembly (and thereby remove the Prime Minister and Cabinet) was removed and the power to appoint Supreme Court judges and military chiefs-of-staff was placed with the Prime Minister.

Prime Minister Sharif ordered the dismissal of the Chief of Army Staff, General Pervez Musharraf, in October 1999, whereupon Musharraf executed a bloodless military coup and assumed executive powers. Although the coup was internationally condemned, General Musharraf claimed that it was necessary to restore both the economy and the deteriorating political situation.

## **2.2 The Musharraf regime: 1999–2008**

On 14 October 1999, General Musharraf declared a state of emergency and issued the Provisional Constitutional Order, which suspended the federal and provincial parliaments, held the Constitution in abeyance, designated Musharraf as Chief Executive and barred any court from making an order against him.

On 12 May 2000, the Supreme Court unanimously validated the October 1999 coup and granted General Musharraf executive and legislative authority for three years from the date of the coup.<sup>13</sup> The current Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry, was a member of this court. On 10 October 2000, Nawaz Sharif was convicted of highjacking and terrorism,<sup>14</sup> but a deal was established

<sup>12</sup> See Martin Lau, *The Role of Islam in the Legal System of Pakistan* (2006, Brill), pp 121-140.

<sup>13</sup> *Zafar Ali Shah v Pervez Musharraf* PLD 2000 Supreme Court 869.

<sup>14</sup> Sharif allegedly attempted to hijack the commercial airliner which had been taken by General Musharraf to return to Pakistan after his dismissal as Chief of Army Staff had been announced. In June 2009, the Supreme Court of Pakistan quashed Sharif's conviction. The decision is unreported but can be accessed on the Supreme Court website at [www.supremecourt.gov.pk/web/user\\_files/File/Crl.P.200of2009.pdf](http://www.supremecourt.gov.pk/web/user_files/File/Crl.P.200of2009.pdf).

whereby he was allowed to go into exile in Saudi Arabia for ten years. With Sharif and Bhutto both physically removed from the country General Musharraf was able to consolidate his regime. In June 2001, following the resignation of President Rafiq Tarar, he assumed the office of President. The events of 11 September 2001 further consolidated the Musharraf regime as Pakistan became a key ally of the United States in the ‘war on terror’.

A referendum in April 2002 confirmed General Musharraf’s assumption of the office of President and allowed him to remain President for another five years. The status and outcome of the referendum were controversial: not only was there no constitutional basis for holding the referendum but there were also allegations of irregularities.

On 21 August 2002, Musharraf promulgated the Legal Framework Order 2002 (LFO). The LFO contained numerous amendments of the 1973 Constitution, ‘undermining the parliamentary system of government and provincial autonomy.’<sup>15</sup> It also revived the controversial Art 58(2) (b) of the 1973 Constitution, allowing the President to dissolve the National Assembly at his discretion, introducing a National Security Council consisting of members of the armed forces,<sup>16</sup> and validating all laws made by the Musharraf regime.<sup>17</sup>

National Assembly elections followed in October 2002, resulting in a thin victory by a splinter party of the Muslim League, the PML-Quaid-e-Azam (PML-Q), which was supporting Musharraf. (Nawaz Sharif and Benazir Bhutto were prevented from returning to contest the position of Prime Minister.) The PPP came second. A new alliance of religious parties, which had united under the name of Muttahidda Majlis-e-Amal (MMA), came third. The unexpectedly strong showing of the parties opposed to Musharraf led to an impasse in the National Assembly, because they refused to take an oath under the provisions of the LFO. For over a year no business could be conducted until December 2003, when an alliance of the MMA and the PML-Q moved and passed the Constitution (Seventeenth) Amendment Act 2007. In essence, this amendment incorporated the provisions of the LFO into the 1973 Constitution. In a further consolidation of his position, Musharraf won a vote of confidence by both the National Assembly and the four provincial assemblies in January 2004, greatly assisted by changes in the voting process, which had been introduced as a result of the 17th Amendment.

However, the support of MMA in getting the 17th Amendment passed had been made conditional on General Musharraf resigning as Chief of Army Staff at the end of 2004, thereby honouring the constitutional prohibition on the President holding any other office of profit.<sup>18</sup> Musharraf reneged on his promise, with political parties close to him passing the President to Hold Another Office Act 2004 on 14 October 2004.

### **2.3 The end of the Musharraf era<sup>19</sup>**

The decline of President Musharraf’s fortunes began in 2005 when the Government’s attempt to privatise one of the largest nationalised industrial enterprises, the Pakistan Steel Mills Corporation,

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15 Hamid Khan, *Constitutional and Political History of Pakistan* (Lahore: Oxford University Press, 2nd edn, 2009), p 660.

16 New Art 152A of the 1973 Constitution.

17 New Art 270 AAA of the 1973 Constitution.

18 Article 63 of the 1973 Constitution.

19 See generally Martin Lau, ‘Annual Survey of Pakistani Law’, in *Yearbook of Islamic and Middle Eastern Law* Vol 13, pp 275-292.

was declared unconstitutional by the Supreme Court.<sup>20</sup> This was the first time in seven years that the Supreme Court had taken a stance against an action of the government. The case was heard by a nine-member bench of the Supreme Court, which included the Chief Justice Iftikhar Chaudhry, who had assumed this position on 30 June 2005. Other cases followed, with the Supreme Court and some of the High Courts taking up cases of alleged human rights violations on their own motion (*suo moto*). While not directly a challenge to the government, these cases nevertheless caused embarrassment and exposed governmental inaction, or worse, lawlessness. This is discussed in more detail in Chapter 3.

Musharraf's tenure was coming to an end in 2007 and he needed the Supreme Court's support if he was to be allowed to seek re-election whilst retaining the position of Chief of Army Staff. The possibility of the Supreme Court no longer being prepared to endorse and validate his actions posed serious difficulties for him. On 9 March 2007 President Musharraf summoned Chief Justice Chaudhry to his office and asked him to resign as Chief Justice or face proceedings for misconduct. As is explained in more detail in the IBAHRI Report 2007,<sup>21</sup> the Chief Justice refused to resign. Later that day the government issued several orders and notifications, the net effect of which were that the Chief Justice was suspended and restrained from exercising any judicial duties and that the charges of misconduct against him would be heard by the Supreme Judicial Council. From 9 March until 13 March 2007, when he was manhandled by police on his way to answer the summons of the Supreme Judicial Council, Chief Justice Chaudhry was kept under house arrest. It was especially at this stage that media coverage of events became crucial. In particular, the manhandling of the Chief Justice evoked intense passion amongst the members of the legal fraternity, laying the seeds for the demonstrations and long marches which were to follow.<sup>22</sup> On 15 March 2007 another order was issued by President Musharraf, declaring that the Chief Justice was to be on compulsory leave with effect from 9 March 2007 until the Supreme Judicial Council had submitted its report to the President and he had taken action on it.

Meanwhile, the Supreme Court had stayed the proceedings of the Supreme Judicial Council on 7 March 2007. The stay order was a result of a legal challenge to those proceedings brought by the Chief Justice himself and a number of bar associations who argued that, according to Art 209 of the 1973 Constitution, the Supreme Judicial Council could not be constituted without the Chief Justice and that some of the members sitting in judgment over the Chief Justice were biased. Hearings of the case before a full bench of the Supreme Court, which excluded the judges who were members of the Supreme Judicial Council, began on 14 May 2007. They continued until 20 July 2007, when the Supreme Court issued a short order setting aside the Reference against the Chief Justice, declaring the Judges (Compulsory Leave) Order of 1970 to be unconstitutional (and, as a result, also the leave order against the Chief Justice), and setting aside the orders of both the President and the Supreme Judicial Council restraining the Chief Justice from acting as a judge of the Supreme Court.<sup>23</sup> The appointment of the Acting Chief Justice was also declared unconstitutional. Chaudhry was thus restored to the position of Chief Justice of Pakistan.

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20 *Watan Party v Federation of Pakistan* PLD 2006 SC 697.

21 *The Struggle to Maintain an Independent Judiciary: A Report on the Attempt to Remove the Chief Justice of Pakistan* (July 2007): available at [www.ibanet.org/Human\\_Rights\\_Institute/HRI\\_Publications/Country\\_reports.aspx](http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx) (accessed 18 August 2009).

22 Muneer A Malik, *The Pakistan Lawyers' Movement: An Unfinished Agenda* (2008, Pakistan Law House), pp 63ff. Malik was President of the Supreme Court Bar Association at the time.

23 *Mr Justice Iftikhar Muhammad Chaudhry v President of Pakistan* PLD 2007 SC 578.

The Chief Justice having been reinstated, the Supreme Court took notice of the ugly scenes of the Chief Justice being manhandled by police when he left his official residence in order to appear before the Supreme Judicial Council on 13 March. In *Suo Moto Case No 1 of 2007*<sup>24</sup> the Supreme Court initiated contempt of court proceedings against seven police officers. All seven tendered unconditional apologies, but this did not save them from punishment – all of them were sentenced to imprisonment ranging from one month to a largely symbolic ‘imprisonment till rising of the Court’ awarded to the Chief Commissioner of Police and his deputy.

## 2.4 The November 2007 emergency

Musharraf’s position had been weakened by the re-instatement of the Chief Justice, and in the summer of 2007 Pakistan witnessed the first stirrings of political change. By the end of 2007 Musharraf’s term as President would come to an end. He had already announced his intention to stand for re-election but the matter was complicated by the fact that according to the Constitution he could not continue to be Chief of Army Staff and President at the same time. However, there were risks inherent in stepping down as the head of the army before becoming head of state; in the gap between the two events he would be stripped of his immunity against prosecution.

National and Provincial Assembly elections were due to be held at the end of 2007 or the beginning of 2008. There were indications that the two politicians who had dominated Pakistani politics in the 1990s, former Prime Ministers Benazir Bhutto and Nawaz Sharif, were preparing themselves to return to Pakistan in order to participate in the parliamentary elections scheduled for January 2008. In August 2007 Musharraf began secret consultations with Benazir Bhutto on a possible power-sharing deal. In the meantime, Nawaz Sharif began to prepare the ground for his return to Pakistan by challenging the legality of his exile.<sup>25</sup> The Supreme Court allowed his petition, holding that ‘no constraint can be placed on a Pakistani citizen to return to his country under Art 15 of the Constitution’.<sup>26</sup> Two and a half weeks after the decision, Sharif boarded a PIA flight for Pakistan. His stay lasted barely four hours. Arrested on arrival, he was immediately deported to Saudi Arabia.

At this stage Musharraf’s fortunes somewhat improved. On 28 September 2007 the Supreme Court dismissed a petition which had challenged the legality of Musharraf running for re-election as President whilst retaining his post as head of the armed forces.<sup>27</sup> The path was now clear for him to seek re-election. On 6 October 2007 he won the vote of the country’s legislators with an overwhelming majority, helped by the fact that the two main opposition parties boycotted it.

However, all was not won since the Supreme Court, in response to another challenge to his re-election,<sup>28</sup> had ruled that while Musharraf was allowed to stand for re-election, his election could not be confirmed before further legal challenges to his candidacy had been adjudicated by the court. The Supreme Court hearings on the constitutionality of Musharraf’s re-election began on 17 October 2007 before an eleven-member bench.

The political uncertainty was compounded by the return of Benazir Bhutto from exile on 19 October 2007, an event which was overshadowed by a suicide bomb attack against her convoy which

24 PLD 2007 SC 688.

25 *Pakistan Muslim League (N) v Federation of Pakistan* PLD 2007 SC 642.

26 At p 673.

27 Unreported; see [www.guardian.co.uk/world/2007/sep/28/pakistan](http://www.guardian.co.uk/world/2007/sep/28/pakistan) (accessed 18 August 2009).

28 Unreported; see [www.guardian.co.uk/world/2007/oct/17/pakistan.benazirbhutto](http://www.guardian.co.uk/world/2007/oct/17/pakistan.benazirbhutto) (accessed 18 August 2009).

killed up to 120 people. Her return had been made possible by the promulgation of the National Reconciliation Ordinance 2007<sup>29</sup> on 5 October 2007, which provided her, and other politicians, with immunity from prosecution for corruption-related offences between 1986 and 1999, although the constitutionality of this Ordinance was contested and the immunities might be void.<sup>30</sup>

On 3 November 2007 President Musharraf, faced with the real possibility that the Supreme Court might block his attempt to assume office as re-elected President whilst retaining his post as Chief of Army Staff, decided to act. With three short orders he imposed a state of emergency, suspended the Constitution and removed a large number of judges from the benches of the four High Courts and the Supreme Court.

The Proclamation of Emergency was justified on the basis of an increase in terrorist attacks which could not be confronted by the government because ‘some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the Government and the nation’s resolve and diluting the efficacy of its actions to control this menace.’<sup>31</sup> In particular, the judiciary had released ‘hard core militants, extremists, terrorists and suicide bombers’, who had subsequently been involved in terrorist activities, had demoralised the police force, interfered with executive functions, and humiliated government officials. The text of the Proclamation concludes that the situation was so serious that the government of the country could not any longer be carried out in accordance with the Constitution, which was therefore held in abeyance.

The Proclamation of Emergency was preceded by the blocking of the transmission of independent television channels by the government, and was accompanied by a massive crackdown. Virtually the entire leadership of the bar was placed under arrest,<sup>32</sup> as was human rights lawyer and UN Rapporteur on Freedom of Religion and Belief Asma Jahangir, while journalist and activist I A Rehman and former law minister Iqbal Haider were arrested at a meeting of the Pakistan Human Rights Commission a few days later. Police set up barricades and barbed wire to block access to parliament, the presidential residence and the Supreme Court.

On the same day as the Proclamation of Emergency, President Musharraf, now unrestrained by any constitutional limitations, issued the Provisional Constitution Order No 1 of 2007, which resurrected the 1973 Constitution in a modified form. Many fundamental rights were suspended and while Pakistan was to be governed ‘as nearly as may be in accordance with the Constitution’, this was ‘subject to this Order and any other Order made by the President.’ This meant that the President could amend the Constitution as expedient. Most importantly, all judges of superior courts were to take a new oath, contained in the Oath of Office (Judges) Order, 2007. The Order dismissed the entire higher judiciary but allowed those judges who, after being invited to do so, had taken the new oath contained in a schedule of the Order, to resume their functions. The new oath enjoined a judge to perform his functions in accordance with the Proclamation of Emergency and the Provisional Constitutional Order 2007 (rather than in accordance with the Constitution).

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29 PLD 2008 Federal Statutes 129.

30 *Dr Mubashir Hassan v Federation of Pakistan* sPLD 2007 SC 76.

31 PLD 2008 Federal Statutes 108.

32 Malik, at pp 240-241. Some estimates claimed that over 3,500 people were arrested.

In order to insulate these measures against judicial review, s 3(1) of the Provisional Constitutional Order provided that no court ‘shall call or permit to be called in question’ any of the three Orders. A few weeks later, further protective armour against judicial review was added by several amendments to the Constitution. A new Art 277AAA validates and affirms all actions taken by President Musharraf, and exempts from judicial review and establishes complete immunity for all office holders.

Of the judges of the Supreme Court, only five took the new oath (although seven others later did so). Chief Justice Chaudhry was not among them. An attempt to declare the Proclamation of Emergency unconstitutional in the form of a short order passed towards the end of the day on 3 November by a seven-member bench of the Supreme Court ended with the storming of the Supreme Court by armed forces and Chaudhry being placed under house arrest. Out of 95 judges of superior courts, 32 took the new oath.

Musharraf’s actions were challenged before the Supreme Court, but predictably, given that its members had taken the new oath, none of the challenges was successful. In *Tikka Iqbal Muhammad Khan v General Pervez Musharraf*<sup>33</sup> the Supreme Court, consisting of the new Chief Justice Dogar and six fellow judges dismissed the challenge, finding that the imposition of emergency was justified in the light of the chaotic events in the country and that the dismissal of judges had been justified since:

‘... some members of the superior judiciary by way of judicial activism transgressed the constitutional limits and ignored the well-entrenched principle of judicial restraint. Thousands of applications involving individual grievances were being processed as *suo moto* cases ostensibly in the exercise of the power under Article 184(3) of the Constitution, which provision is resorted to the enforcement of fundamental rights involving questions of law of general public importance. Instances of transgression of judicial authority at large scale may be found in the cases of determination of prices of fruit, vegetables and other edibles, suspension and transfers of government officials, frequent directions to enact particular laws, stoppage of various development projects, such as New Muree City, Islamabad Chalets, Lahore Canal Road and many more. They rendered the State machinery, particularly legislative and executive branches of the government paralyzed and nugatory. They made ineffective the institution of the Supreme Judicial Council set up under the Constitution for the accountability of the members of the superior judiciary.’<sup>34</sup>

The judges who had not been offered, or who had been offered but had not taken, the new oath under the Oath of Office (Judges) Order 2007 were held to have ceased holding a judicial office from 3 November. In addition, President Musharraf secured several court victories in respect of his re-election. For example, the case of *Jamat-e-Islami v Federation of Pakistan*<sup>35</sup> challenged the validity of the President to Hold Another Office Act of 2004 (which allowed Musharraf to be re-elected as President while remaining Chief of Army Staff). The Supreme Court, now consisting only of judges who had been invited by Musharraf to take the fresh oath, decided against the petitioner on the ground that the issue was outside its jurisdiction: petitions under Art 183(4) of the Constitution had to be concerned with the enforcement of a fundamental right and be of public importance. In this case, the Supreme Court, incredibly, was unwilling to accept that any fundamental rights were at issue.

<sup>33</sup> PLD 2008 SC 6 (short order); PLD 2008 SC 178 (full judgment).

<sup>34</sup> At p 10.

<sup>35</sup> PLD 2008 SC 30.

On 15 November 2007, President Musharraf announced that he would quit his position as Chief of Army Staff as soon as the Supreme Court validated his re-election plans. With the Supreme Court finally behind Musharraf, the stage was now set for the next part in the political drama. On 25 November 2007 Nawaz Sharif returned for the second time from exile (apparently after intervention from Saudi Arabia and on the Saudi king's private jet). This time he was allowed to stay. Three days later, Musharraf resigned as Chief of Army Staff and was sworn in for another five-year term as President. On 23 November 2007 Pakistan was suspended from the Commonwealth because President Musharraf had failed to comply with its demand to lift the emergency.<sup>36</sup>

## 2.5 Lifting of the emergency

On 8 December 2007 the Government announced that the emergency would be lifted, the Provisional Constitution Order repealed and the 1973 Constitution *in its amended form* restored on 15 December. Five presidential orders were issued to effect this.<sup>37</sup>

The emergency was lifted on 15 December 2007 as promised and the election campaign was under way for the parliamentary elections scheduled for 8 January 2008. Then, on 27 December 2007, Benazir Bhutto was killed by a bomb.

Postponed to 18 February 2008, the elections (at which the sacked judges and their families were not allowed to vote) resulted in a clear victory of the two opposition parties, the PPP and the PML(N), with the Pakistan Peoples' Party now being headed by Asif Zardari, the widower of Benazir Bhutto. The two parties entered into a power-sharing agreement and formed a coalition government, with President Musharraf's party, the PML(Q), having been almost obliterated from the political landscape. A few days later, a peaceful demonstration of lawyers in Karachi was violently broken up by police. Escalating violence reached a crescendo in April when many were killed, including several in a fire deliberately lit in a building of lawyers' offices.

In the so-called Murree Declaration the PPP and PML(N) agreed that within 30 days of the federal government having been formed, the judiciary should be restored to the state it was in on 2 November 2007, ie the day before the proclamation of the emergency. This agreement was, however, not adhered to, with the PPP proposing that a committee should be formed to decide on a procedural framework for the reinstatement of those judges who had refused to take the oath on 3 November 2007. Negotiations on the matter broke down.

## 2.6 Musharraf's resignation and its aftermath

The PPP and the PML(N) entered into another agreement concerning the fate of the dismissed judges, declaring on 7 August 2008 that all of them should be restored to their posts immediately after the impeachment of Musharraf, which they had decided to pursue. Isolated and without political backing, Musharraf had nevertheless stayed on as President. However, confronted with the prospect of impeachment proceedings he resigned on 18 August 2008.

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<sup>36</sup> Pakistan was readmitted to the Commonwealth in May 2008.

<sup>37</sup> Revocation of Proclamation of Emergency Order 2007, Repeal of Provisional Constitution Order, Revival of Constitutional Order, Establishment of Islamabad High Court and grant of pension benefits to judges who had either refused or had not been invited by the government to take the oath under the PCO.

The PPP announced that Asif Zardari would be nominated as their candidate for the post of President. On 25 August 2008 the PML(N) pulled out of the coalition with the PPP, largely due to disagreements over the treatment of the sacked judges and particularly the reinstatement of the Chief Justice. The presidential elections were held on 6 September 2008, with Asif Zardari winning with a substantial majority.

A new constitutional crisis erupted on 25 February 2009, when the Supreme Court upheld a decision of the Lahore High Court barring Nawaz Sharif from contesting elections and declaring null and void the election of his brother, Punjab Chief Minister Shabaz Sharif. As a consequence, the Punjab Provincial Assembly was dissolved and Pakistan's most populous province was placed under the direct rule of the Punjab Governor. The PML(N) announced that it would support the Long March of the Lawyer's Movement, which was meant to unite processions of lawyers from all four provinces in Islamabad, where a sit-in would continue until Chief Justice Chaudhry was reinstated.

The government tried hard to prevent the Long March, blocking the transmissions of several private news channels, prohibiting any demonstrations or public gatherings in Punjab and blocking access roads to Islamabad with hundreds of confiscated shipping containers. Starting on 11 March 2009, a large number of lawyers and politicians were arrested. On 15 March 2009 large-scale demonstrations took place across Pakistan, with the largest being held in Lahore, the capital of Punjab. Nawaz Sharif was placed under house arrest but managed to break through the police cordon. By the end of the day police forces in Lahore melted away, evidently no longer willing to obey orders to clamp down on demonstrators.

On 16 March 2009 Prime Minister Yousuf Gilani, in a televised address to the nation, announced that Chief Justice Chaudhry would be reinstated on 21 March, the day when Chief Justice Dogar was due to retire. This was allegedly a compromise deal, backed by the United States and Britain, to avert chaos.<sup>38</sup> The announcement meant that the primary objective of the Lawyers Movement had been achieved. Chief Justice Chaudhry resumed his judicial duties on 23 March 2009, one-and-a-half years after the Supreme Court had effectively reinstated him by throwing out the Presidential reference against him.<sup>39</sup> On 29 March President Zardari lifted the Governor's rule in Punjab, and the Supreme Court issued a stay-order on the disqualification notice of Shahbaz Sharif, thus allowing him to resume the post of Chief Minister of Punjab.

The gradual normalisation of public life is, however, far from complete. Attempts to broker a peace deal with the Taliban in the Swat Valley broke down at the end of April 2009, prompting the government to attempt to dislodge them from Swat with military force. Operations began at the beginning of May 2009 with an estimated 15,000 Pakistani troops deployed in the Swat Valley. The fierce fighting has triggered a refugee crisis: over a million people have fled the Swat Valley and are now being housed in refugee camps.

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38 *The Sunday Times* 15 March 2009, p 25. Some respondents also told the IBA delegation that Pakistan had been only a few hours from another military takeover if a compromise could not be reached.

39 Former Chief Justice Dogar retired without the traditional full-court reference, but was taken to dinner by the President: *Dawn* 21 March 2009, p 3.

## 2.7 Pakistan and human rights law

Pakistan's legal system is based on English common law with provisions to accommodate its status as an Islamic state. The Constitution, comprising almost 300 sections, contains a chapter on fundamental rights including the freedoms of thought, speech, religion and worship, assembly, association, and the press, as well as equality of status.<sup>40</sup> While laws inconsistent with or in derogation of these fundamental rights are void,<sup>41</sup> this will not apply to any laws relating to the armed forces, the police or other forces charged with the maintenance of public order.<sup>42</sup> Apart from challenging laws which might be contrary to fundamental rights, the Constitution does not confer these rights per se on citizens, nor is there a provision to allow courts to apply international human rights norms directly.

Pakistan has ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights and the Convention Against Corruption. Significantly for the purposes of this report, Pakistan is not a party to the International Covenant on Civil and Political Rights, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, having signed but not ratified both treaties on 17 April 2008. It has given no indication that it intends to become a party to the International Convention for the Protection of All Persons From Enforced Disappearances (which is open for signature but is not yet in force).

Pakistan has not been diligent in complying with its reporting obligations under those treaties to which it is a party. It acceded to the Convention on the Elimination of all forms of Discrimination against Women in 1996, but did not submit a report until 2005, in the form of a combined initial, second and third periodic report.<sup>43</sup> The next periodic report to CEDAW was due in April 2009. It has not yet been submitted. Pakistan's most recent report under the Convention on the Elimination of All Forms of Racial Discrimination was submitted in 2008, as a combined 15th, 16th, 17th, 18th, 19th and 20th report.<sup>44</sup> This was ten years overdue and followed Pakistan's previous report, which was a combined 10th, 11th, 12th, 13th and 14th report.<sup>45</sup> While Pakistan's first report under the Convention on the Rights of the Child was submitted in a timely manner, its second report, due in 1997, was not submitted until 2001.<sup>46</sup> A combined third and fourth report was submitted on 19 March 2009.<sup>47</sup>

The IBAHRI's 2007 report on Pakistan referred to 'a poor record of both ratification and reporting' with respect to human rights treaties.<sup>48</sup> In the intervening two years, with the ratification of the International Covenant on Economic, Social and Cultural Rights, and the signing of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, together with periodic reports submitted

40 Constitution, Pt II, Chap 1 (Arts 8-28).

41 Constitution, Art 8(1).

42 Constitution, Art 8(3).

43 CEDAW/C/PAK/1-3, 3 August 2005.

44 CERD/C/PAK/20 (19 March 2008).

45 CERD/C/299/Add.6, 13 June 1996.

46 CRC/C/65/Add.21, 11 April 2003.

47 CRC/C/PAK/3-4 (19 March 2009).

48 *The Struggle to Maintain an Independent Judiciary: A Report on the Attempt to Remove the Chief Justice of Pakistan* (July 2007), p 21.

under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination, the situation is improving but is not yet up to an acceptable standard. Moreover, those human rights treaties to which Pakistan is a party are not self-executing and require an act of parliament to be directly enforceable in domestic courts.

To the extent that they are binding as customary international law, provisions of the Universal Declaration of Human Rights, the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers, are relevant.

Despite the existence of fundamental rights in the Constitution, Pakistan's courts generally do not rely on international norms, domestically binding or otherwise, for guidance.



# Chapter 3 – The Judiciary

## 3.1 Judicial independence: an historical perspective

The current issues affecting judicial independence in Pakistan are inextricably linked to Pakistan's political and legal history. The current constitutional provisions and conventions governing the status of Pakistan's higher judiciary were formed against a backdrop of frequent coups d'état, civil war, persistent under-development and poverty, as well as emerging political trends, such as Islamist movements. Against the threats to judicial independence, there have also been trends and movements to strengthen the judiciary. Chief amongst them are civil society movements, organisations such as the Human Rights Commission of Pakistan, an increasingly visible NGO movement, a diverse media landscape and, significantly, an assertive and increasingly well-organised legal profession.

A commitment to judicial independence is deeply rooted in Pakistan's history. The Objectives Resolution, adopted by the Constituent Assembly in 1949, provided that Pakistan was to be a state 'wherein the independence of the judiciary should be fully observed.' All of Pakistan's constitutions have included the Objectives Resolution as a preamble, and the current (1973) Constitution incorporates it into its main body.<sup>49</sup> The 1973 Constitution, like all its predecessors, contains explicit and unambiguous provisions guaranteeing judicial independence, including detailed provisions on the appointment, tenure, remuneration and removal of judges of the superior judiciary.<sup>50</sup>

In spite of this comprehensive constitutional framework, judicial independence has been a contentious issue throughout Pakistan's history. Most commentators identify the constitutional crisis of 1955 as the starting point of its progressive erosion. In that year, the Federal Court, the predecessor of the Supreme Court of Pakistan, was asked to review the constitutional validity of the dissolution of the first Constituent Assembly by the Governor General. It decided in favour of the Governor General, thus siding with the executive. In doing so, the Federal Court legitimised a prima facie violation of the Government of India Act 1935, which served as the interim constitution of Pakistan until 1956.<sup>51</sup>

With variations, the judicial 'resolution' of the constitutional crisis of 1955 has served as a model for subsequent coups, with the abrogation or suspension of constitutions and proclamations of emergencies being validated as lawful on the basis of terms like the 'doctrine of necessity', 'revolutionary legality' or temporary 'constitutional deviations'. The need and expectation of military dictators to have their actions sanctioned and approved by the apex court has progressively weakened the independence of the judiciary.

While the Court consistently sided with the usurpers of power there were no purges of judges of the higher judiciary, nor were there any overt attempts to interfere with their formal independence during the first two decades of Pakistan's existence. Hamid Khan, a leading commentator on the legal history of Pakistan, observes with reference to the administration of justice in the 1960s that:

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<sup>49</sup> Constitution, Article 2A.

<sup>50</sup> Constitution, Chapters 2, 3 and 4.

<sup>51</sup> See *Federation of Pakistan v Maulvi Tamizuddin Khan* PLD 1955 Federal Court 240 and *Reference by H E The Governor General* PLD 1955 Federal Court 435.

‘It is noticeable that the Supreme Court under the leadership of Chief Justice A R Cornelius, established its independence and gave landmark rulings which gave meaning to the fundamental rights and civil liberties of citizens.’<sup>52</sup>

It may be more to the point that the higher judiciary was for the most part supportive of Ayub Khan’s Government and therefore there was no need to interfere with judicial independence.

The first open attempt to control the judiciary occurred under the martial law imposed by General Yahya Khan, who had been handed power by Ayub Khan on 25 March 1969. By presidential order Yahya Khan forced all judges to submit detailed statements of their assets to the Supreme Judicial Council. As a result of these proceedings a judge of the Lahore High Court resigned and another judge was removed from a High Court.<sup>53</sup>

Following defeat in East Pakistan, Yahya Khan resigned on 19 December 1971. He was succeeded by Zulfikar Ali Bhutto who was sworn in as the new President the next day. The legal aftermath of Yahya Khan’s imposition of martial law in 1969 is significant. For the first time in its history, the Supreme Court refused to validate a coup d’état, deciding that Yahya Khan had been a usurper of power and that his regime had been unconstitutional.<sup>54</sup> This demonstration of judicial independence was, however, made after Yahya Khan’s regime had collapsed, and as history demonstrates, the decision constitutes the exception rather than the rule.

A new constitution came into force in 1973. The provisions of the 1973 Constitution governing the selection, appointment and removal of judges of superior courts were similar to those contained in the constitutions of 1956 and 1962. Despite this continuity in the constitutional framework governing the higher judiciary, there are nevertheless indications that public confidence in the independence of the judiciary began to decline in the 1970s. Ayub Khan had started appointing judges on the basis of political patronage, nepotism, and favouritism and this situation was compounded by Chief Justices promoting their own sons or sons-in-law, or those of their colleagues, on the bench. Hamid Khan observes:

‘Whenever a son returned from abroad, with or without a foreign law degree, or started law practice, he was widely introduced by his judge father to his uncle judges with the understanding that he should be looked after. Naturally, law practice of the sons and sons-in-law of the judges flourished overnight to the chagrin and frustration of the less privileged members of the Bar. They were engaged on fabulous fees with the expectation that they would obtain relief due to personal connections, which they actually did in many cases. Besides, they carried the awe for the members of the subordinate judiciary whom they easily frightened with their overbearing attitudes and arrogance. Those who did not make it in the law practice despite all the advantages and benefits, got themselves appointed as law officers and were eventually elevated to the bench.’<sup>55</sup>

More seriously, the 1970s also saw the increased use of contempt of court proceedings against lawyers, including presidents of bar associations, who had publicly complained about judicial corruption and nepotism. The law was being used by the judges to silence criticism. These cases served as prelude

52 Hamid Khan, *Constitutional and Political History of Pakistan* (2nd edn, Lahore, OUP, 2009) p 265.

53 *President v Justice Shaukhat Ali* PLD 1971 SC 585, Khan, p 292.

54 *Asma Jilani v Government of Punjab* 1972 SC 139.

55 Khan, p 407.

to the Fifth Amendment of the Constitution in 1976,<sup>56</sup> which introduced many changes to the appointment and tenure of judges, and the passing of a new law governing contempt of court.<sup>57</sup> For the first time, the Constitution provided for a retirement age of judges, fixed the tenure of judges to a certain number of years, allowed for the transfer of judges between High Courts and limited the power of courts to issue contempt proceedings. Khan comments that ‘The Fifth Amendment was widely criticised by lawyers and in political circles as it greatly undermined and harmed the judiciary as an independent organ of the state’ but, Khan adds, ‘For the members of the judiciary there was little sentiment in their favour, especially amongst the lawyers, since judges had been repeatedly convicting and sentencing lawyers for contempt of court.’<sup>58</sup>

The erosion of judicial independence accelerated under the martial law regime of Zia ul Haq who removed Zulfikar Ali Bhutto’s Government in a coup d’état on 5 July 1977 and assumed the title of Chief Martial Law Administrator. The higher judiciary cooperated fully with Zia, with the chief justices of the four provincial High Courts acting as governors of their respective provinces immediately after the coup.<sup>59</sup> The Zia regime lasted from 1977 until 1985. These eight years were marked by drastic legal changes, such as the introduction of ostensibly Islamic criminal laws, wide ranging constitutional amendments, and open attacks on judicial independence, in order to create a judiciary supportive of the regime. Zia’s first amendment to the 1973 Constitution can be cited as an example of this change. This amendment changed the constitutional provisions concerning the length of tenure of the Chief Justice of Pakistan, which led to the immediate retirement of the incumbent Chief Justice and the elevation into the post of a judge more sympathetic to Zia.

In September 1977 the Supreme Court validated Zia’s coup on the basis of the doctrine of state necessity and in doing so also validated his amendments to the Constitution.<sup>60</sup> In 1979, the Supreme Court rejected the appeal of Zulfikar Ali Bhutto against his murder conviction and death sentence.<sup>61</sup> One of the judges hearing the appeal later claimed that there had been personal pressure on the judges to reject Bhutto’s appeal and that some of them had been afraid for their lives.<sup>62</sup>

Zia deployed a number of other measures to control the judiciary. The most radical one was purging the higher judiciary through the administration of a new oath. (This method for eliminating potential opposition from the judiciary was copied by Musharraf in 2000 and again in 2007). This required all sitting judges of superior courts to take a new oath which omitted any reference to the 1973 Constitution and insulated all actions of the martial law authorities from judicial review.<sup>63</sup> The majority of High Court and Supreme Court judges took the new oath.<sup>64</sup> The power of courts to review the actions of the military government was taken away by constitutional amendment.<sup>65</sup> In 1981 Zia promulgated the Provisional Constitution Order, 1981, further weakening judicial independence, inter alia by allowing for the transfer of high court judges for up to two years, the transfer of cases between High Courts and requiring all judges to take a new oath.<sup>66</sup> Unlike 1977, when all judges of

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56 The Constitution (Fifth Amendment) Act 1976.

57 The Contempt of Court Act 1976.

58 Khan, p 411.

59 Khan, p 444.

60 *Nusrat Bhutto v Chief of Army Staff* PLD 1977 SC 657.

61 *Zulfikar Ali Bhutto v The State* PLD 1979 SC 53.

62 Khan, p 467.

63 The High Court Judges (Oath of Office) Order, 1977 and the Supreme Court Judges (Oath of Office) Order, 1977.

64 Khan states that the Supreme Judicial Council forced five high court judges to resign after it was found that they had not taken the new oath (at p 473).

65 New Article 212-A of the 1973 Constitution.

66 Khan, p 494.

superior courts were allowed to take the new oath, the 1981 measure went one step further. This time it was not up to the judges to decide whether or not to take the new oath; only judges expressly invited to do so were permitted to take the new oath and remain in their posts. Former Chief Justice Cornelius described this episode as ‘the rape of the judiciary’.<sup>67</sup>

In 1985, democracy returned to Pakistan, but at a price: the newly constituted National Assembly passed the infamous Eighth Amendment to the 1973 Constitution, which confirmed the constitutional amendments made by Zia in the course of seven years of martial law.<sup>68</sup> As a result, all measures introduced by Zia to make the legal system ostensibly more Islamic were permanently incorporated into the 1973 Constitution. This includes the provisions for the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court, although, notably, the security of tenure of judges of the Federal Shariat Court was significantly weaker than that of their counterparts at the High Court. The Eighth Amendment also introduced into the Constitution a new Article 58(2)(b), which allowed the President to dissolve the National Assembly where ‘a situation has arisen in which the Government cannot be carried on in accordance with the Constitution and an appeal to the electorate is necessary.’

From 1985 until 1999 Pakistan was continuously governed by civilian governments. However, none of them was able to serve its full term. The main cause of political instability was the conflict between President and Prime Minister, itself a direct outcome of the constitutional amendments introduced by Zia in order to strengthen the power of the President. Article 58(2)(b) made it possible for the President to dismiss a democratically elected government and it was used to cut short the terms of both Benazir Bhutto’s and Nawaz Sharif’s governments. However, Article 58(2)(b) also increased the role and importance of the Supreme Court, since it was able to review the constitutionality of the dismissal of the government. In the 1990s the Supreme Court emerged as an increasingly powerful institution, deciding the fate of democratically elected governments and as a result becoming embroiled in the conflict between President and Prime Minister. During this period, public interest litigation also propelled the courts into becoming protectors of human rights. Given its powers, both President and Prime Minister attempted to control judicial appointments to the Supreme Court.

In the course of the 1990s Pakistan’s High Courts and the Supreme Court interpreted and clarified the constitutional provisions governing judicial appointments, in a series of judgments often in response to attempts by the executive to interfere with judicial independence. The first of these cases was *Government of Sindh v Sharaf Faridi*<sup>69</sup> where the Supreme Court held that:

‘The independence of the judiciary means (a) every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reasons; and (b) that the Judiciary is independent of the Executive and the Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.’

In the same case the Supreme Court held that the financial independence of the judiciary was a *sine qua non* of judicial independence and directed the central and provincial governments to grant superior courts financial autonomy, meaning that the High Courts and the Supreme Court were to have full control over their budgets.

<sup>67</sup> Quoted in Khan, p 497.

<sup>68</sup> New Article 270A of the 1973 Constitution.

<sup>69</sup> PLD 1994 SC 105.

However, this did not curtail government interference with judicial appointments. The second term of Benazir Bhutto's Government from 1993 until 1997 was marked by a number of attempts, many of them successful, to dictate judicial appointments. Most notably was the elevation of Justice Sajjad Ali Shah to the post of Chief Justice of Pakistan in 1994. His elevation was made in disregard of the well-established convention that the most senior judge of the Supreme Court was to be elevated to the position of Chief Justice of Pakistan. Had the convention been followed, it would have been Justice Saad Saood Jan's turn to become Chief Justice. Constitutional conventions were also ignored with respect to the appointment of judges to the provincial High Courts. Acting Chief Justices were appointed for three of the four High Courts, followed by the appointment of a large number of ad hoc judges, many of whom had political affiliations with Bhutto's PPP Government.

The constitutionality of 20 appointments of judges to the Lahore High Court was challenged in the case of *Al-Jehad Trust v Federation of Pakistan*.<sup>70</sup> In a wide-ranging decision the Supreme Court invalidated the 20 appointments and formulated a detailed set of rules which were to govern judicial appointments to the superior courts. The decision has not been overturned and thus continues to govern judicial appointments to the higher judiciary. The Supreme Court summarised the gist of its 200-plus pages judgment in 13 directions contained in a short order. The main thrust of these directions was to limit the power of the President to impose on the Supreme Court his own choice of judges. Instead, the Supreme Court held that Article 197 of the Constitution, which provides that the President has the right to appoint judges to the Supreme Court 'after consultation with the Chief Justice', had to be read in a manner that made this consultation 'effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play.' Moreover, 'the opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.'<sup>71</sup> Other directions restricted the ability of the President to appoint ad hoc judges, confirmed the principle of seniority in the elevation of a judge to the position of Chief Justice of a High Court, declared that an acting Chief Justice of a High Court could not participate in judicial appointments, restricted the transfer of judges between High Courts or to the Federal Shariat Court and additionally held that judicial appointments made in violation of these directions were unconstitutional and therefore invalid.

The *Al-Jehad Trust* decision must be regarded as a milestone in Pakistan's legal history after two decades of open manipulation of judicial appointments by the executive. It was welcomed by the bar councils and bar associations throughout Pakistan as well as by Benazir Bhutto's political opposition. The slow implementation of the judgment gave rise to further proceedings before the Supreme Court, resulting in a second *Al-Jehad Trust* decision in 1997.<sup>72</sup> The Supreme Court held that in appointing judges, the President was acting on the advice of the Prime Minister, and that such advice was binding on him.

On 5 November 1996 President Leghari dismissed Benazir Bhutto's Government under Article 58(2) (b) of the Constitution, citing the slow implementation of the *Al-Jehad Trust* decisions as one of the reasons for the dismissal. Benazir Bhutto's attempt to have the dismissal declared unconstitutional failed and the general elections held in February 1997 saw Nawaz Sharif's Muslim League emerge

70 PLD 1996 SC 324.

71 At p 365.

72 *Al-Jehad Trust v Federation of Pakistan* PLD 1997 SC 84.

as a clear winner, winning a two-thirds majority in the National Assembly and a clear majority in the Punjab Provincial Assembly.

Despite a strong political mandate, Nawaz Sharif clashed with the Supreme Court within a few months of being elected. A dispute over the appointment of judges to the Supreme Court in mid-1997 resulted in the Supreme Court insisting on compliance with the directions contained in the *Al-Jehad Trust* judgments. However, by that time there were also tensions within the judiciary itself, with some Supreme Court judges being critical of Chief Justice Sajjad whom they accused of being biased in his treatment of his fellow judges when it came to the award of privileges and the constitution of benches. The conflict eventually led to the removal of Sajjad from his post as Chief Justice by his fellow Supreme Court judges – an event unprecedented in the history of Pakistan. It was accompanied by an equally unprecedented storming of the Supreme Court by supporters of Nawaz Sharif, who was facing contempt of court proceedings which could have led to his dismissal as Prime Minister.

The crisis was resolved on 2 December 1997 when Ajmal Mian assumed the post of Chief Justice of Pakistan. The Supreme Court in the case of *Asad Ali v President of Pakistan*<sup>73</sup> confirmed the principle that the senior-most judge of the Supreme Court had to be appointed as the Chief Justice of Pakistan.

On 12 October 1998 General Pervez Musharraf dismissed the Sharif Government in a bloodless coup, suspended the constitution and proclaimed a state of emergency. Initially Musharraf did not touch the judiciary. However, the prospect of the Supreme Court declaring his coup unconstitutional and reinstating the Sharif Government led to the promulgation of the Oath of Office (Judges) Order 2000. A number of High Court and Supreme Court judges, including the Chief Justice of Pakistan, either refused or were not given the new oath. The newly constituted Supreme Court duly validated the coup, continuing a tradition of judicial ‘resolution’ of constitutional crises.<sup>74</sup>

The terrorist attacks in New York City on 11 September 2001 enabled Musharraf to perpetuate his rule. A wide-ranging constitutional amendment, carried out under the provisions of the Seventh Constitution Amendment Act 2003, strengthened Musharraf’s hold of the country, but it did not contain any further attacks on judicial independence. It could be argued that no further measures were necessary, given that the judiciary had been cleansed of dissent in 2000 and was now firmly on Musharraf’s side.

It was seven years into Musharraf’s rule when an important turning point in the relationship between the judiciary and the Musharraf regime occurred. The Supreme Court decided, for the first time, an important case against the Chief of Army Staff and President, by declaring that his Government’s attempt to privatise a major state industry, Pakistan Steel Mills, was unconstitutional.<sup>75</sup> The decision marked the beginning of a series of cases in which both the Supreme Court and the four provincial High Courts began to question the actions of the Musharraf regime.

Musharraf’s reaction to these challenges has been described in Chapter 2. On 9 March 2007 Chief Justice Chaudhry was accused of judicial misconduct. The proceedings against him before the Supreme Judicial Council were declared unconstitutional by the Supreme Court in July 2007. Restored as Chief Justice, Chaudhry was again removed following the declaration of an emergency on

73 PLD 1998 SC 161.

74 *Zafar Ali Shah v General Pervez Musharraf* PLD 2000 SC 869.

75 *Watan Party v Federation of Pakistan* PLD 2006 SC 697.

3 November 2007. Chaudhry was only able to resume his office almost 18 months later, on 21 March 2009, following street protests and unrest.

The legal history of Pakistan has therefore displayed a disjunction between the lip service paid to judicial independence in constitutional and legal documents and reality, particularly when the judges themselves have a stake in the governing regime. The judiciary has at times been complicit in erosions to its own independence, with particularly the Supreme Court having been used as an instrument of the executive, and litigation used to promote political objectives rather than to safeguard the rule of law. As one retired judge told the IBA delegation, a judge is only independent when left alone to make his/her decisions according to principle – it is particularly the latter which is affected when there is endemic corruption, regardless of the technicalities of appointment or dismissal. Many respondents told the delegation said that they considered the existing rules would be sufficient for judicial independence, if only they were implemented consistently. However, it was also noted that due to endemic corruption, particularly in the subordinate courts, the status of the judiciary in Pakistan is low. This, together with low rates of pay, was identified by respondents to the IBA delegation as a disincentive to many leading advocates who might otherwise accept elevation to the bench. The low esteem and lack of respect is clearly a further impediment to enhancing the status of the judiciary. According to respondents, it is also because of the corruption that litigants frequently feel that resort to a court is simply a waste of time. There is a general distrust in the integrity of the legal system itself.

The movement to reinstate Chief Justice Chaudhry marks a significant turning point in expectations and aspirations for the independence of the judiciary in Pakistan. The reinstatement of the Chief Justice Chaudhry in March 2009 presents an important opportunity for Pakistan's judiciary not only to address the legacy of Musharraf's reign but to complete the journey towards judicial independence which came to an abrupt halt in 1999. There are a number of challenges on the road ahead. These can be categorised under three headings:

- the Constitution and composition of the judiciary;
- the integrity of judicial institutions and officers; and
- the capacity and effectiveness of the judicial institutions and officers to deliver justice, uphold the rule of law and protect human rights.

### **3.2 The Constitution and composition of the judiciary**

#### *a) The 'PCO judges'*

A significant factor in the appointment and removal (through forced resignation) of judges has been the legacy of the Provisional Constitutional Order of 2007 (PCO).<sup>76</sup> This Order, together with the Oath of Office (Judges) Order 2007, required the judges of the Supreme Court, High Courts and Federal Shariat Court to swear a new oath in accordance with, and abide by the provisions of, the Proclamation of Emergency of 3 November 2007, and the PCO. Any judge who did not do so ceased to hold office 'with immediate effect.' A Supreme Court Order on the same day to the effect that

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<sup>76</sup> Provisional Constitution Order No 1 of 2007.

these actions were *mala fide* and void was met with the house arrest of many judges, preventing a full hearing of the matter scheduled for two days later. As discussed above, requiring judges to swear a new oath is not unknown in Pakistan. Indeed, Chief Justice Chaudhry had himself sworn a new oath to General Musharraf in 2000. Swearing a new oath means that judges then effectively have a stake in the new order. This, some respondents told the IBAHRI delegation, might not affect day-to-day cases, but it does affect cases on sensitive, especially political, matters. More generally, it has contributed to a lack of public confidence in the independence of the judiciary. Some judges who had initially refused to swear the new oath subsequently changed their minds and returned to the bench. Many new judges were appointed following the PCO and had taken the new oath. Some judges steadfastly refused to swear the new oath but, unless they actually resigned at the time, are now reinstated to the bench. That means that, in effect, three classes of judges were created in the superior courts. The Supreme Court bench, which originally had 16 judges plus the Chief Justice, swelled to nearly 30 judges. (There is no precise stipulation in the Constitution as to the number of judges to be appointed to the court.)

Many respondents interviewed in the course of the IBAHRI mission expressed concern that High Court and Supreme Court appointments made during the 2007-09 period were politically motivated and that the appointees did not always meet the constitutionally-mandated qualifications for appointment. Respondents repeatedly stated that the appointments procedures followed in such cases lacked independence, transparency and legitimacy. Emotions clearly run high. Some respondents suggested that taking the new oath subverted the Constitution, was contrary to Article 6, and thus amounts to high treason. The IBAHRI delegation was told of PCO judges being refused service in shops and publicly shunned, indicating that deep feelings on this issue are not limited to the legal profession and exist throughout the whole of Pakistani society.

Most, but not all, of those the delegation spoke with distinguished between the legitimacy of those judges appointed under the authority of Chief Justice Dogar, who had become Chief Justice following the proclamation of emergency, and PCO judges in general, noting that the practice of taking an oath under a PCO was not a new development in Pakistan. This practice was nevertheless consistently viewed by respondents as having contributed to a weakening of the independence of the entire judiciary in Pakistan.

Respondents differed as to what steps should be taken to resolve the situation following the restoration of the Chief Justice. Some were of the view that only the Parliament could remedy this situation through legislation or an amendment to the Constitution. Others, some of whom were attorneys who adopted a practice of wearing a black armband as a protest when appearing before the PCO judges, said that they 'expected' the Chief Justice to act to remove such judges. While some talked in terms of the need for a 'purge' of those judges who abrogated the Constitution, to ensure accountability so that wrongs are not legitimised, others talked of a need for reconciliation and continuity to minimise further disruption to the functioning of the judiciary.

This dilemma was addressed by the Supreme Court of Pakistan when it delivered its decision with respect to Constitutional Petitions No 8 and No 9 on 31 July 2009.<sup>77</sup> Fourteen judges of the Supreme Court, led by Chief Justice Chaudhry, declared that the Proclamation of Emergency of 3 November

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<sup>77</sup> *Sindh High Court Bar Association v Federation of Pakistan; Nadeem Ahmed v Federation of Pakistan*. The decision is not yet reported but can be accessed at [www.dawn.com](http://www.dawn.com) (accessed 19 August 2009).

2007, as well as the PCO, the Judges Oath Order, the first and second Amendment Orders, and the Islamabad High Court (Establishment) Order were ‘unconstitutional, *ultra vires* of the Constitution and consequently... illegal and of no legal effect.’ These Orders were declared to be serious impediments to the functioning of the judiciary as well as to the rule of law. Judgments which had purported to validate these Orders<sup>78</sup> are overturned as they are wrong in law and, further, the Supreme Court which had delivered those judgments had been improperly constituted.

This ruling means that all appointments to the Superior Courts made since 3 November 2007 are void *ab initio* and the appointees ‘cease to hold office forthwith’. Former Chief Justice Dogar’s appointment was also held to be illegal. Those justices who had been appointed prior to 3 November 2007 but who swore the new oath will be subject to proceedings under Article 209 of the Constitution for misconduct. (See further below.)

It remains to be seen what the reaction to this remarkable judgment will be. It sets a novel precedent for Pakistan given its legal history described above. The judgment is a great stride towards preventing the use of courts to validate the abuse of authority. However, it is essential that the judiciary, the legal profession, the government and civil society reflect on all the determinants for judicial independence and the rule of law. The removal of the so-called ‘PCO judges’ must not be allowed to camouflage the many endemic and systemic problems which beset the judiciary and the legal system. These must still be addressed.

#### *b) Judicial appointment and removal procedures*

The constitutional framework and conventions governing judicial appointments in Pakistan are rooted in the country’s colonial past and post-colonial developments. In British India, appointments to the High Courts and the Federal Court were made by the Crown, represented by the Governor General. This system was formalised by the Government of India Act of 1935,<sup>79</sup> which served as Pakistan’s temporary constitution from 1947 until 1956. The 1956 Constitution provided that the Chief Justice of Pakistan was to be appointed by the President, and all other judges of superior courts were to be appointed by the President after consultation with the Chief Justice.

The 1973 Constitution provides for the appointment of judges to the higher courts in Articles 177 and 193. The appointment process of the Chief Justice and judges of the Supreme Court is the same as under the 1956 Constitution. A judge of a High Court is appointed by the President after consultation with the Chief Justice of Pakistan and also with the Governor of the province concerned and, except where the appointment is that of the Chief Justice, with the Chief Justice of the relevant High Court. The Constitution also sets out the minimum qualifications of experience required for appointment as a judge of the superior judiciary.

During the period of military rule from 1977 to 1985 the army’s control over judicial appointments was such that there was little open controversy regarding the exact meaning of Articles 177 and 193. With the return of democracy, however, this changed. As discussed above, two issues in particular caused controversy: whether it was the President himself or the President acting on the advice of the Prime Minister, who was empowered to appoint judges (given that Article 48(1) of the Constitution

<sup>78</sup> For example *Tikka Iqbal Muhammad Khan’s Case* PLD 2008 SC 178.

<sup>79</sup> Part IX, sections 200 and 220 of the Government of India Act, 1935.

provides that ‘in the exercise of his functions, the President shall act on the in accordance with the advice of the Cabinet or the Prime Minister’); and what was required by the term ‘consultation’ in these circumstances.

In 1989, the President and Prime Minister mutually agreed a detailed appointment procedure of Supreme Court and High Court judges, which involved recommendations from the Chief Justice of a High Court or the Supreme Court, and from the Law and Justice Minister, the Prime Minister and the President, as well as background checks conducted by the intelligence and law enforcement agencies. The general tenor of the agreement is that judicial appointments are to be agreed by the judiciary, the President and the Prime Minister. However, as one experienced respondent pointed out to the delegation, the intelligence reports are sent to the Prime Minister and the President, not to the Chief Justice. The reports are about the ‘moral character’ of the candidate. This may have an adverse impact on candidates who drink alcohol, or on women candidates against whom sexual allegations have been made (which apparently occurs frequently). This exacerbates gender bias already present in the system and contributes to a conservative Islamisation of the legal system (discussed further below).

The Agreement on Judicial Appointments is significant in that it appears from the interviews conducted in the course of the IBAHRI mission that its procedures continue to govern the appointment of judges to the higher judiciary, even though this procedure is not required by the Constitution. The Agreement is reproduced as Appendix I to this Report.

This scheme was further refined as a result of the two *Al-Jehad Trust* cases of 1996 and 1997,<sup>80</sup> discussed above, which emphasised that in the appointment of judges the recommendation(s) of the Chief Justice were crucial (and that if the Chief Justice’s recommendation was not followed he or she would have to recommend someone else, rather than having his opinion ignored). Further, the courts noted that, in appointing judges, the President was acting on the advice of the Prime Minister and that the consultation process must be meaningful.

As can be discerned from the outline of the events between 1997 and 2009, this carefully designed scheme has not always been adhered to, mainly for political reasons. Some respondents told the IBAHRI delegation that they thought the appointments process itself was satisfactory; problems arose because of political or personal bias on the part of those making the decisions. However, many respondents commented that the process was subject to political interference and could not be said to be independent as such. There were also concerns that even in the absence of open political manipulation the current system for judicial appointments lacks transparency and has inadequate safeguards against manipulation. The Chief Justice of a High Court or, in the case of appointments to the Supreme Court, the Chief Justice of Pakistan, occupies a pivotal role and influence in the procedure. There are concerns that vesting an exclusive right in one office potentially weakens judicial independence in that it creates powerful incentives to influence the office of the Chief Justice in the course of the appointments process. Respondents told the IBAHRI delegation that incentives which might influence superior court judges did exist, such as appointments to statutory or constitutional bodies such as the Election Commission, following retirement from the bench.

The absence of adequate checks and balances in the appointments process can, and has, heightened perceptions of a lack of independence in the judiciary. Despite the process of binding consultations

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<sup>80</sup> *Al-Jehad Trust v Federation of Pakistan* PLD 1997 SC 4.

on judicial appointments, as established by several Supreme Court decisions, respondents repeatedly stated to the delegation that political interference did occur. The lack of transparency and openness of the current procedure makes these allegations difficult to substantiate. However, it is clear that a strong perception that the process is frequently subject to manipulation persists, notably amongst the judiciary itself and amongst members of the legal profession.

Concerns were also communicated to the IBAHRI delegation that the current procedure is unable to promote better gender balance and better representation of minorities amongst the judiciary.

In 2006 a 'Charter of Democracy' was drawn up which included suggested amendments to the Constitution regarding senior judicial appointments.<sup>81</sup> This Charter recommends setting up a commission consisting of Chief Justices who have never taken a PCO oath, the Vice Chairmen of the Pakistan and relevant provincial Bar Councils, Presidents of the relevant High Court Bar Associations, the federal Minister for Law and Justice and relevant provincial counterpart, and the Attorney General of Pakistan and Advocate General of the relevant province. This commission would forward the names of three candidates for each appointment to the Prime Minister, who would select one name for confirmation to a Joint Parliamentary Committee through a transparent public hearing process. This proposed commission would also be responsible for the removal of judges. These proposals would introduce a public process for judicial appointments. Several respondents expressed support for the Charter of Democracy proposals. Others were sceptical, noting that the Charter is an agreement between two political parties, the PPP and the PML(N). Respondents also pointed out that although the proceedings of the Joint Parliamentary Committee would be public, the proposal would shift power to political parties to secure the appointment of the judge of their choice. The potential for increased politicisation of the process remained. Respondents also noted that these proposals did not address the need to strengthen the independence of the judiciary through measures to enhance the representation in the judiciary of women or minority communities.

The Charter of Democracy does not address the appointment and removal process for judges of subordinate courts. There is a Federal Judicial Academy which provides orientation and training, both pre- and in-service, for new judges, magistrates, law officers and court personnel in subordinate courts. Judges in subordinate courts are appointed through civil service examination run by each provincial Public Service Commission. As discussed below, most complaints of corruption related to the subordinate courts. The lack of respect for the judiciary and the lower esteem in which the subordinate courts are held further exacerbates the problem of corruption.

The IBAHRI recommends that there should be a review and reform of the existing appointments procedures to ensure greater transparency and independence from political interference. Consideration should be given to the establishment of an independent Judicial Appointments Commission with specific criteria for its membership to give sufficient input into the process from all relevant federal and provincial stakeholders and to prevent domination by political parties. A transparent nominations process should promote judicial appointments made against agreed criteria based on merit. The aims of the Commission should include incorporating gender balance and representation of minority communities in the judiciary, provided candidates are otherwise meritorious.

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<sup>81</sup> Clause 3. The Charter is reproduced as Appendix 2.

Removal of senior judges is currently effected by the Supreme Judicial Council<sup>82</sup> (SJC). This consists of the Chief Justice of Pakistan, the next two most senior Supreme Court judges, and the two most senior High Court judges. Prior to 2004, the President had to provide the SJC with information about a judge and direct it to inquire into the matter. It makes a recommendation to the President. Since 1973 the SJC has not taken formal proceedings against any judge, and prior to the 1973 Constitution few references of misconduct were filed, of which only two were contested.<sup>83</sup>

In 2005, the SJC laid down procedural rules to govern its enquiries into allegations of judicial misconduct.<sup>84</sup> These rules established a mechanism for investigating complaints. As the Supreme Judicial Council's Chair, the Chief Justice instructs one Member of the Council to provide his/her opinion on whether there is sufficient material to commence an enquiry.<sup>85</sup> If that Member is of the opinion that there is sufficient material to commence an enquiry, the matter will be placed before the full Council,<sup>86</sup> which will then conduct an enquiry.<sup>87</sup> If the Council is of the view that the matter warrants removal proceedings being taken against the judge, it must issue a show cause notice with supporting material, calling upon the judge to explain the conduct within 14 days.<sup>88</sup> On receipt of the reply from the judge, the Council shall convene its meeting to proceed further with the matter.<sup>89</sup>

The (mis)use of this body in the case of Chief Justice Chaudhry has been discussed in detail in the IBAHRI 2007 Report.<sup>90</sup> Briefly, the Chief Justice was summoned to Army House on 9 March 2007, and confronted with allegations of misconduct by President Musharraf in full military uniform in the company of several other senior military officers and the Prime Minister. Musharraf demanded the Chief Justice's resignation. When the Chief Justice refused, he was held incommunicado at Army House for approximately five hours. During this time, the President issued an Order restraining the Chief Justice from carrying out his functions, appointed another judge as Acting Chief Justice, issued a reference to the SJC detailing complaints against the Chief Justice, and convened a meeting of the SJC in Islamabad by flying in on special planes two of its members. The SJC issued an Order that the Chief Justice not perform his judicial functions until the reference was answered.

Several respondents told the IBAHRI delegation that following the adoption of the new set of procedures in 2005, the process was conceptually a good mechanism for dealing with allegations of misconduct, but had not been sufficient in practice. However, other respondents emphasised that what was needed was a change in the mindset of politicians who fail to respect the independence of the judiciary and perceive the Supreme Judicial Council as an instrument through which to sanction 'troublesome' judges. Some respondents were of the view that proceedings of the SJC should be public, while others said that its proceedings should remain private to avoid further politicisation of the judiciary, adding that while the publicity of Chief Justice Chaudhry's mistreatment helped the cause of the Chief Justice himself, it did not assist the judiciary more generally.

Removal of judges in subordinate courts is effected through the relevant provincial High Court. The delegation was told that removal in this way does not happen often.

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82 Constitution, Article 209.

83 *The State v Justice Akhlaq Hussain* PLD 1960 SC 26; and *The President v Justice Shaukat Ali* PLD 1971 SC 585.

84 The Supreme Judicial Council Procedures of Enquiry 2005.

85 *Ibid*, Section 7.

86 *Ibid*, Section 7(3).

87 *Ibid*, Section 8.

88 *Ibid*, Section 9(1).

89 *Ibid*, Section 9(2).

90 *The Struggle to Maintain an Independent Judiciary: A Report on the Attempt to Remove the Chief Justice of Pakistan* (July 2007).

The IBAHRI recommends that there be a review of the role, procedures and composition of the Supreme Judicial Council, particularly with respect to allegations of misconduct that may arise concerning the Chief Justice. The IBAHRI further recommends that a review of High Court procedures for the removal of judges in subordinate courts be undertaken, particularly with a view to standardising the benchmarks for judicial conduct throughout Pakistan.

### **3.3 The integrity of judicial institutions and officers**

#### *a) Misconduct and accountability*

The Supreme Judicial Council has the exclusive jurisdiction to decide whether a judge in a superior court is guilty of misconduct or is mentally or physically incapable of performing his duties. It is the President who has the power to dismiss a judge following a report of the Council to this effect. As discussed above, the Supreme Judicial Council had remained dormant for many years. In an odd twist of fate it was Chief Justice Iftikhar Chaudhry himself who had revived the Supreme Judicial Council from its dormant state. Elevated to the position of Chief Justice on 30 June 2005, Chaudhry made judicial accountability a priority and three months later he presided over the first meeting of the Supreme Judicial Council in two decades.

The proceedings against the Chief Justice before the Supreme Judicial Council were declared unlawful by the Supreme Court in July 2007,<sup>91</sup> resulting in his immediate reinstatement. Several respondents expressed concerns to the IBAHRI delegation that, in the light of this judgment, the role of the Supreme Judicial Council as an institutional mechanism to investigate allegations of judicial misconduct had been weakened. The judgment of the Supreme Court also has to be seen in the light of the efforts by Chief Justice Chaudhry to revive the Supreme Judicial Council as an effective means to counter judicial misconduct.

The new procedures introduced in 2005 retain the power of the President to submit references concerning allegations against a judge to the Council, but also add to this two more avenues. The Council can now receive complaints directly from any member of the public, and it can also initiate *suo moto* inquiries against a judge on the basis of information received. Several respondents, when questioned by the IBAHRI delegation, commented that the Supreme Judicial Council was nevertheless still ineffective as a mechanism to ensure accountability and to safeguard the integrity and independence of the judiciary. Some said that because of camaraderie amongst Pakistan's judges, a mechanism comprised of people outside the judiciary, or of retired judges, should be set up.

Following the quashing of the proceedings against Chief Justice Chaudhry in July 2007 there is an urgent need to restore public confidence in what is currently the only available institutional mechanism to investigate allegations of judicial misconduct. At present there appears to be a high degree of uncertainty surrounding its procedures and role. This can be illustrated with reference to the case of *Shaukat Baig v Shahid Jamil*,<sup>92</sup> an appeal from a decision of the Lahore High Court where a precedent set by the Supreme Court had not been followed and, in addition, disparaging comments had been made about the country's apex court. In response the Supreme Court declared that:

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<sup>91</sup> *Mr Justice Iftikhar Muhammad Chaudhry v President of Pakistan* PLD 2007 SC 578.

<sup>92</sup> PLD 2005 SC 530.

‘care and caution must be observed while offering comments on any judgement delivered by this Court in order to avoid the possibility of *suo moto* action by the Supreme Judicial Council and initiation of proceedings under the contempt laws.’<sup>93</sup>

This gives a very wide meaning to the concept of judicial misconduct. The case illustrates that more clarification is needed to demarcate and define the role of the Supreme Judicial Council, both to safeguard against abuses and to ensure effectiveness as a mechanism for enhancing accountability.

In addition, as was evident from the proceedings surrounding Chief Justice Chaudhry himself, there is a lack of clarity as to what procedures should apply where the allegations of misconduct arise in relation to a Chief Justice. Many respondents told the IBAHRI delegation of the confusion that arose as to the process to be followed when the proceedings were initiated. As is also illustrated by the reference against Chief Justice Chaudhry, politically motivated references against judges (and even frivolous or vexatious ones) can have a chilling effect on judicial independence.

Therefore, with regard to accountability and misconduct, as well as the removal, of judges the IBAHRI reiterates the recommendation made above for an urgent review of the composition, powers and functions of the Supreme Judicial Council, and of its procedures and practices.

The delegation was informed that the current Code of Conduct for judges is not enforced and needs reforming. The recent *PCO Judges Case* discussed above also addressed this issue. In addition to holding that those already-appointed judges who swore the new oath should be investigated pursuant to Article 209 of the Constitution, it held that a new clause should be added to the Code of Conduct so that any judge who offers ‘any support in whatever manner to any unconstitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution’ will be deemed to be in breach of the misconduct rule in Article 209. The judgment does not say whether this would be an irrebuttable presumption, but it nevertheless puts a heavy burden on any judge in circumstances where there is the slightest whiff of unconstitutionality. The judgment does not distinguish between a judge acting in good faith and one acting *mala fides*. Clearly, the judgment recognises the damage that has been done to the independence of the judiciary in Pakistan through previous judicial endorsements of unconstitutional transitions, but it might end up imposing a new restriction on judicial independence.

A National Accountability Bureau was in fact created in 1999 under the National Accountability Ordinance to tackle corruption and the misuse and abuse of power and authority. It investigated hundreds of references against public servants, politicians and others. It was criticised by some respondents who told the IBAHRI delegation that since the burden of disproof is on the defence, and charges such as ‘misuse of authority’ are vague, its provisions were exploited during the Musharraf regime. The perception of some respondents was that the National Accountability Bureau, established by President Musharraf and directed by army appointees, only acted when vital (ie, political) interests were involved, even if corruption was evident. The Bureau was originally intended to investigate allegations of corruption in the judiciary (and the Ordinance could extend to this),<sup>94</sup> but according to some respondents a policy was developed not to pursue corruption in the judiciary (allegedly because it was felt that judges from whom corruption is tolerated are less likely to challenge the government). In any event, the present Government has decided to repeal the

<sup>93</sup> At p 569.

<sup>94</sup> Article 9.

Ordinance and disband the Bureau, apparently in reaction to the negative sentiment it has attracted. Some commentators have argued that this will make Pakistan in breach of its obligations under the United Nations Convention Against Corruption which requires a ratifying country to have one apex national anti-corruption agency to promote the accountability of both the public and private sectors.<sup>95</sup> The *PCO Judges Case* was not concerned with corruption in the private sector. The draft of the Holders of Public Office (Accountability) Act 2009 (which proposes the establishment of an independent Accountability Commission) does not include the judiciary within the definition of 'holders of public office'. The limited scope of the Bill has been criticised. The endemic nature of corruption in Pakistan has a corrosive effect on the judiciary and on the legal system generally and recommendations are made in Chapter 5 in this regard.

### *b) Performance management*

There is no performance management of an organised kind in any courts. While the High Courts do have a supervisory power over subordinate courts within their province, with inspection teams of judges and a 'complaint cell' for public use, several respondents indicated to the IBAHRI delegation that this was not effective (for example, subordinate court staff always seemed to find out about inspection visits beforehand and 'behaved themselves' on the day). The delegation was told that some bar associations are trying to address this problem and at least one High Court has an Administration Committee of ten judges examining this issue, but that the work has only just started. It was the clear impression of the delegation, on the evidence available to it, that what was being done was insufficient and in most instances this was of a reactive rather than a proactive nature.

### *c) Corruption and political bias of the judiciary*

Several of those interviewed in the course of the IBAHRI mission expressed two concerns with regard to the state of Pakistan's judiciary. First, that corruption was a serious problem, especially amongst the subordinate judiciary, and secondly, that political bias amongst the higher judiciary influenced the outcome of politically sensitive cases. Lack of impartiality as a result of bribes or political bias constitutes a serious threat to judicial independence and the rule of law.

It would have been beyond the capacity of the IBAHRI delegation to conduct a thorough investigation of these concerns. However, the fact that they were voiced with some regularity and consistency indicates to the delegation that the issue of corruption and political bias is a matter of real concern which needs to be addressed urgently. This perception is also confirmed by anti-corruption organisations such as Transparency International which have identified corruption in the courts as a particular problem in Pakistan.<sup>96</sup>

Respondents told the IBAHRI delegation of bribery and other incentives being used to influence the scheduling of trial proceedings or the processing of documents. Many respondents said that such corruption was both endemic and widely tolerated. One respondent told the delegation of an instance, which the delegation was unable to corroborate, of a politically-biased judge writing a judgment, locking it in a desk until the appeal period had elapsed, and then pre-dating it and filing it.

<sup>95</sup> Aslam Pervaiz Abro, 'Corruption in the public and private sectors ...', 21 July 2009, available at [www.dawn.com](http://www.dawn.com) (accessed 19 August 2009).

<sup>96</sup> Transparency International, *Global Corruption Report 2007* at p 246 notes that there are relatively few allegations of corruption within the senior judiciary, but that the problem is acute in subordinate courts where money has to be paid at virtually every step of the process either to court officials or judges.

Since the IBAHRI mission was concluded, the National Judicial (Policy Making) Committee has produced the National Judicial Policy 2009, which was drafted by the Supreme Court Registrar and approved by Chief Justice Chaudhry after wide consultation with stakeholders.<sup>97</sup> It addresses the backlog of cases in the courts (see below) and the assertion of the Chief Justice to show ‘zero tolerance of corruption in the judiciary.’ It advocates many measures, including: the Code of Conduct for subordinate judiciary adopted by the High Courts in Peshawar and Lahore be extended to the other provinces; introduction of a mechanism for disciplinary action against corrupt or inefficient court staff; examination of judgments to discover instances of nepotism or favouritism; surprise inspections of subordinate judiciary by the High Courts; and complaints of lawyer corruption made to a Chief Justice to be transmitted to the Bar Council for action. It also bars the appointment of judges to political posts such as Governor. The IBAHRI commends these initiatives. The recent decision in the *PCO Judges Case* discussed above will deem collusion with an unconstitutionally appointed official to be judicial misconduct.

The IBAHRI recommends that the Supreme Court takes active steps to fully implement the National Judicial Policy’s recommendations on the eradication of corruption in the administration of justice and in effective responses to complaints of corruption. This should be applied to combat corruption at all levels of the judiciary and to ensure that political bias does not influence the outcome of politically sensitive cases. The IBAHRI further recommends that the Code of Judicial Conduct be further developed and enforced, and applied to all levels of the judiciary. The IBAHRI further recommends that a system of performance management of the judiciary and court staff be introduced and effectively monitored through strengthened inspection mechanisms. Relevant Civil Service rules should also be applied with respect to court staff alleged to be corrupt.

### **3.4 The capacity and effectiveness of the judicial institutions and officers to deliver justice, uphold the rule of law and protect human rights**

#### *a) Judicial activism: public interest litigation and suo moto litigation*

Public interest litigation (ie, a case brought by a petitioner on behalf of the public at large) and *suo moto* litigation (ie, cases initiated by petitioners or by judges themselves) are made possible in the Supreme Court and in the High Courts by Articles 184 and 199 of the Constitution of Pakistan, on questions of public importance with reference to the enforcement of any of the fundamental rights conferred by the Constitution. The rise of public interest litigation in the early 1990s was followed by an almost complete disappearance of such cases by the end of the decade. However, this trend has been reversed under the tenure of Chief Justice Iftikhar Muhammad Chaudhry. Shortly after Chaudhry became Chief Justice, the President of the Supreme Court Bar Association of Pakistan noted that ‘it is highly credible that the Bench has taken to broadening its jurisdiction in the area of public interest litigation’ and he urged the Supreme Court that ‘this spirit be extended when the time comes to strike down the excesses of the ever-powerful executive.’<sup>98</sup>

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<sup>97</sup> This is reproduced in Appendix 3.

<sup>98</sup> Malik Muhammad Qayyum, ‘Supreme Court Bar Association’s Dinner in Honour of Mr Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan, 21 January 2006’, in PLD 2006 J 12, at p 13.

An example of a public interest litigation case is *In the matter of Muhammad Ismail Memon, Advocate Complainant*.<sup>99</sup> A petition had been filed in the Supreme Court in respect of the death of 70-year-old Professor Ghazi Khan Jakhrani and his 65-year-old wife, whose decomposed bodies were found 15 days of their death. They reportedly died due to starvation because of long delays in the payment of pension and other entitlements. After ordering an investigation, the Supreme Court not only ordered the civil servants who had caused the delay to be punished, but directed:

‘all the Government Departments, Agencies and Officers deployed to serve the general public... shall not cause unnecessary hurdle or delay in finalizing the payment of pensionary/retirement benefits cases in future and violation of these directions shall amount to criminal negligence and dereliction of the duty assigned to them.’<sup>100</sup>

In order to give further pungency to its order, the Supreme Court directed that in cases of any such delay the head of the concerned government department should be held liable for contempt of court and ‘shall be dealt with strictly in accordance with law’.<sup>101</sup>

Similarly, in *Muhammad Yamin Khan v Government of Pakistan*<sup>102</sup> the Karachi High Court, relying on the Objectives Resolution enshrined in Article 2A of the 1973 Constitution and its references to social justice as enunciated in Islam, made an order directing the Station Superintendent of Hyderabad Railway Station to allot a disabled man a vending stall on a busy part of the main platform. The Karachi High Court also ordered the Railway Authority to formulate a policy for a quota system for disabled persons ‘so that all such persons in the country may earn their livelihood in a respectable manner’.<sup>103</sup>

With respect to *suo moto* petitions, the IBAHRI delegation was referred to the use of these in relation to disappeared persons, but none of the decisions dealing with missing or disappeared persons has been reported in the law reports. These cases frequently dealt with allegations of people being apprehended by Pakistani security forces and handed over to US authorities. (It was alleged by some respondents that the disappearances cases made Chief Justice Chaudhry unpopular with the US Government, emboldening President Musharraf’s reaction to the Chief Justice.) *Suo moto* cases have in fact involved a range of issues significantly wider than suspected kidnapping and failure to adhere to fundamental rights and the rule of law in respect of terror suspects. Issues dealt with through this process include the price of energy and food stuffs, the trade in kidneys and other organs, and inaction by the police in serious crimes, as well as practices and customs considered a danger to the common good.<sup>104</sup> An example is the *suo moto* judgment concerning the flying of kites.

In *Suo Moto Petition No 11 of 2005*<sup>105</sup> Chief Justice Chaudhry suppressed the practice of kite flying. This matter was brought to the attention of the Supreme Court in the form of a newspaper clipping, which highlighted some of the dangers associated with the pastime. While there were no reliable data on the total damage caused by kite-flying before the Court, there was evidence that kite-flying damaged electricity lines and interrupted supplies, that some people had had their throats cut by kite strings (which are often made of metal or other cutting material), and that a number of boys were injured

99 PLD 2007 SC 35.

100 Ibid p 43.

101 Ibid p 44.

102 PLD 2006 Kar 93.

103 Ibid p 98.

104 See Muneer A Malik, *The Pakistan Lawyers’ Movement: An Unfinished Agenda* (2008, Pakistan Law House), pp 200ff.

105 PLD 2006 SC 1.

or had been killed because they had tried to jump from roof to roof in their attempt to claim their trophy, an opponent's kite successfully cut and descending towards the ground.

The Punjab government had already taken action in the matter, having promulgated the Prohibition of Dangerous Kite Flying Activities Ordinance of 2001, but Chief Justice Chaudhry found that the Ordinance did not go far enough to curb the dangerous sport. After having heard a number of parties, including the Kite Flying Association, the manufacturers of kite strings, the police, and of a student who had lost the power of speech after his throat had been cut by a kite string, Chaudhry issued 11 interim directions, all effective until the date of the next hearing.

They were wide-ranging: the manufacture and sale of kites and kite-flying strings of all kinds (including the 'sharp Maanjha' metallic wire and nylon cord) was restrained; no-one was allowed to fly kites with 'sharp Maanjha' strings; and the owners or occupiers of houses, shops and other buildings were not to allow kite-flying activity on their roof-tops, failing which they also would be liable for contempt of court. In addition, provincial governments were ordered to give wide publication to the order through press and electronic media and the police were instructed to enforce the order strictly. The Supreme Court relied on Article 9 of the Constitution, which guarantees the right to life, as it had been interpreted in the case of *Shela Zia v WAPDA*,<sup>106</sup> and decided that it could take action if the right to life was endangered by kite-flying.

Similarly, in *Re: Suo Moto Case No 1/K of 2006 (Gender Equality)*<sup>107</sup> the Federal Shariat Court took notice of a newspaper report according to which, under the Citizenship Act 1951, only men, but not women, were allowed to obtain Pakistani citizenship for their foreign spouses. The Government defended the rule on several grounds, the majority of them being concerned with national security and immigration control. Rejecting these arguments, the Court found the rule to be discriminatory and in violation of Articles 2-A and 25 of the Constitution, as well as contrary to Pakistan's international obligations and, most importantly, repugnant to Holy Qur'an and Sunnah.<sup>108</sup> The court ordered the President to change the rule within six months of the date of the judgment.

The use of public interest litigation and *suo moto* actions is thus a powerful tool and constitutes a considerable enhancement of judicial powers. There has been no systematic study of the re-emergence of these powers in Pakistan. While it may be questioned whether such litigation strategies are needed where the Government functions on the basis of respect for the rule of law and fundamental rights and there exists an active and strong civil society, some respondents told the IBAHRI delegation that the use of the *suo moto* power reflected the malaise of the judiciary with respect to the political situation in Pakistan. A clear majority of respondents (including human rights activists and senior members of both the legal profession and the judiciary) told the delegation that they were generally supportive of the use of these powers to protect human rights, although concerns were expressed over their use in cases which were perceived as being of a political nature and not suitable for adjudication by courts. There is little doubt that this form of judicial activism enjoys widespread support amongst the public at large who have now recognised the higher judiciary as an important guarantor of human rights and social justice. In the face of widespread governmental lawlessness during the Musharraf era, the re-emergence of public interest litigation saw the Supreme Court in particular become the people's only hope for justice and human rights and the only check on misuse of Executive power.

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106 PLD 1994 SC 693.

107 PLD 2008 FSC 1.

108 Ibid p 16.

However, some respondents expressed concerns that while these cases did fill the political void created by a regime that was dysfunctional or was simply disinterested in the fundamental rights of the people, they were nevertheless political rather than legal in nature and had been overused. Extra-legal pressures and demands for intervention to prevent and punish abuses of fundamental rights could result in the system itself being abused. Some respondents told the IBAHRI delegation that these cases could undermine the ability of the government to implement its economic policy, for example in cases concerning the privatisation of nationalised industries or the taxation of fuel. The delegation was told that in one (unreported) *suo moto* case a High Court blamed the provincial government for electricity load shedding. Such cases raise legal questions concerning socio-economic human rights. Socio-economic rights remain controversial in Pakistan and some of the criticisms voiced to the IBAHRI delegation may reflect an unease with courts addressing problems of distributive injustice as questions of rights. There are also concerns that the considerable media coverage of the cases may encourage judges to be populist in nature rather than act as jurists concerned with safeguarding the rule of law and fundamental rights.

Concerns of a practical nature were also expressed to the delegation. *Suo moto* cases may in fact offer relief to fewer people because a constitutional petition filed with respect to disappeared persons, for example, might affect may hundreds of people, while a *suo moto* action might only affect a few. These cases can be a reaction to specific instances of breaches of human rights<sup>109</sup> and do not necessarily set precedents. As they are instigated individually, by a petitioner or by a judge, multiple courts may be determining similar issues, but making different orders and effectively competing against each other. Some respondents suggested that judicial powers should be directed to rectifying deficiencies in the legal system (for example, by introducing proper procedures with respect to disappeared persons rather than actually trying to locate those persons).

Clearly, however, the courts have a duty to provide remedies, particularly where gross violations of fundamental rights and misuse of power have occurred. The willingness of the Supreme Court in particular to question forced disappearances reflects a commitment to the independence of the judiciary in the face of an often hostile executive. However, key issues arise with respect to the capacity of the judiciary to respond effectively to the rights claims at stake and to define appropriate and legally enforceable remedies. A related critical issue is the ability of the judiciary to withstand pressures from powerful social interest groups, the government or political parties, which may unduly influence the role of the courts and the use of *suo moto* powers and public interest litigation.

Judicial activism can have a catalytic effect in securing fundamental rights, particularly when the government's record in this regard is poor. However, if activism crosses into populism there can be a 'fatal attraction' (as one respondent put it) to lead a populist movement, even if the cause itself is just. While an activist judge who is focused on fundamental rights and the rule of law may be able to introduce changes that are needed, a populist judge who lacks such a focus can rarely do so, no matter how well-intentioned he or she may be. The prevailing judicial culture and the capacity for independence are key determining factors in ensuring that public interest litigation and *suo moto* powers are not misused.

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<sup>109</sup> For example, one respondent related a case where a man had had his feet chopped off in a feud and the judge in a *suo moto* action ordered an investigation by the police and hospitalisation for the victim, neither of which had occurred.

The use of these strategies in Pakistan is a much more recent development than in other jurisdictions such as India and South Africa, which have developed well-established practices on public interest litigation in particular. The IBAHRI recommends that the Supreme Court formulates a judicial policy governing public interest litigation and *suo moto* cases which ensures the balance, and separation, of powers whilst safeguarding the role of judiciary in the protection of human rights and the rule of law for individuals and groups who are genuinely aggrieved. In order to do this, a careful study and analysis of public interest litigation and the use of *suo moto* powers is needed, to examine and reflect on their development to date in Pakistan and the implications for judicial independence. A judicial dialogue on this topic, including dialogue with civil society organisations, the legal profession and academia, would serve to highlight both the limits and the potential of these strategies within a society based on the rule of law.

### *b) Security of judicial officers*

In the course of its visit the IBAHRI delegation was told by a number of those with whom they spoke that the provision of security for judges and their families was insufficient. This applied especially to judges of trial courts dealing with cases of violent crime and cases which were religiously sensitive, such as blasphemy cases.

Security of judicial officers is a fundamental precondition for judicial independence and for the proper functioning of courts. A judge who is being threatened or intimidated needs to be certain that all possible steps have been taken to ensure his or her physical safety and security, as well as that of family members. Defendants charged with religious crimes such as blasphemy are being denied a fair trial if the judge does not adjudicate according to the evidence adduced, but rather convicts because of fear for his or her safety if there is an acquittal. The IBAHRI delegation received several submissions that, in particular, members of religious minorities, as well as women accused of sexual offences, did not receive fair trials and were in many cases found guilty on weak or insufficient evidence. The delegation was told that these trials were often delayed for several years with the accused persons being held in prison on remand or pending appeals to superior courts.

On the whole, superior courts appear to be more robust, and better protected, and thus less liable to be swayed by concerns over personal safety and security. Indeed, it appears that many of the convictions of members of religious minorities and women are overturned on appeal. Respondents frequently praised the steadfastness of the superior judiciary in the face of extremist and populist pressures.

Given an already weak legal position because of inadequate legislative protection, it is imperative that members of minority groups (particularly religious minorities), and other oppressed people receive fair trials by judges whose impartiality and independence is not compromised by religious extremists and pressure groups.

The IBAHRI recommends an urgent review of the security protection provided to members of the judiciary, particularly during controversial or sensitive trials. Any deficiencies thus identified should be urgently rectified.

### *c) Physical infrastructure*

Judicial independence and integrity are fundamental ingredients for an effective and just legal system. However, judges do not operate in a vacuum but require physical infrastructure and support as well as remuneration and benefits which are commensurate with their status and experience. The IBAHRI delegation is aware of several initiatives to improve the physical infrastructure of courts, in particular the Access to Justice project of the Asian Development Bank. Nevertheless, many respondents have expressed concerns about the state of the courts in Pakistan. While the delegation observed the Supreme Court and High Courts to have adequate buildings, including libraries, the situation is not satisfactory at the level of trial courts, where many buildings are run down and in many cases lacked the capacity to deal with the sheer number of trials. In some instances, the delegation was told, judges in subordinate courts did not have their own offices. This means that they are easily approached by anyone connected with a case and the respect due to their judicial role is compromised.

The IBAHRI delegation was also told of court budgets being set by legislatures, whereas other bodies such as the Securities and Exchange Commission, and the Competition Commission, have much more autonomy in this regard. It was suggested that courts being given more financial autonomy would enable them to be more independent.

The IBAHRI recommends that particular attention should be paid by the federal and provincial governments to improving the physical infrastructure and financial autonomy of courts, especially of the subordinate courts.

### *d) Remuneration*

The IBAHRI delegation received several submissions concerning the remuneration package of judges. It appears in particular that the salaries of judges in the subordinate courts are low, increasing the judge's vulnerability to corruption. In addition, low salaries tend to deter well-qualified candidates from joining the judiciary, given that they could earn significantly more in legal practice. The delegation was also told that without standardisation with respect to cost of living and scale, increases that have been granted to judges were not granted proportionately to all judges.

The IBAHRI recommends a review of current pay scales and remuneration schemes of all judges with a view to ensuring that salary and benefits are commensurate with the status and importance of courts, in order to safeguard independence and integrity.

### *e) Security of tenure*

The legal history of Pakistan has been one in which tenure of judicial appointments has suffered. It was pointed out to the delegation that security of tenure was introduced by Prime Minister Bhutto but, allegedly, not merely to promote judicial independence but also to confer an advantage upon relatives who were judges. Under the Zia administration the mechanism of changing the judges' oath through the introduction of a Provisional Constitutional Order was introduced, which was repeated again by President Musharraf in 2000 and again in 2007, as described above. Apart from the constitutional dilemmas produced by the use of PCOs and altered judicial oaths, this has also meant that judges have had no real security of tenure.

The IBAHRI recommends that security of tenure for judges be guaranteed by law.



# Chapter 4 – The Legal Profession

Members of the legal profession formed the vanguard of the popular movement to restore Chief Justice Chaudhry. They also bore the brunt of the attacks of the Musharraf regime when protests were stifled. The IBAHRI delegation met many lawyers (and judges) who were detained for opposing the government's actions from 2007 onwards. Many were injured, some severely, in the struggle. Shocking photographs of this appeared around the world in the media. The Karachi violence was particularly appalling, lasting several days. The Tahir Plaza building containing 200 lawyers' chambers was torched by unidentified attackers and many lawyers were incinerated. A proper investigation has never been held. The Sindh High Court Bar Association publicly blamed the ruling party (MQM). Others met by the delegation in Lahore told how they had been arrested by police, who were waiting at the court premises with tear gas from 7am during 'Operation Zero Tolerance', and charged with terrorism under the Anti-Terrorism Act.

The following account was given to the delegation by a woman lawyer who had protested about the treatment of lawyers. It is used here as an illustration of the violence which was still occurring at the time of the IBAHRI mission.

A First Information Report (FIR) was lodged with the police in February 2008 on the basis that the lawyer was 'waging war against the state'. An FIR authorises police to arrest a person without a warrant and instigate processes that may lead to a criminal charge. The lawyer's office and home were then raided, but a direction was made that she not be arrested and the FIR was later cancelled by the provincial government. By 2009 the lawyer was again under suspicion and although she telephoned the relevant Minister, who said that there were no charges against her, her home was raided by 50 police on the night of 12-13 March 2009. She was hiding in her attic and could hear the police violently breaking locks in their search for her. When they discovered her there was a scuffle, and she fell, breaking her leg in three places. She was unconscious. The police left saying, according to her nephew who witnessed the incident, 'we are satisfied'. She was taken to hospital by relatives. They called the Chief Justice, who contacted the Home Secretary, who apparently said that she should not be touched. The relatives brought her home later the same night and the police returned, wanting to take her to the police station. She refused (under Pakistani criminal law a woman should not be arrested between sunset and sunrise). She was placed under house arrest for 30 days. The Chief Justice of the province advised her to submit an application for release. On 16 March the police, who had been stationed at her home, informed her that they had been ordered to withdraw by the Prime Minister. The Chief Minister said during a television interview that he had no idea who was responsible for this and that he had ordered an inquiry into the matter. When the lawyer spoke to the IBAHRI delegation on 23 March 2009, she said she had no idea what progress had been made. She gave her interview with her leg in plaster up to the hip; her doctors had told her that it would have to remain like that for at least two months.

This incident illustrates not only the violence perpetrated against lawyers (including women) in order to intimidate them into silence and submission, but also demonstrates the frenzied confusion that occurred at all levels in the process of attempting to do so. There is no doubt that many lawyers

were brave and put their personal safety at risk. One account of a peaceful protest by the Sahiwal Bar Association on 4 May 2007 notes that this was met by police carrying bottles of acid and cans of petrol which were thrown at the torch-bearing procession.<sup>110</sup> The Additional Registrar of the Supreme Court, Syed Hammad Raza, was shot dead on 13 May 2007.<sup>111</sup> The home of Muneer Malik, President of the Supreme Court Bar Association, was strafed with bullets on 10 May 2007, narrowly missing his daughter who was working on a desktop computer near a window.<sup>112</sup> The boycotts of courts that occurred also led to financial hardship for many lawyers, especially the younger and less experienced ones. Several respondents, including those who were not lawyers, told the IBAHRI delegation that while there had been protests by lawyers before in Pakistan, the recent protests were much more widespread and on an unprecedented scale. Many respondents praised the lawyers' actions, saying that because of them martial law is not likely to be as easily resorted to as in the past. Other respondents, however, were of the opinion that the lawyers' movement, while undoubtedly effective in campaigning for the restoration of the Chief Justice, had nevertheless become romanticised and was vulnerable to political infiltration.

While it appears clear that the lawyers were united in their opposition to the way in which Chief Justice Chaudhry had been treated, there was a marked difference of opinion among respondents as to whether the movement itself was united<sup>113</sup> and whether it had indeed been exploited by political parties, which diverged in their views – and cynically changed their policies – with respect to the reinstatement of the Chief Justice.<sup>114</sup> Despite this, several respondents noted that the lawyers' protests might not have been as successful as they were had it not been for the organisational expertise of the political parties when they joined the lawyers in the protests. Several respondents commented that even though the lawyers' movement had taken a moral and principled position with respect to the restoration of the judges, some within that community are prepared to achieve their aims in whatever way possible – for them, the end justifies the means.

Some examples drawn to the attention of the delegation included lawyers breaking the boycott of courts being manhandled by other lawyers; lawyers going from room to room to disrupt court proceedings presided over by 'PCO judges'; and lawyers laying siege to the Lahore High Court when they learned that Sher Afghan, a former minister accused of supporting Musharraf's removal of judges, was present, trapping him in the building for five hours. Afghan, who was 70 years old, allegedly has a heart condition; when an ambulance was called it was driven away by the lawyers who allegedly beat Afghan (Aitzaz Ahsan announced his resignation as President of the Supreme Court Bar Association in protest at this). While the delegation was in Pakistan, the Swat Bar Association called on the President of Pakistan to implement the Nizam-e-Adl Regulation introducing Islamic courts (see below), holding protest demonstrations and threatening another long march to Islamabad if their demands were not met. As judges can be activist but should not be populist, lawyers can be activist but should not in their professional capacity be politicised to the neglect of the rule of law and the ethical standards of the legal profession.

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110 See Muneer A Malik, *The Pakistan Lawyers' Movement: An Unfinished Agenda* (2008, Pakistan Law House), p 145.

111 Malik at p 146.

112 Malik at pp 149-51.

113 Some younger lawyer respondents claimed that the more senior lawyers wanted to end the boycotts because they had more to lose and pressured their junior colleagues to abandon the struggle.

114 There was particular divergence between the two main opposition parties (PPP and PML(N)) here. When it returned to power, PPP did not immediately restore the Chief Justice. There were many points of view as to why this was so: that he would overturn the National Reconciliation Ordinance (a 'deal between Benazir Bhutto and President Musharraf which would have ended corruption charges against Bhutto's husband, Mr Zardari'); that the United States was opposed to the reinstatement because they wanted to engineer a 'soft landing' for Musharraf who had supported the war on terror; that the United States was concerned that the use of *suo moto* actions relating to disappeared persons was interfering with the war on terror; and because the Chief Justice was simply a wild card who could not be trusted.

The activities of lawyers in Pakistan are governed by the Pakistan Bar Council and by bar councils established in the provinces.<sup>115</sup> The bar councils are not representative bodies like bar associations but have a limited membership of the most senior attorneys. The *ex officio* Chairman of the Pakistan Bar Council is the Attorney General. The *ex officio* Chairman of a provincial Bar Council is the Advocate General of the province. These are the bodies which govern the legal profession with respect particularly to admission and misconduct issues. They also recognise and derecognise bar associations, which are open to all attorneys who practise in the Supreme Court or in a relevant provincial court (and which, while they are mandated to maintain high professional standards, have little enforcement power and were described by one respondent as being like ‘clubs for attorneys’). The IBAHRI delegation was informed by some respondents that the changing composition of the bar councils during the crisis over the Chief Justice, as anti-government lawyers were replaced by pro-government lawyers, led to the establishment by the bar associations of a body called the National Lawyers Convention. This was intended to be a representative body, made up principally of lawyers, to take action with respect to the constitutional crisis. The Convention elected a National Coordination Council, and it was the Steering Committee of this Council which made the decisions affecting such things as the long march. While it was run by lawyers, it also included other stakeholders and political parties (the IBAHRI delegation was told that Nawaz Sharif, the head of PML(N), attended meetings). According to one report,<sup>116</sup> the calling off of the proposed sit-in at Islamabad after the long march was done by Nawaz Sharif, albeit in consultation with the President of the Supreme Court Bar Association. The Pakistan Bar Council (which had itself called for a boycott of ‘PCO judges’ in January 2008) denounced the National Coordination Council, saying it had no legitimacy. One respondent also claimed that one Bar Council froze the accounts of a bar association after it and its members endorsed and participated in a demonstration, and also suspended the practising licenses of some advocates, although this action was later rescinded.

In the meantime, the Legal Practitioners and Bar Councils (Amendment) Ordinance 2007 was promulgated by President Musharraf on 24 November 2007 as an attempt to restrict the already-limited autonomy of Bar Councils. The Ordinance introduces far-reaching amendments to the Legal Practitioners and Bar Councils Act 1973 by providing a new procedure for the punishment of advocates for misconduct. A new section 41 empowers a High Court or the Supreme Court (instead of a Bar Council) to receive complaints of misconduct concerning an advocate and to pass by way of sanction a range of orders, including the suspension or indeed the removal of an advocate from the roll of advocates. Respondents, including senior legal practitioners in all the provinces, expressed grave concern to the IBAHRI delegation at the implications of this Ordinance and its potential to undermine the independence and integrity of the legal profession. It was clearly viewed as a repressive measure. Given the concerns surrounding judicial independence, the IBAHRI delegation is concerned that the Ordinance can be used to intimidate members of the legal profession.

The IBAHRI recommends, as a first step, the repeal of the Legal Practitioners and Bar Councils (Amendment) Ordinance 2007. In addition, the IBAHRI recommends that the system of unrepresentative bar councils, the *ex officio* Chairmen of which are the Attorney General or an Advocate General, be phased out and replaced by a system of fully independent bar associations, established by legislation, to govern the legal profession. In this regard, the respective codes of

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115 Legal Practitioners and Bar Councils Act 1973.

116 *Dawn*, 26 March, 2009, p 7.

conduct for lawyers should be re-examined with respect to the boundaries of proper professional conduct, with particular attention paid to addressing corruption within bar associations, especially with respect to election of officers.<sup>117</sup> In the meantime, the IBAHRI recommends that bar associations investigate allegations of unprofessional behaviour, particularly those involving resort to violence, and discipline those responsible.

### **a) Legal education and training**

The quality of legal education in Pakistan is uneven. There are some centres of excellence, for instance in Lahore and Karachi, but also many colleges and universities where the quality of legal education is low, mainly due to a lack of resources such as well-resourced libraries and IT legal research facilities. Several respondents expressed concern to the IBAHRI delegation about the impact the low quality of legal education has on legal practice and the rule of law. Also, admission requirements under the Legal Practitioners and Bar Councils Act are vague. Inadequate attention to the skills required for practice, as well as to professional ethics and to emerging legal specialisms, were highlighted as shortcomings. Some respondents told the IBAHRI delegation that lawyers had become street fighters because many did not have the intellectual grounding to mount academic arguments about independence of the profession. Inadequate attention to professional ethics had, some respondents asserted, contributed to corruption in the legal system, where, especially in the lower courts, lawyers are the channel for bribes.

Several respondents told the IBAHRI delegation that the general standard among both the judiciary and attorneys was frequently low, resulting in bad decisions because of poor advocacy and poor use of precedent. This also meant that not only were some decisions bad, but also that courts were producing inconsistent decisions. Some respondents said that specialist judicial training in how to write judgments was needed.

In a move to improve the quality of legal education in Pakistan, the Pakistan Bar Council issued the Pakistan Bar Council (Recognition of Universities) Rules 2005. The main thrust of these Rules is to confine recognition of law degrees to a limited number of colleges and universities, which are deemed by the Bar Council to meet a certain minimum standard of education, defined under section 2(a) of the Rules as to include ‘physical factors like premises spread over about 10,000 square yards, a law faculty of qualified and experienced teachers and library composed of at least 20,000 volumes.’ The First Schedule of the Rules contains a list of domestic and international universities and colleges whose degrees are recognised as law degrees qualifying for practice in Pakistan. Holders of other degrees, or universities not listed, can apply to the Bar Council for recognition of, respectively, their degree or institution. Likewise, the Bar Council can withdraw recognition from an institution following an inspection.

In 2007 the Bar Council applied to the Supreme Court for a direction to the effect that the ‘Federal Government, the Higher Education Commission, all the Provincial Governments and the universities be directed to adopt and implement the Affiliation of Law Colleges Rules... and further that no Charter or NOC be issued to any institution, college or individual to establish law college without compliance of the afore-referred Rules.’<sup>118</sup> The Supreme Court did not encounter any objection to

<sup>117</sup> See Muneer A Malik, *The Pakistan Lawyers' Movement: An Unfinished Agenda* (2008, Pakistan Law House), Chap 2.

<sup>118</sup> *Pakistan Bar Council v. Federal Government* PLD 2007 SC 394, at p 396.

the application but nevertheless added to its order a compelling and thoughtful analysis of the ills affecting contemporary legal education in Pakistan. Singled out for particular criticism were private law colleges, which were primarily business ventures and only secondarily educational institutions. In its Order the Supreme Court not only decreed that the Rules of the Pakistan Bar Council were to be read into the rules framed by any Pakistani university but also set up a five-member Committee to update and improve the syllabus prescribed for a law degree.

The IBAHRI delegation met with representatives of the students' movements; many law students played leading roles in organising protests and monitoring the policing of them, particularly through the use of new technologies such as blogging. It is particularly commendable that some law schools, such as the Law faculty at LUMS, worked with law students to reflect on and analyse the ethical and legal dimensions of the lawyers' movement and the constitutional crisis precipitated by the removal of Chief Justice Chaudhry. Respondents to the IBAHRI delegation noted that legal education rarely takes such opportunities to examine the law in practice or to engage with pressing issues of fundamental rights, particularly as university programmes in human rights are limited and clinical legal education initiatives are rare.

The IBAHRI welcomes the efforts to improve the quality of legal education and recommends the adoption of the following additional measures:

- strengthening of training on professional ethics, practice and procedure;
- revision of the legal education curriculum to include greater emphasis on skills-based training and clinical legal education methodologies;
- integration of training on international human rights law in legal education;
- establishment of clinical legal education programmes with links to civil society and judicial monitoring programmes; and
- introduction of gender and law programmes/courses in law faculties and integration of a gender equality perspective into the legal education curriculum.

A further complaint made to the delegation by several respondents was that assessment in law schools lacks rigour. Exam questions tend to be descriptive rather than analytical, requiring recitation rather than reflection. It was also alleged that in many law schools examination questions tend to be repeated, so students merely study the last five years or so of questions and prepare those; they study the exams rather than study the law. In addition, it was alleged that corruption in the sitting of exams (for example, by students getting substitutes to write the exams for them) was common. The IBAHRI recommends that law schools undertake an extensive revision of their assessment policies and procedures to guarantee appropriate scholastic standards, eliminate cheating, and better equip law students for the rigours associated with bringing Pakistan up to an acceptable international standard regarding the rule of law.

It was also drawn to the delegation's attention that there is no independent, refereed academic law journal produced by Pakistan's law schools. Some respondents attributed the lack of objective detailed scrutiny of court decisions and legislation in Pakistan to this deficiency. The IBAHRI recommends that law schools endeavour to establish their own high quality law journals and,

if university or government funding for this purpose is not forthcoming, to seek funding from international donor organisations.

While there have been ongoing efforts to improve university legal education, these efforts do not extend to advocates already in practice, although the delegation was made aware of initiatives such as the provision of refresher courses for young lawyers by the Federal Judicial Academy in 1993 as well as human rights law training for rural lawyers by the Democratic Commission for Human Development (a Pakistani NGO), and the Human Rights Commission of Pakistan, which are designed to strengthen skills and capacity in legal practice particularly in the subordinate courts. The IBAHRI, therefore, further recommends that bar councils and bar associations consider introducing a compulsory system of continuing professional development for all advocates. Any such professional development programme should include both substantive law training and updating of skills (including case management, information technology and electronic legal research skills).

# Chapter 5 – Other Systemic Issues

The previous two chapters have already indicated a number of systemic issues that are evident from the dilemmas faced by the judiciary and the attorneys in Pakistan. These include: the history of corruption and the high social threshold of tolerance for it as a routine matter; the interference with judicial appointments; the manipulation and improper removal of judges; the misuse of judicial power; the lack of accountability and performance management for judges; the need for improved physical infrastructure in the courts; inadequate security for judges; low levels of remuneration of judges; and the lack of true security of tenure for judges.

This chapter considers other systemic issues which need to be addressed.

## a) Introduction of Islamic courts

A surge of Taliban activities in the tribal areas of Pakistan in 2008 and the beginning of 2009, with several areas such as the Swat Valley near Islamabad effectively falling under the control of the Taliban, motivated the government to enter into a peace deal with the Taliban. The deal involved acceding to the Taliban's main demand: the introduction of Islamic law and courts. In April 2009 the government issued the Sharia Nizam-e-Adl Regulation 2009<sup>119</sup> (SNA) as part of a peace deal. In return, the Taliban promised to stop all fighting, although they were not asked to disarm or disband. At least on paper, the SNA aims to address the Taliban's two main criticisms of Swat's legal system: the absence of Islamic law and institutions, and the long delays experienced by litigants and complainants in the disposal of cases.

With respect to the former, the SNA provides for two measures. First, it reconstitutes court structures by providing for three tiers of courts: Qazi courts at the trial level, an appeal court called a Zillah court, and an apex court called Dar-ul-Qaza. Secondly, the SNA provides that the judges of these courts have to be judicial officers of the North West Frontier Province, but as an additional qualification they also need to have completed a Sharia course from a recognised institution.<sup>120</sup> The government is also empowered to appoint executive magistrates who enjoy exclusive jurisdiction over the trial of criminal offences contained in the Pakistan Penal Code 1860, carrying a punishment of up to three years. However, their jurisdiction goes beyond the offences contained in the Code because they can also try an individual for any offence under the established principles of Sharia. These offences are unspecified in the SNA and they will be individually interpreted by each executive magistrate who will, for example, decide whether the flying of kites or the shaving of beards is against the established principles of the Sharia.

In a similar vein the SNA introduces Islamic law as the new substantive law for the area, providing in section 19 (2) that: 'Notwithstanding anything contained in any law for the time being in force all cases ... shall be decided by the courts concerned in accordance with Sharia'h: provided that cases of non-Muslims in matters of adoption, divorce, dower, inheritance, marriage, usages and wills shall be conducted and decided in accordance with their respective personal laws.' The SNA also lists a

119 The text of this Regulation is available on a number of websites. See, for instance, Associated Press of Pakistan at: [www.app.com.pk/en/\\_/index.php?option=com\\_content&task=view&id=73492&Itemid=2](http://www.app.com.pk/en/_/index.php?option=com_content&task=view&id=73492&Itemid=2) (accessed 21 August 2009).

120 This is defined as 'the Shariah Academy established under the International Islamic University Ordinance 1985 or any other institution imparting training in Uloom-e-Sharia and recognised as such by the government' (Section 2(e) of the SNA).

number of other laws which continue to apply to the Swat region, but these laws can be ignored by a judge if in his opinion they are not in accordance with the Shariah.

The SNA also aims to confront the problem of delays by imposing strict time limits on the hearing and disposal of cases, as well as encouraging out of court settlements.

With the Pakistani army having stepped up military operations against the Taliban in areas close to Swat, on the grounds that the peace deal had been breached, there must be doubts about the future of the SNA. It was criticised by many respondents when talking to the IBAHRI delegation, as well as by the media, human rights organisations and the international community. In addition, it appears that the Taliban itself has circumvented the system of official courts and is enforcing their own interpretation of Islamic law through commanders on the ground. The taking over of the judicial system, and the judiciary, by militants in this area is in grim contrast to the celebration in the rest of Pakistan of the restoration of the judiciary. It is significant that the lawyers' movement, which was vociferous with respect to the Chief Justice, has been silent on this issue, except for the Swat Bar Association, which demanded the implementation of the SNA, as was discussed in Chapter 4.

Under the Constitution, laws must be in conformity with the injunctions of Islam,<sup>121</sup> but Islamic law is not itself a constitutional *grundnorm*. International human rights standards apply to all individuals within a state's jurisdiction. Access to justice, including access to the courts, is a fundamental human right that should not be denied to individuals because of their geographical location. The IBAHRI recommends that in dealing with demands for the application of Islamic law the government should give paramount consideration to an investigation of the recognition and protection of human rights as guaranteed in the 1973 Constitution by the Human Rights Commission (see also below). In the meantime, the IBAHRI recommends the restoration of access to the ordinary court system in order to ensure the right of all persons to access to justice and the rule of law in accordance with the Constitution.

## **b) The media**

Media coverage had a substantial impact on the public reaction to the treatment of judges and lawyers by the Musharraf regime, particularly television which showed live coverage of events. People knew what was going on in more detail than had been the case during previous periods of emergency. Scenes of lawyers, non-lawyers, men and women being beaten by the authorities depicted the desperation and level of oppression by the government. Scenes of the long march showed the widespread support for the judges. Media censorship was pervasive and on several occasions television stations were raided and closed. However, as several respondents reported to the IBAHRI delegation, the media itself could be complicit and biased. In particular, a distinction was seen between news coverage and talk shows, where the latter were frequently manipulated. Some respondents said that while the number of television stations in Pakistan had grown from two to 30, some are mere mouthpieces for political parties. Some respondents also pointed out that media support for the judges had, over time, been inconsistent. For example, there was no great media support for those judges victimised for hearing blasphemy cases.

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<sup>121</sup> Article 227.

An unintended effect of the media, according to some respondents, was that it tended to paper over problems within the judiciary itself. Judges who had been perceived to be incompetent or corrupt were now cast as victims and deserving of public support.

The IBAHRI recommends that all stakeholders, especially the government and the media, take steps to strengthen the right to freedom of expression and the independence of the media, in particular by enhancing the capacity to conduct investigative journalism on issues pertaining to human rights and the rule of law, and to monitor violations of media freedom.

### **c) The role of civil society**

Civil society contributed greatly to opinion building in the judicial crisis. Several respondents told the delegation that civil society organisations supported the lawyers before the political parties did. The delegation was also told that, apparently for the first time in Pakistan's history, the women's movement was specifically targeted by the police for violence.

The IBAHRI delegation was impressed with the close attention being paid by many civil society organisations to the independence of the higher judiciary. However, given the limited resources available, considerably less attention is paid to the functioning, and indeed independence, of the subordinate judiciary. The IBAHRI recommends that civil society organisations seek to take on a more prominent role in monitoring and reporting on the independence of the subordinate judiciary given that it is at this level that the vast majority of cases are being decided. Effective monitoring of subordinate courts by civil society organisations would require the provision of additional resources and support by donors, and the IBAHRI encourages such support from them.

### **d) The treatment of women and minorities**

Several respondents told the delegation that in their opinion attitudes based on gender or caste often played a significant part in the handling and outcome of court cases. In particular, gender-based violence was frequently not given sufficient attention because, in one city, there are only two female medico-legal officers to examine all female victims. Combined with such practical shortcomings are belief systems which, in addition to being misogynistic, privilege jirgas over court proceedings as dispute settlement mechanisms. Jirgas are appointed at the behest of the most powerful person(s) in an area. They have no necessary respect for the rule of law. This means that access to justice, regardless of the shortcomings already mentioned, is simply irrelevant for many Pakistani women. Although the Protection of Women (Criminal Laws Amendment) Act was passed in 2006, and deals with such things as rape, forced marriages and Zina, respondents complained that the Act was vaguely worded and that after its introduction conviction rates in rape cases actually declined.

As Pakistan has been a party to the Convention on the Elimination of All Forms of Discrimination Against Women since 1996, the IBAHRI recommends that domestic implementation of its provisions be undertaken and that in particular the recommendations made by the UN Committee on the Elimination of Discrimination Against Women in its Concluding Comments on Pakistan's periodic reports, made in June 2007, be implemented.<sup>122</sup> Any declarations seeking to limit the scope of Pakistan's obligations under the Convention should be withdrawn.

<sup>122</sup> *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Pakistan* CEDAW/C/PAK/CO/3 (11 June 2007).

The rights of minorities are Principles of Policy in the Constitution<sup>123</sup> and thus are not binding rules, but Article 25 of the Constitution nevertheless guarantees equality before the law and the equal protection of the law for 'all citizens' as a fundamental right. Pakistan ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1966, without reservation. The IBAHRI recommends that domestic implementation of its provisions be undertaken. In addition, and as a support to this, Pakistan should ratify the UN Covenant on Civil and Political Rights and domestically implement its provisions.

The IBAHRI delegation was told that the use of jirgas in criminal matters has in fact been held by the courts to be illegal, but rulings to this effect have been ignored. The IBAHRI recommends that legislation be passed addressing the role of jirgas and other traditional forms of justice and regulating their use and their relationship to the formal justice system.

### **e) The police**

In addition to recounting the violence perpetrated against lawyers and demonstrators, several respondents told the IBAHRI delegation that there was an urgent need for police reform generally. Enforcement of the law by police is axiomatic for the rule of law, but unreasonable, biased and violent methods of enforcement are a direct abrogation of it. In addition to alleged corruption within the police service, the delegation was told that police training not only encourages support of the status quo, but that it is devoid of any training with respect to social marginalisation. Much police thinking, and reaction, is based on stereotypes. While there is a legal procedure to handle allegations of police misconduct, it is not usually followed and the delegation was repeatedly told that complaints against the police are not taken seriously. The delegation notes that in Pakistan's periodic report to the UN Committee on the Elimination of Racial Discrimination reference is made to a comprehensive programme on human rights sensitisation in police training schools and colleges.<sup>124</sup> It is evident that more and better training is required. Moreover, Article 8(3) of the Constitution expressly exempts the police from the requirement that all laws and customs must be consistent with the fundamental rights set out in the Constitution.

The IBAHRI recommends that police training be reformed to include more sensitisation to the issues affecting women and minorities and also to include fundamental rights in an effective manner. Further, in order to align police practices with fundamental rights under the Constitution, the IBAHRI recommends that the exemption for police in Article 8(3) of the Constitution should be removed.

### **f) Understanding and appreciation of human rights in general**

The IBAHRI delegation was told on several occasions that human rights are not much resorted to by Pakistan's courts and, because of the history of declarations of emergency, those fundamental rights that do exist in the Constitution have been regularly abrogated. Law schools do not always teach human rights as part of the law curriculum and some law schools have encountered political pressure to discontinue such teaching. Some respondents said that the Koran is more often resorted to than human rights principles in deciding cases. There appears to be little teaching of human rights in schools.

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<sup>123</sup> Article 36 safeguards the legitimate rights and interests of minorities, and Article 33 discourages parochial, racial, tribal, sectarian and provincial prejudices.

<sup>124</sup> *Reports Submitted by States Parties under Article 9 of the Convention: Pakistan* CERD/C/PAK/20 (19 March 2008), p 21.

The IBAHRI recommends that further comprehensive studies be undertaken on the relationship between international human rights standards, Islamic Law and domestic law in Pakistan. As part of this, Pakistan's adherence to its obligations under the United Nations Convention Against Corruption should be investigated as well (see above).

### **g) Other issues affecting the courts**

A complaint made to the delegation was that often litigants cannot understand what is happening in court as the proceedings are in English. This is particularly the case in proceedings before the superior courts, in reports of judgments and in laws published in the *Official Gazette*. Given that the vast majority of Pakistanis do not understand English, its use hampers access to the legal system. It is also a fundamental human right that court proceedings (especially criminal proceedings) be conducted in a language understood by a litigant or an accused.<sup>125</sup> The use of English also creates a barrier between the lower courts (where local languages are commonly used) and the English-medium superior courts. The use of English divides not only courts but also the legal profession itself, with lawyers educated in English at foreign universities being more likely to appear before higher courts, and also more likely to earn higher fees. (When statutes and reported judgments are in English, it is difficult to argue points of law in Urdu or Punjabi.) There is no doubt that the issue is considered controversial with a number of respondents stating that English was too well established as the legal language of Pakistan to be changed in the near future, and that as law is a postgraduate degree, law students will understand English in any case.

The IBAHRI recommends that efforts should be made by the courts and the government to give those who do not speak English full access to the legal system, for example by providing translations of reported judgments and laws, and better interpretation facilities.

Another complaint made to the delegation concerned the Anti-Terrorism Courts. These have the status of District Courts, but the high conviction rate (estimated at 90 per cent by one respondent) gives rise to suspicion about the standards of advocacy and methodology employed in them. On 3 August 2009, a full court meeting of the Supreme Court decided to form committees at both Supreme Court and High Court level to monitor Anti-Terrorism Courts. The IBAHRI welcomes this initiative and recommends that an independent investigation into the functioning of the Anti-Terrorism Courts, their rates of conviction and their adherence to international human rights standards and the rule of law, is urgently required. The continued operation of these courts should be reviewed, with due consideration given to ceasing their operation and transferring their functions to the ordinary criminal justice system, with necessary protections and security ensured.

In addition, the use of military courts was raised by several respondents. On 10 November 2007, President Musharraf amended the Pakistan Army Act 1952 to enable military courts to try civilians on a wide range of charges, including terrorism, anti-national activities, sedition, attacks on army personnel, waging war against the state, making statements conducive to public mischief, and assaults on the President with intent to disrupt him in the exercise of his powers. Prior to the amendment, military court could only try civilians if one of the co-accused in the same case was a member of the

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<sup>125</sup> International Covenant on Civil and Political Rights, Article 14(3)(f). This reinforces the recommendation made above that the Covenant should be ratified by Pakistan and domestically implemented.

armed forces. The Human Rights Commission of Pakistan condemned the amendment as blatantly violating human rights and the Constitution. The IBAHRI recommends an immediate repeal of the November 2007 amendments to the Pakistan Army Act 1952 and a judicial review of all cases involving civilians heard by military courts under those amendments.

The delegation was told by several respondents of the generally litigious culture which has developed in Pakistan, particularly within government departments. This has been stimulated by the fact that courts make few orders for costs and the departments have access to panels of lawyers in the Advocate Generals' offices at insignificant fees. Even if costs are awarded, these are taxed on an 1877 Schedule, so an unsuccessful litigant will have to pay only a fraction of the real costs if an action is lost. If a case has little chance of succeeding either at first instance or on appeal, litigation is nevertheless a gamble worth taking, for litigants generally as well as for government departments trying to meet their performance targets. This means that a litigation lottery mentality is emerging which exacerbates the already huge backlog of cases. The IBAHRI recommends that the courts urgently review the costs regulations.

There is a backlog of over 1,500,000 cases in the Pakistan court system. It was estimated by one respondent that civil cases take approximately 10 years to resolve. The National Judicial Policy 2009<sup>126</sup> proposes short-term measures to address delays, including amendments to bail applications and time limits for disposal of cases, and long term measures such as increased funding for infrastructure and the introduction of computerisation.<sup>127</sup> However, the budgetary allocation to the judiciary is negligible. The National Judicial Policy document estimates that the allocation is less than one per cent of federal and provincial budgets.<sup>128</sup> The recommendations made with respect to physical infrastructure of the courts also apply here. The IBAHRI further recommends that the short-term measures proposed in the National Judicial Policy to address the backlog of cases be implemented immediately.

## **h) The Constitution in general**

Pakistan's 1973 Constitution has undergone many amendments designed to entrench orders made during the emergency periods to which the country has been subjected. Although the recent *PCO Judges Case*<sup>129</sup> described in Chapter 3 goes some way to addressing the problems created by measures promulgated during emergency rule, it does not completely eliminate them. Prominent amongst these issues is the legal status of the 17th Amendment to the Constitution, which incorporated the provisions of President Musharraf's Legal Framework Order 2002 (which incorporated emergency Orders into the Constitution and allowed Musharraf to hold the offices of President and Chief of Army Staff simultaneously). In addition, the constitutionality of the National Reconciliation Ordinance (which effectively withdrew corruption proceedings against politicians) must be addressed. There are others which have been incorporated into the Constitution. If the independence of the judiciary is to be strengthened, and the rule of law truly restored, an open and transparent dialogue is needed on the legacy of the Musharraf and other military regimes. An analysis and revision of the Constitution, to eliminate provisions which impugn fundamental rights

<sup>126</sup> Reproduced in Appendix 3.

<sup>127</sup> National Judicial Policy 2009, Part D.

<sup>128</sup> At p 5.

<sup>129</sup> *Sindh High Court Bar Association v Federation of Pakistan; Nadeem Ahmed v Federation of Pakistan*. The decision is not yet reported but can be accessed at [www.dawn.com](http://www.dawn.com) (Accessed 21 August 2009).

and the rule of law, and to align the justice system with Pakistan’s domestic and international legal obligations, is warranted.

The IBAHRI recommends that the government establish a permanent body of eminent jurists to analyse the Constitution and its implementation in the light of accepted standards of fundamental rights and the rule of law, and to make appropriate recommendations for constitutional amendment to the National Assembly.



# Chapter 6 – Conclusions and Recommendations

*‘... in all the years since the birth of Pakistan the superior courts of this country continued to abide by their colonial mindset: that they were there firstly to preserve law and order – even at the cost of liberty.’<sup>130</sup>*

If in Pakistan there were true commitment to the letter and the spirit of the 1973 Constitution (purged of its emergency and military rule-induced provisions) and to Pakistan’s international human rights obligations, many of the problems described in the preceding chapters would be solved. It is this lack of commitment, and the reasons for it, which Pakistan must address in order to guarantee judicial independence and to promote a just rule of law.

Endemic corruption has undoubtedly been a major factor. The *Global Corruption Barometer 2009*,<sup>131</sup> compiled by Transparency International, indicates that government departments top the list of most corrupt in Pakistan, followed by the judiciary, law enforcement agencies, political parties, the private sector, and the media. This comprehensive list suggests that corruption is widespread. But a list alone does not elucidate the interlocking factors which produce and sustain corruption. There is no doubt that judicial corruption tended to be tolerated by military regimes because judges with compromised integrity would be less likely to challenge the government. But it is also the result of poor accountability procedures, together with low judicial status, inadequate judicial remuneration, compromised judicial tenure, poor quality court infrastructure and the inertia generated by a feeling that reform would be a futile exercise.

Commitment to judicial independence is expressed in the fundamental documents upon which Pakistan’s legal system is based, but the promise of adherence to the rule of law which this raised has frequently been betrayed. Successive military dictatorships have sought legitimacy through Supreme Court rulings and, as a consequence, the courts have been seen as part of the political apparatus. If the courts did not cooperate, judicial dismissal and appointments procedures were manipulated and evaded.

Malik’s allusion to a colonial mindset in the quotation above, where order is privileged and liberty is compromised, is apt. Indeed, in some respects Pakistan society might be described as feudal. This is evident in the political landscape which tends to be dominated by industrial and land-owning elites. The dynastic nature of politics is apparent when the leadership of a political party moves from a father to his daughter, then to her son, and then to her widower. Together with an exemption from accountability through a National Reconciliation Ordinance, such a system not only stultifies reform but also sustains a mindset that considers the rule of law only to apply to the poor, not to the rich and powerful. There has sometimes been a similar dynastic nature exhibited within the legal profession, where judges’ sons have reportedly been given preferential treatment and enjoyed an easy rise through the system.

Where courts have become a tool of the government rather than an independent and indispensable part of the machinery of the state, an obvious antidote is creating the circumstances for true independence for the courts, the judiciary and the legal profession as a whole. The Supreme Court

<sup>130</sup> Muneer A Malik, *The Pakistan Lawyers’ Movement: An Unfinished Agenda* (2008, Pakistan Law House), p 4.

<sup>131</sup> [www.transparency.org/news\\_room/in\\_focus/2009/gcb2009](http://www.transparency.org/news_room/in_focus/2009/gcb2009) (accessed 22 August 2009).

of Pakistan in the *Faridi case*<sup>132</sup> in 1994 stated that judicial independence means that a judge is free to decide matters without any improper influences or inducements, particularly from the executive and the legislature. But this also entails independence from opposition political parties, and freedom from undue influence by individuals and groups within the wider society (including members of the legal profession itself) who might be pursuing political agendas.

Independence is itself a loaded term. Judicial reaction to government lawlessness during the Musharraf regime saw the increasing resort to public interest litigation and the use of *suo moto* actions. No country wants a purely technocratic judiciary. However, the level of judicial activism perceived to be acceptable may vary between the context of a dictatorship and the context of a democracy. Perceptions of proper judicial conduct, and of judicial independence, can therefore be contextual. Thus, Muneer Malik, former President of the Supreme Court Bar Association, writes:

‘Much ado ... was created about the Chief Justice’s judicial activism and the fact that it allegedly blurred the lines between the executive and the judiciary and detracted from the principle of separation of powers. I was under no illusions that the level of judicial scrutiny of executive actions maintained in Pakistan might be considered unusual in some countries – for example England – with a more traditional constitutional jurisprudence. But what is frequently forgotten [is] that such judicial circumspection is the outcome of a long democratic history where governments themselves display a far greater sensitivity to the wishes of [their] own electorate. ... During the Musharraf era, a particular problem faced by our courts was that the legislature had completely abdicated its role as a watchdog over the executive and left the judiciary to shoulder the entire burden. In this scenario ... I considered that enhanced levels of judicial scrutiny over executive actions was not only desirable but imperative.’<sup>133</sup>

Moreover, the Bangalore Principles of Judicial Conduct 2002<sup>134</sup> stipulate that in addition to independence, the values of impartiality, integrity, propriety, competence, diligence, and the equal treatment of all before the courts are also essential to proper judicial conduct. These are themselves subjected to myriad influences.

If there are no straightforward answers, there can be no easy method of solving the challenges, as the solutions may be hedged with qualification and mediated by context. Chief Justice Chaudhry, the focus of the protests against the Musharraf regime, had himself taken an oath under a PCO in 2000 under the Musharraf regime and was a member of the Supreme Court which validated the 1999 coup.<sup>135</sup> He became the ‘people’s judge’ after he refused to resign and a David and Goliath scenario, fanned by popular antagonism to the Musharraf regime and publicised by the media, helped to construct him as such. As described in Chapter 4, the lawyers’ movement which acted so bravely and suffered so much for the highest ideals ran the risk of becoming politicised and vulnerable to outside influence and may not have been as unified as it appeared to be.

Yet expectations are high that the judiciary in particular, and the legal profession in general, take a lead in restoring the rule of law and the protection of human rights. In a situation where

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<sup>132</sup> *Government of Sindh v Sharaf Faridi* PLD 1994 SC 105.

<sup>133</sup> Malik, at pp 37-8.

<sup>134</sup> Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, 25-26 November 2002. See [www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf) (accessed 22 August 2009).

<sup>135</sup> *Zafar Ali Shah v Pervez Musharraf* PLD 2000 Supreme Court 869.

cosmetic changes are not any longer regarded as sufficient, the question of the balance to be struck between restraint and compromise on the one hand, and a thorough purge on the other, arises. The recent decision of the Supreme Court declaring the appointments of judges who swore the 2007 oath under the Provisional Constitution Order to be void, and deeming the support by a judge to an unconstitutional functionary to be judicial misconduct,<sup>136</sup> is a strong declaration endorsing the protection of the judiciary from the misuse of political authority. But it is essential that such measures are supported by political processes, civil society, the media and other stakeholders so as not to destabilise the political system. The issues, particularly with respect to judges, and the many changes needed, have been outlined in Chapter 3 above. However, judges and lawyers do not operate in isolation and cannot solve Pakistan's many problems on their own. They must also have the collaboration of government to address, in a genuine and sustainable way, the structural problems afflicting the legal system. The use of Anti-Terrorism Courts, and the situation in Swat, described in Chapter 5, are but two examples of areas where only the action of government will be effective.

In addition, other states and the international community must shoulder part of this burden, at least to the extent that it is no longer regarded as acceptable, as many countries said during the Musharraf regime, that these matters were 'an internal affair for Pakistan', thus diluting the international pressure that might otherwise be brought to bear upon abuses of fundamental rights.

The role and independence of the judiciary, and the applicability and enforcement of human rights standards for all, must not again be treated as contingent matters subject to political expediency.

## **IBAHRI recommendations**

### *With respect to the judiciary:*

1. There should be a review and reform of the existing appointments procedures to ensure greater transparency and independence from political interference. Consideration should be given to the establishment of a Judicial Appointments Commission with specific criteria for its membership to give sufficient input into the process from all relevant federal and provincial stakeholders and preventing domination by political parties. A transparent nominations process should promote judicial appointments made against agreed criteria based on merit. The aims of the Commission should include incorporating gender balance and representation of minority communities in the judiciary, provided candidates are otherwise meritorious.
2. There should be a review of the role, procedures and composition of the Supreme Judicial Council, particularly with respect to allegations of misconduct that may arise concerning the Chief Justice.
3. A review of High Court procedures for the removal of judges in subordinate courts should be undertaken, particularly with a view to standardising the benchmarks for judicial conduct throughout Pakistan.

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<sup>136</sup> *Sindh High Court Bar Association v Federation of Pakistan; Nadeem Ahmed v Federation of Pakistan* (31 July 2009, unreported).

4. The Supreme Court should take active steps to fully implement the National Judicial Policy's recommendations on the eradication of corruption in the administration of justice and in effective responses to complaints of corruption.
5. The Code of Judicial Conduct should be further developed and enforced, and applied to all levels of the judiciary.
6. A system of performance management of the judiciary and court staff should be introduced and effectively monitored through strengthened inspection mechanisms.
7. The Supreme Court should formulate a judicial policy governing public interest litigation and *suo moto* cases which ensures the balance, and separation, of powers whilst safeguarding the role of the judiciary in the protection of human rights and the rule of law for individuals and groups who are genuinely aggrieved. A careful study and analysis of public interest litigation and the use of *suo moto* powers should be undertaken, together with dialogue between the judiciary, civil society organisations, the legal profession and academia, to examine and reflect on the implications for judicial independence.
8. An urgent review of the security protection provided to members of the judiciary, particularly during controversial or sensitive trials, should be undertaken and deficiencies thus identified should be urgently rectified.
9. The federal and provincial governments should improve the physical infrastructure and financial autonomy of courts, especially of the subordinate courts.
10. A review of current pay scales and remuneration schemes of all judges should be undertaken with a view to ensuring that salary and benefits are commensurate with the status and importance of courts.
11. Security of tenure for judges should be guaranteed by law.

*With respect to the legal profession:*

12. The Legal Practitioners and bar councils (Amendment) Ordinance 2007 should be repealed.
13. The system of unrepresentative bar councils, the *ex officio* Chairmen of which are the Attorney General or an Advocate General, should be phased out and replaced by a system of fully independent bar associations, established by legislation, to govern the legal profession.
14. Codes of conduct for lawyers should be re-examined with respect to the boundaries of proper professional conduct, with particular attention paid to addressing corruption within bar associations, especially with respect to election of officers. In the meantime, bar associations should investigate allegations of unprofessional behaviour, particularly those involving resort to violence, and discipline those responsible.

*With respect to legal education:*

15. The following measures should be introduced into legal education curricula: training on professional ethics, practice and procedure should be strengthened; greater emphasis should

be placed on skills-based training and clinical legal education methodologies; training on international human rights law should be integrated into programmes; clinical legal education programmes with links to civil society and judicial monitoring programmes should be established; gender and law programmes/courses should be available in law faculties and gender equality perspective integrated into the curriculum.

16. Law schools should undertake an extensive revision of their assessment policies and procedures to guarantee appropriate scholastic standards, eliminate cheating, and better equip law students for the rigours associated with bringing Pakistan up to an acceptable international standard regarding the rule of law.
17. Law schools should endeavour to establish their own high quality law journals and, if university or government funding for this purpose is not forthcoming, to seek funding from international donor organisations.
18. Bar councils and bar associations should consider introducing a compulsory system of continuing professional development for all advocates, to include both substantive law training and updating of skills (including case management, information technology and electronic legal research skills).

*With respect to civil society:*

19. The government and the media should take steps to strengthen the right to freedom of expression and the independence of the media, in particular by enhancing the capacity to conduct investigative journalism on issues pertaining to human rights and the rule of law, and to monitor violations of media freedom.
20. Civil society organisations should seek funding and take on a more prominent role in monitoring and reporting on the independence of the subordinate judiciary.

*With respect to Pakistan's international obligations:*

21. Domestic implementation of the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women should be undertaken. In particular the recommendations made by the UN Committee on the Elimination of Discrimination Against Women in its Concluding Comments made in June 2007, on Pakistan's periodic reports should be implemented and any declarations seeking to limit the scope of Pakistan's obligations should be withdrawn.
22. Domestic implementation of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination should be undertaken.
23. Pakistan should ratify the UN Covenant on Civil and Political Rights and domestically implement its provisions.
24. Legislation should be passed addressing the role of jirgas and other forms of traditional justice and regulating their use and their relationship to the formal justice system.

25. Police training should be reformed to include more sensitisation to the issues affecting women and minorities and also to include fundamental rights in an effective manner.
26. The exemption for police in Article 8(3) of the Constitution should be removed.
27. Further comprehensive studies should be undertaken on the relationship between international human rights standards, Islamic law and domestic law in Pakistan.
28. Pakistan's adherence to its obligations under the United Nations Convention Against Corruption should be investigated by a well-established civil society organisation such as the Pakistan Human Rights Commission.
29. Efforts should be made by the courts and the government to give those who do not speak English full access to the legal system, for example by providing translations of reported judgments and laws, and better interpretation facilities.
30. An independent investigation into the role of the functioning of the Anti-Terrorism Courts, their rates of conviction and their adherence to international human rights standards and the rule of law, is urgently required. The continued operation of these courts should be reviewed, with due consideration given to ceasing their operation and transferring their functions to the ordinary criminal justice system, with necessary protections and security ensured.
31. The amendments made in November 2007 to the Pakistan Army Act 1952 should be immediately repealed and a judicial review should be held of all cases involving civilians heard by military courts under those amendments.

*With respect to access to justice:*

32. The government should restore access to the ordinary court system in areas such as the Swat Valley, in order to ensure the right of all persons to access to justice and the rule of law in accordance with the Constitution.
33. The courts should urgently review their costs regulations.
34. The short-term measures proposed in the National Judicial Policy to address the backlog of cases in the courts should be implemented immediately.
35. The government should establish a permanent body of eminent jurists to analyse the Constitution and its implementation in the light of accepted standards of fundamental rights and the rule of law, and to make appropriate recommendations for constitutional amendment to the National Assembly.

# Appendix 1 – 1989 Agreement on process for judicial appointments to superior courts

## Item I: Appointment of Judges of the High Courts:

- 1.1. On his own initiative or on receipt of information from the law and Justice Division verbal or written a panel of three names against each vacancy is forwarded by the Chief Justice of the concerned High Court to the Governor of the province. Copy of this communication is sent to the Federal Law Ministry.
- 1.2. From the Governor the file goes to the Chief Minister of the Province. The Chief Minister through the office file makes recommendations or his comments on each nominee of the Chief Justice to the Governor.
- 1.3. The Governor sends a D.O. Letter to the Federal Law Secretary containing his opinion on each nominee in the Chief Justice's panel based on the recommendations/comments of the Chief Minister.
- 1.4. Copies of the D.O. Letters of the Provincial Chief Justice and the Governor are sent by the Federal Law Secretary to the Chief Justice of Pakistan for his comments.
- 1.5. Based on the recommendation/comments/opinions of the Provincial Chief Justice, Governor of the Province and the Chief Justice of Pakistan, the Law and Justice Division submits a summary to the Prime Minister together with recommendations of Chief Justice and Governors. The Law and Justice Minister approves the submission of the Summary.
- 1.6. On receipt of the Summary, the Prime Minister calls for report from the DI. B. and DG ISI.
- 1.7. After completion of above formalities, the Prime Minister and President hold consultations in the light of the recommendations, comments, opinions and Intelligence reports etc.
- 1.8. Based on such consultations and as agreed in one or in more than one meetings the Prime Minister tenders advice on the Summary to the president reflecting the agreement reached which is approved accordingly.

## Item II: Appointment of the Chief Justice of a High Court

- (1) Chief Justice of Pakistan sends his recommendation to the Federal Law Secretary.
- (2) Law and Justice Division obtains the views of the Governor of the concerned province. Views of the Governor, based on the opinion of the Chief Minister of the Province, are communicated to the law and Justice Division.
- (3) In the matter of appointment of the Chief Justice of a High Court, due weight is given to the recommendation of the Chief Justice of Pakistan.

- (4) Preference is given to the senior most puisne Judge of the High Court for appointment as Chief Justice.
- (5) The most senior Judge would be superseded only in case there is anything adverse on record against him. In that case consultation would be held between the president and the Prime Minister in order to determine the question of supersession. If it is agreed that on the basis of record the supersession is justified then the next most senior of the Judges of High Court will be appointed Chief Justice.

### **Item III: Appointment of the Judges of the Supreme Court**

- (1) On the request of the law and Justice Division or on his own initiative, the Chief Justice sends a panel to the federal law Secretary to fill available vacancies.
- (2) On the basis of the recommendations of the Chief Justice of Pakistan, a Summary (Submission authorised by the law and Justice Minister) is submitted by the Law and Justice Division to the Prime Minister.
- (3) Based on such consultations and as agreed in one or in more than one meetings the Prime Minister tenders advice on the Summary to the President reflecting the agreement reached which is approved accordingly.
- (4) Following has been consistent practice so far in the appointment of Supreme Court Judges:
  - (i) On recommendation of the Chief Justice of Pakistan Supreme Court Judges have been appointed from amongst the nominees of the Chief Justice of Pakistan.
  - (ii) Nominees were Judges of the High Court.
  - (iii) Representation of the various High Courts were kept in view.
- (5) Above practice would be continue to be followed in future also.

### **Item – IV: Appointment of the Chief Justice of Pakistan**

- (1) On occurrence of a vacancy of Chief Justice of Pakistan a Summary is submitted by the Law and Justice Division to the prime Minister. Submission of the Summary is authorised by the Law and Justice Minister.
- (2) Preference is given to the senior most Judge of the Supreme Court for appointment as Chief Justice. The senior most Judge would be superseded only in case there is anything adverse on record against him.
- (3) Decision in principle would be made in the light of item 2 of Mutual Arrangements.’

# Appendix 2 – Charter of Democracy

1. We the elected leaders of Pakistan having deliberated on the political crisis in our homeland, the threats to its survival, the military's subordination of all state institutions, the marginalization of civil society, the mockery of the Constitution, growing poverty, unemployment and inequality, breakdown of rule of law and unprecedented hardships under a military dictatorship which has pushed our beloved country to the brink of total disaster;
2. Noting the most traumatic experiences that our nation experienced under military dictatorships that played havoc with the nation's destiny and created conditions disallowing the progress of our people and the flowering of democracy. Even after removal from office they undermined the people's mandate and the sovereign will of the people.
3. Drawing history's lesson that the military dictatorship and the nation cannot co-exist – as military involvement adversely affects the economy and the democratic institutions as well as the defence capabilities and the integrity of the country – the nation needs a new direction from a militaristic approach of the Bonapartist regimes as the current one;
4. Taking serious exception to the vilification campaign against the representatives of the people, the victimization of political leaders/workers and their media trials under a Draconian law in the name of accountability, in order to eliminate the representative political parties, to Gerrymander a king's party and concoct legitimacy to prolong the military rule;
5. Noting our responsibility to our people to set an alternative direction for the country on an economically sustainable, socially progressive, politically democratic and pluralist, federally cooperative, ideologically tolerant, internationally respectable and regionally peaceful basis to decide once for all that only the people have the sovereign right to govern through their elected representatives as conceived by the Father of the Nation Quaid-i-Azam Mohammed Ali Jinnah;
6. Reaffirming our commitment to democracy and universally recognized fundamental rights, the rights of a vibrant opposition, internal party democracy, ideological/political tolerance, bipartisan working of the parliament through powerful committee system, a cooperative federation with no discrimination against federating units, the devolution of power, maximum provincial autonomy, the empowerment of the people at the grassroots level, the emancipation of our people from poverty, ignorance, want and disease, the uplift of women and minorities, the elimination of Kalashnikov culture, a free media, an independent judiciary, a neutral civil service, rule of law and merit, the settlement of disputes with neighbours through peaceful means, honouring international contracts, laws/covenants and sovereign guarantees to achieve a responsible status through a foreign policy that suits our national interests;
7. Calling upon the people of Pakistan to join hands to save our motherland from the clutches of military dictatorship and to defend their fundamental, social, political and economic rights and for a democratic, federal, modern and progressive Pakistan as dreamt by the Founder of the nation have adopted the following, 'Charter of Democracy';

## A. CONSTITUTIONAL AMENDMENTS

1. The 1973 Constitution as on 12<sup>th</sup> October 1999 before the military coup shall be restored with the provisions of joint electorates, minorities, and women's reserved seats on closed party list in the Parliament, the lowering of the voting age, and the increase in seats in parliament and the legal Framework Order, 2000 and the Seventeenth Constitutional Amendment shall be repealed accordingly.
  - i. The Appointment of the Governors, three Services Chiefs and the CJCSC shall be made by the Chief Executive who is the Prime Minister, as per the 1973 Constitution.
3. (a) The recommendations for appointment of judges to superior judiciary shall be formulated through a commission, which shall comprise of the following:
  - i. The Chairman shall be a Chief Justice, who has never previously taken oath under PCO.
  - ii. The members of the commission shall be the Chief Justices of the provincial High Courts who have not taken oath under the PCO, failing which the senior most judge of that High Court who has not taken oath shall be the member
  - iii. Vice Chairmen of Pakistan and Vice Chairmen of Provincial Bar Councils with respect to the appointment of judges to their concerned province
  - iv. Presidents of High Court Bar Associations of Karachi, Lahore, Peshawar, and Quetta, with respect to the appointment of judges to their concerned province
  - v. Federal and Provincial (for the concerned provinces) Minister for Law & Justice
  - vi. Attorney General of Pakistan and advocate generals for the concerned provinces for concerned provinces
    - (a-i) The Commission shall forward a panel of three names for each vacancy to the Prime Minister, who shall forward one name for confirmation to Joint Parliamentary Committee for confirmation of the nomination through a transparent public hearing process.
    - (a-ii) The Joint Parliamentary Committee shall comprise of 50 percent members from the treasury benches and the remaining 50 percent from opposition parties based on their strength in the Parliament nominated by respective Parliamentary leaders.
- (b) No judge shall take oath under any Provisional Constitutional Order or any other oath that is contradictory to the exact language of the original oath prescribed in the Constitution of 1973.
- (c) Administrative mechanism will be instituted for the prevention of misconduct, implementation of code of ethics, and removal of judges on such charges brought to its attention by any citizen through the proposed commission for appointment of Judges.
- (d) All special courts including Anti Terrorism and Accountability Courts shall be abolished and such cases be tried in ordinary courts. Further to create a set of rules and procedures whereby, the arbitrary powers of the Chief Justices over the assignment of cases to various judges and the

transfer of judges to various benches such powers shall be exercised by the Chief Justice and two senior most judges sitting together.

4. A Federal Constitutional Court will be set up to resolve constitutional issues, giving equal representation to each of the federating units, whose members may be judges or persons qualified to be judges of the Supreme Court, constituted for a six year period. The Supreme and High Courts will hear regular civil and criminal cases. The appointment of Judges shall be made in the same manner as for Judges of Higher Judiciary.
5. The Concurrent List in the Constitution will be abolished. A new NFC award will be announced.
6. The reserved seats for women and minorities in the National and Provincial Assemblies will be allocated to the parties on the basis of the number of votes polled in the general elections by each party.
7. The strength of the Senate of Pakistan shall be increased to give representation to minorities in the Senate.
8. FATA shall be included in NWFP province in consultation with them.
9. Northern Areas shall be developed by giving it a special status and further empowering the Northern Areas Legislative Council to provide people of Northern Areas access to justice and human rights.
10. The Local Bodies Election will be held on party basis through Provincial Election Commissions in respective provinces and constitutional protection will be given to the Local Bodies to make them autonomous and answerable to their respective Assemblies as well as to the people through regular courts of law.

## **B. CODE OF CONDUCT**

11. National Security Council will be abolished. Defence Cabinet Committee will be headed by PM and will have a permanent secretariat. The PM may appoint a Federal Security Advisor to process intelligence reports for the Prime Minister. The efficacy of the higher defence and security structure, created two decades ago, will be reviewed. The Joint Services Command structure will be strengthened and made more effective and headed in rotation among the three services by law.
12. The ban on a 'Prime Minister not being eligible for a third' term of office will be abolished.
13. (a) Truth and Reconciliation Commission (T&RC)' [NEEDS OPENING QUOTE] be established to acknowledge victims of torture, imprisonment, state-sponsored persecution, targeted legislation, and politically motivated accountability. The Commission will also examine and report its findings on military coups and civil removals of governments from 1996.  
  
(b) A Commission shall also examine and identify the causes of and fix responsibility and make recommendations in the light thereof for incidences such as Kargil.

- (c) Accountability of NAB and other Ehtesab operators to identify and hold accountable abuse of office by NAB operators through purgery and perversion of justice and violation of human rights since its establishment.
  - (d) To replace politically motivated NAB with an independent Accountability Commission, whose Chairman shall be nominated by the Prime Minister in consultation with the Leader of Opposition and confirmed by a Joint Parliamentary Committee with 50 percent members from treasury benches and remaining 50 percent from opposition parties in same manner as appointment of judges through transparent public hearing. The confirmed nominee shall meet the standard of political impartiality, judicial propriety, moderate views expressed through his judgments and would have not dealt with matters relating to a former or present member of the Federal cabinet or their families.
14. The Press and Electronic Media will be allowed its independence. Access to Information will become law after parliamentary debate and public scrutiny.
  15. The Chairmen of Public Accounts Committee in the National and Provincial Assemblies will be appointed by Leaders of Opposition in the concerned assemblies.
  16. Terrorism and militancy are by products of military dictatorship, negation of democracy, are strongly condemned, and will be vigorously confronted.
  17. An effective Nuclear Command and Control system under the Defence Cabinet Committee will be put in place to avoid any possibility of leakage or proliferation.
  18. Peaceful relations with India and Afghanistan will be pursued without prejudice to outstanding disputes.
  19. Kashmir dispute should be settled in accordance with the UN Resolutions and the aspirations of the people of Jammu and Kashmir.
  20. Governance will be improved to help the common citizen, by giving access to quality social services like education, health, job generation, curbing price hike, combating illegal redundancies, and curbing lavish spendings in civil and military establishments as ostentatious living causes great resentment amongst the teeming millions. We pledge to practice simplicity, at all levels.
  21. Women, minorities, and the under privileged will be provided equal opportunities in all walks of life.
  22. We will respect the electoral mandate of representative governments that accepts the due role of the opposition and declare neither shall undermine each other through extra constitutional ways.
  23. We shall not join a military regime or any military sponsored government. No party shall solicit the support of military to come into power or to dislodge a democratic government.
  24. To prevent corruption and floor crossing all votes for the Senate and indirect seats will be by open identifiable ballot. Those violating the party discipline in the poll shall stand disqualified by

a letter from the Parliamentary Party Leader to the concerned Speaker or the Chairman Senate with a copy to the Election Commission for notification purposes within fourteen days of receipt of letter failing which it will be deemed to have been notified on the expiry of that period.

25. All military and judicial officers will be required to file annual assets and income declarations like Parliamentarians to make them accountable to the public.
26. A National Democracy Commission shall be established to promote and develop a democratic culture in the country and provide assistance to political parties for capacity building on the basis of their seats in Parliament in a transparent manner.

### **C. FREE AND FAIR ELECTIONS**

27. There shall be an independent, autonomous, and impartial Election Commission. The Prime Minister shall in consultation with Leader of Opposition forward up to three names for each position of Chief Election Commissioner, Members of Election Commission, and Secretary to Joint Parliamentary Committee, constituted on the same pattern as for appointment of judges in superior judiciary, through transparent public hearing process. In case of no consensus, both Prime Minister and Leader of Opposition shall forward separate lists to the Joint Parliamentary Committee for consideration. Provincial Election Commissioner shall be appointed on the same pattern by Committees of respective Provincial Assemblies.
28. All contesting political parties will be ensured a level playing field in the elections by the release of all political prisoners and the unconditional return of all political exiles. Elections shall be open to all political parties and political personalities. The graduation requirement of eligibility which has led to corruption and fake degrees will be repealed.
29. The Local bodies elections will be held within three months of the holding of general elections.
30. The concerned Election Authority shall suspend and appoint neutral Administrators for all Local Bodies from the date of formation of a caretaker Government for holding of general elections till the elections are held.
31. There shall be a neutral caretaker Government to hold free, fair, and transparent elections. The members of the said Government and their immediate relatives shall not contest elections.

### **D. CIVIL – MILITARY RELATIONS**

32. The ISI, M.I and other security agencies shall be accountable to the elected government through P.M Sectt, Ministry of Defence, and Cabinet Division respectively. Their budgets will be approved by D.C.C after recommendations are prepared by the respective ministry. The political wings of all intelligence agencies will be disbanded. A Committee will be formed to cut waste and bloat in the armed forces and security agencies in the interest of the defence and security of the country. All senior postings in these agencies shall be made with the approval of the government through respective ministry.
33. All indemnities and savings introduced by military regimes in the constitution shall be reviewed.

34. Defence budget shall be placed before the Parliament for debate and approval.
35. Military land allotment and Cantonment jurisdictions will come under the purview of Ministry of Defence. A Commission shall be set up to review, scrutinize, and examine the legitimacy of all such land allotment rules, regulations, and policies, along with all cases of state land allotment including those of military urban and agricultural land allotments since 12<sup>th</sup> October, 1999 to hold those accountable who have indulged in malpractices, profiteering, and favouritism.
36. Rules of Business of the federal and provincial governments shall be reviewed to bring them in conformity with Parliamentary form of government.

(Mohtarma Benazir Bhutto) *Chairperson*  
Pakistan Peoples Party

(Mr. Nawaz Sharif) *Quaid*  
Pakistan Muslim League-N

Dated:14<sup>th</sup> May, 2006  
London, UK

# Appendix 3 – National Judicial Policy

The following was taken from [www.supremecourt.gov.pk/njp2009/njp2009.pdf](http://www.supremecourt.gov.pk/njp2009/njp2009.pdf), on 26 August 2009.

# National Judicial Policy

## 2009

**A year for focus on Justice at the Grassroot Level**

**National Judicial (Policy Making) Committee**

Published by:  
Secretariat, Law & Justice Commission of Pakistan,  
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## Justice at the Grassroot Level

The Chief Justice of Pakistan/Chairman, National Judicial (Policy Making) Committee (NJPMC) in his introductory speeches and remarks during the 4-day meeting (18–19 April & 16–17 May 2009) of the NJPMC, made important observations, the substance of which follows:

“The Meeting of the NJPMC has been convened at a critical moment of our national history. There has occurred a gradual deterioration in the law and order situation and parts of the country are experiencing militancy and violence, causing the displacement of hundreds of thousands of innocent people - men, women, children and elderly. These are difficult times. We face existential threats. But I do not think that the difficulties are insurmountable. We are a tenacious nation, have demonstrated, more than once, our strength and ability to face challenges. The lawyers' movement for restoration of independent-minded judges and supremacy of law/Constitution is a case in point. The movement for a grand cause was thronged by enthusiastic groups including civil society organisations, professional groups, political parties and students, etc. In the evening of 15 March 2009, the movement transformed itself into a mini-revolution. It demonstrated the agility and determination of the masses to stand by the Constitution and dispensation of power under this supreme law. It emboldened me to say today, that together we could face challenges and convert them into opportunities. I have full faith in the ability of the people to rise to the occasion and chalk out a future course of action, based on democratic values and constitutional principles.

The restoration of 3 November (2007) judiciary has ushered in a new era: an era of hope that political dispensation in the country and

governance shall be in accordance with the constitutional principles. The people of Pakistan have reposed great confidence in the ability of the judiciary to redress their grievances and grant them relief. They have very high expectations of the courts to settle their disputes, restore their rights/entitlements and maintain peace in society by sending the guilty behind bars. I thank the people for believing on us! We must strive to meet their expectations. This is time to repay our debt to the nation. We could do so by addressing the perennial twin-problems of “backlog” and “delays” in the system of administration of justice. To achieve the objective, we need to formulate new judicial policy. I had asked the Secretariat of the NJPMC to prepare a framework of action for clearing the backlog and expeditious disposal of cases. The draft is before you. Let us examine it and evolve a strategy for the purpose. I want the active participation of all stakeholders of the justice sector, essentially the members of the bench and the bar and also related agencies viz police/prison department and prosecution branch. The Policy that we ultimately approve would be one that has broad ownership. That is why extensive consultations have been carried out to get the viewpoint of judges, lawyers, litigants and others.

The Policy seeks to achieve its objectives, by efficient utilisation of existing resources. We have to operate by remaining within the given legal/procedural framework. The laws are indeed time-tested. Given earnest effort by the bench and the bar, I am confident of achieving positive results. However, keeping in view the gigantic effort new resources would be needed. We would be very economical in the utilization of the needed resources. I am confident that the Government will provide the requisite funds, as our effort is to strengthen the administration and improve governance. It is necessary for peace and security, thereby spurring trade/commercial activities and foreign/local investment in the economy. This is how, the industrialised countries progressed. This is

how, we can move forward. We could achieve the results by establishing a society based on the supremacy of Constitution and rule of law. Our aim is to provide Justice for All. I thank the members of NJPMC for endorsing my proposal to celebrate 2009, as the year for Justice at the Grassroot Level.

The key features of the National Judicial Policy are strengthening the independence of the judiciary by its separation from the executive and ridding the courts of the menace of corruption, thereby presenting a clean and positive image of judiciary. In the Policy, we have set high goals for ourselves. The goals are to initially reduce, and ultimately eliminate, backlog at the level of superior as well as subordinate courts, and further, to fix time frame for disposal of civil and criminal cases. The criminal cases will get priority on account of the sub-human conditions in which under-trial prisoners are kept in jails. Writs for protection of fundamental rights i.e. right to life, liberty, equality, property and freedom of thought, conscience, association, etc will also be maintained on fast track. Furthermore, financial/rent matters and family/juveniles cases will also receive preference, which is crucial for economic development and protection of family values.

In the ultimate analysis, the new Policy seeks to ensure that the constitutional principles of equality before law and equal protection of law are strictly adhered to. Adherence to law/Constitution leads to nation building. It is a sure recipe for economic growth and social progress. Law protects the rights/interests of poor/downtrodden segments of society. It helps to break shackles of cruelty/injustice. It puts an end to exploitation of the underdog by the rich/influential. Let us strive to achieve the noble goals, set in the Policy. Let us infuse confidence in the minds of our people that the system of administration of justice is capable of meeting the challenges of time and emerging realities. Let us make the judicial organ of the state as a sheet anchor at the time of serious challenges. I have no doubt that

my brother Judges in the superior courts and judicial officers would help and support us in our drive to steer the ship of the nation through troubled waters. I am equally confident of the help and support of the members of the bar. We have carried out very wide consultations with them as well as other stakeholders. Their valuable suggestions have been incorporated in the Policy. The Policy will be launched effective from 1 June 2009 and will be actively monitored by the NJPMC. I should continue to meet judges and bar members for its smooth implementation”.

Justice Iftikhar Muhammad Chaudhry  
Chief Justice of Pakistan

## Executive Summary

The National Judicial Policy Making Committee (NJPMC) in 2 marathon sessions lasting over 4 days considered and approved a uniform National Judicial Policy. The Policy is an attempt to streamline the judicial system in the country and make it responsive to the present-day requirements of society. The objective is to clear the huge backlog that has accumulated over the years at all level of judicial hierarchy. The current pendency of cases is as follows:

Superior judiciary			Subordinate judiciary		
i.	Supreme Court of Pakistan	19055	i.	Punjab	1225879
ii.	Federal Shariat Court	2092	ii.	Sindh	144942
iii.	Lahore High Court	84704	iii.	NWFP	187441
iv.	High Court of Sindh	18571	iv.	Balochistan	7664
v.	Peshawar High Court	10363		<b>Total</b>	<b>1565926</b>
vi.	High Court of Balochistan	4160			
	<b>Total</b>	<b>138945</b>			

As is obvious from the above table, there is huge backlog of cases pending before courts, at all levels of judicial hierarchy. The figure does not include the pendency before the special courts / administrative tribunals, which is equally high. The backlog has accumulated due to various reasons/factors but essentially it is due to inadequate budgetary allocation. The gradual increase in population as well as litigation has never been addressed through appropriate development plans for expansion in infrastructure and increase in strength and capacity of courts. Courts have continuously suffered on account of shortage of funds. As is manifest from the table below, budgetary allocation to judiciary is negligible. Not even 1% of Federal/Provincial budget is allocated for the third pillar of the State. No wonder then, the judges are overburdened. To quote an example, in the Province of Punjab, an average, the judicial officer has to deal with a cause list of 1668 cases per day, which is humanly not possible. The problem of shortage of funds, to some extent was addressed by the Access to Justice

**NATIONAL JUDICIAL POLICY**

Programme of the Government of Pakistan but more needs to be done. The Government must therefore address the problem of shortage of funds to enable the judiciary to cope with the twin-problems of “backlog” and “delays”.

**Statement Showing Budgetary Allocation and Strength of Judiciary in Pakistan**

Sr. No	Name of Court	Sanctioned Strength	Working Strength	Staff			Federal/ Provincial Budget (In Rs.)	Allocation for Judiciary (In Rs.)	Percentage of Total Rev. / Exp for the Year 2008-09
				BPS 1 to 16	BPS 17 & above	Total			
1	Supreme Court of Pakistan	CJ + 29	CJ + 27	606	145	751	4,630,292,869,000	354,500,000	0.00765%
2	Federal Shariat Court	CJ + 7	CJ + 4	190	64	254	4,630,292,869,000	82,408,000	0.001779%
3	<b>Lahore High Court</b>	CJ + 59	CJ + 53	1249	349	1598	256,948,656,000	2,201,867,000	0.86%
4	<b>Subordinate Judiciary:</b>								
	i. Distt. & Sessions Judge	36	36	10631	-	10631			
	ii. Addl. Distt & Sessions Judge	290	261						
	iii. Senior Civil Judge	37	37						
iv. Civil Judge / Judicial Magistrate	754	617							
5	<b>High Court of Sindh</b>	CJ + 39	CJ + 36	790	279	1069	180,987,200,000	1,234,504,000	0.68%
6	<b>Subordinate Judiciary:</b>								
	i. Distt. & Sessions Judge	62	24	4242	-	4242			
	ii. Addl. Distt & Sessions Judge	90	78						
	iii. Senior Civil Judge	98	85						
iv. Civil Judge / Judicial Magistrate	200	193							
7	<b>Peshawar High Court</b>	CJ + 19	CJ + 12	321	68	389	170,558,000,000.873	613,203,000	0.17%
8	<b>Subordinate Judiciary:</b>								
	i. Distt. & Sessions Judge	24	20	3566	-	3566			
	ii. Addl. Distt & Sessions Judge	97	87						
	iii. Senior Civil Judge	24	20						
iv. Civil Judge / Judicial Magistrate	201	183							
9	<b>High Court of Balochistan</b>	CJ + 10	CJ + 4	356	58	414	65,943,525,270	470,679,870	0.36%
10	<b>Subordinate Judiciary:</b>								
	i. Distt. & Sessions Judge	24	17	1773	-	1773			
	ii. Addl. Distt & Sessions Judge	27	19						
	iii. Senior Civil Judge	12	8						
	iv. Civil Judge/Jud. Magis./Family Judges	124	69						
v. Qazi/Member, Majlis-e-Shoora	42	35							

The historical movement for restoration of independent-minded judges, supremacy of the Constitution and rule of law, ultimately triumphed. It led to heightened expectations of the public that the judicial organ would promptly respond to their agonies and dispense justice to all and sundry. Conscious of the public expectations/aspirations, the Chief Justice of Pakistan decided to initiate the process of formulating a new judicial policy for expediting trial proceedings. He assigned the task to the Secretariat of NJPMC to devise an appropriate strategy and work plan for action.

The NJPMC is a statutory body the nation's apex judicial forum. It is headed by the Chief Justice of Pakistan and comprises Chief Justice, Federal Shariat Court and 4 Chief Justices of High Courts, as members. The Secretary, Law and Justice Commission of Pakistan is designated as the Secretary to the Committee. The Committee is required, inter alia, to prepare and implement judicial policy for all courts, tribunals and quasi-judicial institutions. The functions of the Committee are:

1. Improving the capacity and performance of the administration of justice;
2. Setting performance standards for judicial officers and persons associated with performance of judicial and quasi-judicial functions;
3. Improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and
4. Publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts, courts subordinate to High Courts, Administrative Courts and Tribunals.

The Chief Justice of Pakistan/Chairman NJPMC convened a 2-day session of the Committee on 18-19 April 2009 to consider a draft providing for steps to strengthen judicial independence, check corrupt practices in the judicial system and prioritize certain

categories of cases for expeditious disposal. The meeting lasted for 2-days; in one session, the representatives of the bar including Vice Chairman, Pakistan Bar Council, Vice Chairmen, 4 Provincial Bar Councils, President, Supreme Court Bar Association and Presidents, all High Court Bar Associations were also invited. After thorough deliberations, a draft report was approved. It was decided that the approved draft will be circulated to all the relevant stakeholders of the justice sector for getting their input. Accordingly, the draft policy was forwarded to all judges of the Supreme Court, High Courts and Subordinate Courts. Copies of the draft were also forwarded to the President, Supreme Court Bar Association, all High Courts Bar Associations, all District Bar Associations and all Tehsil Bar Associations. Copies were also forwarded to Attorney General for Pakistan, all Advocates General, all Prosecutors General, Secretary, Law and Justice Division, Secretaries of 4 provincial Law Departments, all Inspectors General of Police, all Inspectors General of Prisons, members of the Law and Justice Commission of Pakistan, etc. The Secretary, NJPMC also gave a press briefing to share the draft report with the media and general public. The draft was also placed on the LJCP website for input.

The draft National Judicial Policy was subjected to thorough analysis at various fora. The members of the bar held in-house sessions to discuss the report. The District & Sessions Judges convened meetings of district judiciary alongwith representatives of the District/Tehsil Bar and forwarded their recommendations to the respective High Court. The Chief Justices of High Court held consultations with the judges of the High Court, District & Sessions Judges and representative of the High Court Bar Associations. Similarly, consultations took place in the office of Attorney General for Pakistan, Advocates General, Secretary, Law and Justice Division and Law Departments, etc. The output of such deliberations was forwarded to the Secretary, NJPMC. Many judges of superior courts, members of the bar also contributed input (list of institutions/individuals from whom replies received is at Annexure).

The input/recommendations received from various fora/individual members were examined and a comprehensive draft prepared. The draft was initially discussed in a meeting, chaired by the Registrar, Supreme Court/Secretary, NJPMC and attended by the Registrar of the Federal Shariat Court and 4 High Courts. The Committee of Registrars compiled a uniform policy draft for consideration. The NJPMC considered the draft in its meeting on 16-17 May 2009. After exhaustive deliberations lasting for 2 days, the Committee finally approved the National Judicial Policy. The Committee decided that the respective High Court would make strategies and prepare plans for effective implementations of the Policy. The Policy will be released on 30th May 2009 in a press briefing by the Registrar, Supreme Court/Secretary NJPMC and come into force on 1st June 2009.

The thrust of the National Judicial Policy is to consolidate and strengthen the independence of judiciary, thereby enabling the Judicial Organ to exercise institutional and administrative independence and judges to have decisional independence to decide cases fairly and impartially. In this regard, important decisions have been made including the determination of the Chief Justices of High Courts to decline appointments as acting Governor of the province and recall of all judges working in executive departments of the Federal/Provincial governments. The Policy also lays stress on proper conduct and judicial propriety, on the part of judges, to maintain a clean image of the judiciary. Following the repeated assertions of the Chief Justice of Pakistan to show “Zero-tolerance for corruption in judiciary”, the new Policy provides several steps/measures to nab and punish corrupt judicial officers and court staff. Greater vigilance will be exercised by the respective Chief Justices in eradicating corruption in all its forms and manifestations.

The Policy provides strategy and plans for the clearance of backlog, expeditious resolution of disputes and quick dispensation of justice. Particular attention is given to timely disposal of criminal cases

especially the cases of under-trial prisoners, languishing in jails. Urgency has been accorded to cases involving violation of fundamental rights and restraint on liberty/freedom of individual. Therefore, bail matters will be quickly decided. Certain categories of cases, having close nexus with economic development and good governance, have been prioritized. It includes disputes pertaining to trade, commerce, investment, taxes, duties etc. The family cases, juvenile offences, rent matters, drugs/terrorism cases will also be kept on fast track for quick disposal. The plan of action provides for disposal of all pending cases within one year. Newly instituted cases in the Supreme Court and High Courts will also be decided in one year period from date of filing. The High Court and Subordinate Courts in the province of Balochistan will be able to decide all pending cases within six months and all fresh cases in six months time from the date of institution. This is indeed a tall claim and difficult goal but equally strong is the determination of the NJPMC to honour its commitment to the nation. It would require gigantic efforts and hard work but every effort will be made to achieve the desired goals by full and effective utilization of existing resources. However, where new resources are required, the government will be approached for allocation of necessary funds for the purpose.

Dr. Faqir Hussain  
Secretary

## National Judicial Policy

### A. INDEPENDENCE OF JUDICIARY

- 1) **In future no chief justice or a judge of the superior court shall accept appointment as acting Governor of a Province.**
- 2) **No retired judge of the superior court shall accept an appointment which is lower to his status or dignity including appointment as presiding officer of Banking Court, Customs Court, Administrative Tribunal, etc.**

The Committee asked the retired judges of the superior judiciary to maintain the highest standards of decorum and voluntarily relinquish the charge of such posts which are lower to their status to earn respect in public and uphold the principle of the independence of judiciary.

The Committee asked the Secretary, National Judicial (Policy Making) Committee to write letters to the Secretary, Establishment Division and Provincial Chief Secretaries to relieve all such judges and may not make such appointments in future.

- 3) **Instead of appointing retired judges/judicial officers as presiding officers of the special court/tribunal, qualified serving judges be appointed against these posts, in consultation with the Chief Justice of the High Court.**
- 4) **Posting of serving judges against executive posts in Federal and Provincial Government Departments on deputation be discontinued. All such judges should be repatriated to the respective High Courts, where their services are needed most for expeditious disposal of pending cases.**

- 5) **All special courts/tribunals under the administrative control of Executive must be placed under the control and supervision of the judiciary, their appointments/postings should be made on the recommendation of the Chief Justice of concerned High Court.**
- 6) **In future the judiciary would avoid its involvement in the conduct of elections, as it distracts the judicial officers from professional duty and complaints of corrupt practices tarnish the image of judiciary.**

The reputation of judiciary is at stake during election due to involvement of vested interests groups, etc in corrupt practices. On the other hand, it also adversely affects the judicial functions of the courts. Even otherwise, the Conduct of General Elections Order 2002, Representation of the People Act, 1976 and Local Government Ordinance 2001 do not contain any provision which requires that the elections are to be held under the supervision of the Judiciary. Therefore, in future, the Judiciary should remain aloof from the process of election to focus on disposal of cases. However, in case of request from the Government, the NJPMC would decide the extent to which and form of help to be extended to Government in the conduct of elections. The judiciary will continue to extend support and cooperation in adjudication of election related disputes/complaints as provided under the law.

**B. MISCONDUCT**

**The Judges of the superior courts should follow the Code of Conduct prescribed for judges. They should take all steps necessary to decide cases within the shortest possible time. As provided by Article X of the Code of Conduct: “In his judicial work a Judge shall take all steps to decide cases within the shortest time, controlling effectively efforts made to prevent early disposal of cases and make every endeavor to minimize suffering of litigants by deciding cases expeditiously through proper written judgments. A judge who is unmindful or indifferent towards this aspect of his duty is not faithful to his work, which is a grave fault”. Hence, the Chief Justice of concerned High Court may report cases of violation of Code of Conduct including incidents of unusual delays/inefficient performance to the Chairman, Supreme Judicial Council for action.**

The prime duty of a judge is to present before the public a clean image of judiciary. The oath of a judge implies complete submission to the Constitution and under the Constitution to the law. Subject to these governing obligations, his function of interpretation and application of the Constitution and the law is to be discharged for the maintenance of rule of law. To be a living embodiment of these powers, functions and obligations call for possession of the highest qualities of intellect and character. Equally, it imposes patterns of behavior, which are the hallmark of distinction of a judge among his fellow-men. Therefore, the Committee asked the Chief Justices to report the violations of Code of Conduct to the Supreme Judicial Council for appropriate action.

**C. ERADICATION OF CORRUPTION**

- 1) The code of conduct for subordinate judiciary, framed by the Peshawar High Court and adopted by the Lahore High Court should be considered for adoption by the High Courts of Sindh and Balochistan.**
- 2) The present mechanism for initiation of disciplinary action against corrupt and inefficient judicial officers/court staff be improved. In each High Court a Cell to be called “Cell for Eradication of Corruption from Judiciary” may be established in the office of Registrar, under the supervision of Chief Justice of High Court to entertain complaints with credible evidence. Copies of such complaints may also be forwarded to the Registrar, Supreme Court of Pakistan. As regards the officers/staff of the Supreme Court, a Judge shall be the Incharge of such Cell.**
- 3) Action should be initiated against those judicial officers/staff that carry persistent reputation of being corrupt or have their life style beyond ostensible means of income.**
- 4) To guard against the evil of nepotism, favoritism, corrupt means, etc, the MITs in High Courts may examine the judgments of the judicial officers to detect incidents of corruption/improper conduct. All the judicial officers of the subordinate judiciary may be asked to send copies of the judgments including bail/stay orders for scrutiny to MITs.**
- 5) Surprise inspections be carried out by the Chief Justices/judges of the High Courts to monitor the working of subordinate judiciary. In this regard, Judges of the High Courts be designated for each division/district on rotation basis.**
- 6) The District and Sessions Judges should also report about the corruption/misconduct of their subordinate judges.**

- 7) The judge should himself write order sheets, interlocutory orders and register petitions.
- 8) Appropriate criminal cases under the relevant provisions of law may also be registered against the judicial officers/court staff involved in corruption.
- 9) The corrupt judicial officers be made OSDs and kept against their post for the purpose of drawing salary only and disciplinary proceedings should be quickly finalized.
- 10) No judicial officer/official should be posted in home district and those remained posted in a particular district beyond 3 years should be transferred to other district.
- 11) Naib Courts having completed 3 months attachment with a court should be sent back to their parent department instead of transferring them to other court by rotation.
- 12) The complaints of corrupt practices and professional misconduct against lawyers addressed to the Chief Justice of High Court should be forwarded to the Bar Council for action. The Council should take immediate action on such complaints under intimation to Registrars of the concerned High Court.
- 13) Incentives should be given to the honest, efficient and hard working judicial officers including advance increments and posting at stations of choice etc.

**D. EXPEDITIOUS DISPOSAL OF CASES****SHORT TERM MEASURES****I. CRIMINAL CASES**

- 1) In bailable cases, grant of bail is a statutory right of the accused; therefore, the court before which the accused appears or is brought may immediately release him on bail, subject to furnishing of sureties as provided under section 496 Cr.P.C.**
- 2) Bail application under section 497 Cr.P.C. with photocopy of the FIR, duly authenticated by the Counsel, should be accepted and the court shall call for record of the case on its own through Naib Court.**
- 3) In bail matters, notice to State for production of record shall not exceed beyond 3 days and all the Provincial Police Officers/Inspectors General of Police shall issue standing instructions to the concerned officers to ensure production of record without delay.**
- 4) Bail applications under section 497 of Cr.P.C. shall be decided not beyond a period of 3 days by the Magistrate, 5 days by Court of Sessions and 7 days by the High Court.**

To overcome the problem of congestion in Jails, the court should exercise powers under section 497 Cr.P.C. keeping in view the principles of grant of bail including the principle that if the offence does not fall under the purview of prohibitory clause, grant of bail is a rule and refusal is an exception.

In case bail is rejected, the court should take all possible measures for disposal of the case to reduce the chances of

filing of bail petitions before the higher courts. However, where the accused desires to move the higher court, the trial court should provide attested copies of all the relevant documents to avoid the chance of requisitioning of original record from the trial court which hinders the disposal of case.

- 5) Applications for cancellation of bail under Sub-section (5) of section 497 Cr.P.C. should be decided within 15 days by the courts including High Court.**

Grant of bail or otherwise is the discretion of a court and should be exercised diligently and once a bail is granted it should not be withdrawn unless an opportunity is given to the accused.

- 6) In Criminal Cases it is the duty of the police/investigating agency to submit Challan (Police Report) within a period of 14 days as contemplated in section 173 Cr.P.C. In case of non-completion of investigation, an interim report shall be submitted and in such cases, the court shall not grant remand beyond 15 days period.**

- 7) Non-completion of investigation and non-submission of Challans in statutory period is a major cause of delays in disposal of cases. Since, Police plays crucial role in administration of justice, therefore, the District Police Officers may be asked to ensure that the police should conclude investigation and submit Challans within the prescribed period of 14 days. They may be asked that the SHOs who fail to comply with this statutory provision should be treated as inefficient officer under the Police Order and the court may also lodge complaint under section 166 PPC against him. The DPOs should also submit list of cases in which Challans are still pending for want of investigation for inspection and passing appropriate orders by the District and Sessions Judge.**

- 8) **No judge should grant remand in the absence of accused and while granting remand should strictly adhere to the relevant provisions of the Code of Criminal Procedure and principles laid down in the Hakeem Mumtaz case (PLD 2002 SC 590)**
- 9) **All criminal cases punishable with imprisonment for upto 7 years registered after 1st January 2009 be kept on fast track for disposal within 6 months.**

For disposal of freshly instituted cases within the stipulated period and to avoid piling of cases, there may be practical difficulties but the same can be overcome by extending court timings depending upon the workload. The extended time could be utilized for writing judgments, framing of charge and other miscellaneous work.

- 10) **All criminal cases punishable with imprisonment from 7 years and above including death cases shall be decided within a period of 1 year.**

Chapter XX and XXII-A of the Code of Criminal Procedure 1898 prescribe detailed procedure for trial of cases by Magistrate and the Court of Sessions to ensure fair trial for the accused. Since this procedure takes longer time, therefore to finalize the proceedings, the following measures should be adopted to cut short the delays:

- a) On receipt of Challan, the court shall immediately fix the case and issue production warrants/notice.
- b) When the accused is brought or appears before the court he should be provided with copies of statements and relevant documents as provided under section 241C and 265C Cr.P.C and be directed to ensure presence of his Counsel on the next date of hearing enabling the court to commence the trial.

- c) Under section 173 Cr.P.C, it is the duty of the concerned SHO/ Investigating Officer to produce witnesses and case property before the court during trial. Therefore, the court shall take all necessary measures to bind the SHO/IOs to procure evidence on the fixed date.
- d) All efforts should be made to produce witnesses and the case property on the first date of hearing.
- E) If no case is made out or there is no probability of accused being convicted, the accused should be acquitted of the charge under Section 249-A or 265-K CrPC, as the case may be.
- f) The court shall not grant unnecessary adjournments and if possible should proceed with the case on day-to-day basis.
- g) The court shall take care that only relevant and admissible evidence is recorded.
- h) The District and Sessions Judges should hold meetings with the jail authorities to ensue the production of UTPs on the date of hearing to avoid delays on account of non-production of prisoners.
- i) The court should take strict action against the parties or witnesses causing deliberate delays in proceedings.
- j) The judgments should be based on well founded reasons and acumen so that it not only resolve the disputes but also lessen the prospects of future litigation.

k) Delay in disposal of criminal cases is mostly due to the non-cooperation of relevant stakeholders of justice sector namely, lawyers, police and prison authorities; therefore, the court should ensure that they may fulfill their legal obligations to minimize delays and expedite trials.

**11) Cases relating to preventive detention under section 107 read with section 151 Cr.P.C. should be decided as early as possible by following the procedure as envisaged under section 112, 117 and 118 Cr.P.C.**

**12) Production before court for remand/trial is a statutory right of every prisoner; therefore, the District and Sessions Judges should ask the jail authorities to ensure that the prisoners must be produced before the court. The District and Sessions Judges should also monitor that while granting remand all requisite procedural formalities are complied with.**

Sub section (3) of section 167 Cr.P.C. requires that while granting police remand reasons should be recorded for doing so after scrutiny of record and under no circumstances accused should be remanded to police custody unless it is made clear that his presence is actually needed for some specific purpose connected with the completion of investigation. Moreover, sub section (4) of section 167 Cr.P.C. requires the Magistrate to forward a copy of remand order with reasons for making it to the Sessions Judge. Strict compliance of this provision would help the Sessions Judges to supervise the action of Magistrates working under them.

Section 344 Cr.P.C. empowers the Court to postpone/adjourn the proceedings and remand the accused person to judicial custody upto 15 days; however,

grant of judicial remand in routine on “Robkars” in absence of accused person amounts to violation of law. Therefore, it is recommended that adjournments should not be granted unless necessitated in the interest of justice and for the reasons beyond control.

- 13) In criminal cases, non-representation of accused by Counsel is also a source of delay in trial, therefore, the Chief Justices of High Courts, in consultation with the Chairman of the Legal Aid Committee of the Provincial Bar Councils or Pakistan Bar Council, may appoint lawyer in such cases to avoid delay. In this regard a list of the advocates should be maintained in each district so that they can be appointed for provision of legal aid to accused person who cannot afford to hire the services of Counsels. However, prior to appointing any Counsel option of selection from that list should be given to the accused in the interest of justice.**
- 14) To check the tendency of filing false and frivolous cases, the court should take penal action against the party by imposing fines under section 250 Cr.P.C. or filing complaints under section 182 and 211 of the PPC.**

In cases triable by a Magistrate, if the court discharges or acquits all or any of the accused and is of the opinion that the accusation against them or any of them was false or frivolous, the court may acquit or discharge the accused and may call upon the complainant/informant to show cause as to why he should not pay compensation to the accused. After considering the facts and circumstances of the case the Magistrate may direct the complainant / informant to pay to the accused a compensation not exceeding rupees twenty five thousand. The compensation payable under section 250 is recoverable as arrears of land revenue.

If this provision of the law is enforced in its true sense, it would certainly help to reduce the number of groundless and frivolous complaints/ cases .However, in fixing the amount of compensation, the court should carefully consider the status of accused as well as that of the complainant and the nature of accusation.

Besides, if it appears to a court that forgery or perjury has been committed in relation to any proceeding before it then the court can proceed against the defaulter under section 476 Cr P.C. to vanish the impression that anyone can abuse the process of law by falsehood or fabrication and that too without any risk of prosecution. Before prosecuting the accused it is essential for the court to consider whether there is a reasonable probability for the conviction and is it expedient in the interest of justice or not?.

Under section 476 of the Cr.P.C. the court may itself take cognizance of the offence and try it in accordance with the procedure prescribed for summary trials in Chapter XXII of the Code. However, if the court considers that the accused should not be tried summarily under section 476, it may after recording the facts constituting the offence and statement of the accused forward the case to a court competent for trial.

- 15) Under the Police Order 2002, the Police Complaints Authorities and District Public Safety Commissions are setup at various levels for enquiring into complaints against police regarding misuse of authority, dishonest investigation, negligence and inefficiency. Therefore, it is needed that in appropriate cases the Presiding Officers should make references to concerned authorities for initiation of proceedings against the delinquent police officers/officials.**

- 16) **Transfer applications under section 526 & 528 Cr.P.C, miscellaneous applications like Supardari of vehicle and disposal of property under chapter XLIII of the Code and other applications arising out of interim orders should be decided within 7 days.**
- 17) **In murder references under section 374 Cr.P.C, the practice of printing paper books be discontinued and photocopied books may be accepted so as to avoid unnecessary delay in disposal of appeals for want of printing of paper book**
- 18) **To address the issue of convicts including women languishing in jails for want of payment of Diyat, Arsh & Daman even after serving their entire period of sentence of imprisonment, the Federal Government has already framed Rules, called the Diyat, Arsh and Daman Fund Rules 2007. However, despite lapse of considerable time the benefits of this legislation have not trickled down to the deserving convicts. Therefore, the Provincial Chief Secretaries may be asked to consider the cases of such convicts and make necessary arrangements for payment on first come first-serve basis.**

The provincial government may also explore possibilities for creating other funds through Bait-ul-Maal, provincial charitable endowment, if any, and donations. Such funds shall be maintained under proper accounting/auditing mechanism.

- 19) **The Courts/Government should make use of the Probation of Offender Ordinance 1960 as well as the Good Conduct Prisoners Probation Release Act 1926 to extend benefits of the said laws by releasing the deserving convicts on parole/probation in accordance with law.**

For effective use of these legislations the Committee recommended that:

- a) The Probation and Parole Officers should be activated and be asked to visit jails frequently for conducting inquiry and submission of reports to facilitate the courts and provincial governments to consider the cases of deserving convicts.
- b) The Provincial Home Departments should ensure the presence of Probation and Parole Officers in jails during the visits of the Sessions judges and judges of the High Court.
- c) The Registrar, Supreme Court/Secretary, NJPMC may convene regular meetings of the Registrars of the High Courts and Home Secretaries to evolve strategies for effective enforcement of the aforesaid laws.
- D) In proper cases the Sessions judges should exercise powers under Probation of Offender Ordinance 1960 or make recommendations to concerned government to extend favour to the convicts /UTP under Good Conduct Prisoners Probation Release Act 1926, as the case may be.

**20) The Registrars of High Courts should approach the Law and Justice Division to know about the pending mercy petitions and copy of the list shall be submitted to the Registrar, Supreme Court, who shall take-up the matter with the competent authority in consultation with the Chief Justice Pakistan on priority basis. In case of rejection of mercy petition, the Provincial Home Secretaries should ensure completion of the process without unnecessary delay to maintain the deterrent**

**effect of the sentence.**

- 21) Emphasis should be given on quick disposal of Narcotics and Anti Terrorism cases, cases of women and Juvenile offenders etc.**

For early disposal of ATA cases, the Committee recommended that the judges of the High Courts and Supreme Court be designated to monitor and ensure compliance of guidelines laid down in case of Liaquat Hussain vs. Federation of Pakistan (PLD 1999 SC 504).

- 22) To clear the backlog under different categories, special benches should be constituted at Principal seat and Branch Registries of Supreme Court and High Court to decide current/old cases by placing the prioritized ones on fast track.**

**II. CIVIL CASES**

- 1) Writ petitions under Article 199 of the Constitution should be fixed for 'Katchi Peshi' on the next day of institution and be disposed of as quickly as possible.**
- 2) Writ petitions of the following categories if competent under the law, should be decided within 60 days:**
  - I. Pertaining to service disputes including promotion, transfer and such other matters,**
  - II. Relating to admission of students in professional colleges and allied matters,**
- 3) Stay matter under Order 39 rule 1&2 should be decided within 15 days of grant of interim injunction and in case of delay, the judicial officer should report reasons to the concerned Chief Justice of the High Court through Registrar.**

The Committee considered the issue of frequent grant of temporary injunctions by the courts without realizing the consequences and recommended that the following instructions should be complied with strictly:

- a) All Courts shall examine such applications critically and ensure that the interlocutory injunctions should be granted ex-parte only in very exceptional circumstances, unless the plaintiff can convince the Court that by no reasonable diligence could he have avoided the necessity of applying for unilateral order.
- b) Such injunctions should be limited to a minimum time within which a defendant can come effectively before the Court.

- c) It should be noted that under Rule 2-A of Order 39, Code of Civil Procedure, an interim injunction passed in the absence of the defendant shall not ordinarily exceed 15 days, provided that such injunction may be extended for failure of its service on the defendant when such failure is not attributable to the plaintiff or when the defendant seeks time for defence.
  - d) The Court should take greatest care to state exactly what acts are restrained instead of copying the application, and if only one or some of the acts are sought to be restrained, the injunction should be confined to that and should not hold on other acts to which the defendant can possibly object.
  - e) When the defendant appears or files his reply/affidavit then the court should immediately dispose of the matter without any adjournment and if it is not possible the court should take an undertaking from the defendant to be restrained from doing any act complained about.
  - f) The Court should not allow the abuse of injunction by common tactics such as non-service of process or lingering on the period by seeking adjournments etc.
  - g) An order of Injunction made under Rule 1 or 2 of Order 39 after hearing the parties or after notice to the defendant shall cease to have effect on the expiration of six months unless extended by the Court after hearing the parties again and for reasons to be recorded for such extension and a report of such extension should be submitted to the High Court.
- 4) The rent cases should be decided speedily within a period of 4 months.**

It is noticed that the provisions of rent laws are not properly understood, appreciated and applied in proceedings by the Rent Controllers, therefore, the Committee asked for strict compliance of guidelines given by the Supreme Court of Pakistan in case reported in SCMR 2000 at page 556, which are as under:-

- a) Affidavits of not more than two witnesses in support of the ejectment application shall be filed in the Court in addition to the affidavit of the petitioner himself in support of the contents of ejectment petition.
- b) While replying to the ejectment application the respondent shall be similarly required to submit his own affidavit and affidavits of two other witnesses in support of his affidavit on the date fixed in the notice served upon him.
- c) The parties shall be bound to produce their witnesses for purpose of their respective cross-examination on the day fixed by the Court.
- d) A party obtaining the affidavits of the witnesses in support of his petition / reply would be bound to produce them in the Court for cross-examination and in case of its failure to do so their evidence shall be excluded from consideration.
- e) Appeals against the interim orders of the Rent Controller and resort to Constitutional jurisdiction, against orders at intermediate stages arising out of the ejectment proceedings, should be discouraged.
- f) The Court should take serious view of the situation when witnesses for cross-examination in support of their affidavits deliberately avoid / evade appearance in Court.

- g) Adjournment of ejectment petition should not be allowed except under unavoidable circumstances on an application moved by a party supported by affidavit. In such cases also adjournment should not be made for a period exceeding three days. Following the above procedure in ejectment matters appears to be necessary to achieve the goal of expeditious disposal of a case within a period of three months particularly in respect of residential tenements.
- 5) **Appeals, Writ Petitions and other miscellaneous petitions pertaining to rent matters should be decided in 60 days.**
- 6) **Revision petitions under CPC arising out of interlocutory orders i.e. interim stay orders, misjoinder and non-joinder of necessary parties, appointment of local commissioners and non-payment of court fee should be decided within 3 months subject to the maintainability of such petition.**
- 7) **Family cases should be decided within 3-6 months.**
- 8) **Civil appeals arising out of family cases, custody of minors, guardianship cases, succession and insolvency cases, if competent, shall be decided within 30 days and for any delay, reasons should be furnished to the High Court.**
- 9) **Banking, tax, duty, levy and cess cases should be decided within 6 months.**
- 10) **Civil Judges should decide review applications within 30 days and the trial of new cases (instituted after 1st January 2009) should be completed within 6 months.**
- 11) **Negotiable Instrument cases which are decided through summary procedure as provided under Order XXXVII of the Code of Civil Procedure 1908 should be decided in 90 days.**

- 12) **Priority should be given to women and juvenile cases for quick disposal.**
- 13) **The Small Claims and Minor Offences Courts Ordinance 2002 should be applied in earnest. The High Courts should designate civil judges cum magistrates to try exclusively cases under said law. Such judicial officers be imparted training in ADR. For this purpose a Committee of judges of the High Courts headed by a judge of the Supreme Court would arrange training in ADR for master trainers who would later on train the remaining judges in provinces.**

The Small Claims and Minor Offences Ordinance Courts 2002 has been promulgated for providing exclusive forum for facilitating the resolution of small disputes. This law also provides for ADR mechanism for facilitating the resolution and settlement of disputes outside the court system. This could be transformed into an excellent forum for addressing backlog of cases, therefore, the High Courts should approach respective provincial governments for establishment of more such courts to deal with the cases under the provisions of Small Claims and Minor Offence Courts Ordinance 2002 exclusively.

- 14) **In the Supreme Court and High Courts, priority should be given to dispose off old cases, except cases in which special orders were passed by court for fixation of the cases on specified dates.**
- 15) **To clear the backlog under different categories, special benches should be constituted for each category on the Principal seat and Branch Registry of the Supreme Court and High Court. There should be a commitment of judges to decide the old civil/criminal cases (filed upto 31 December 2008) within one year.**
- 16) **Priority should be given to the disposal of trade, commercial and investment cases. Such cases should be managed on fast**

**track through establishment of designated courts and by constituting special benches by High Courts and Supreme Court.**

- 17) Late issuance of cause lists by the High Courts creates problems for lawyer/litigant and parties to appear in court on short notice, which results in adjournments. Therefore, to provide reasonable time to the parties to adjust their schedule, the Supreme Court and High Courts should issue their cause lists one month in advance**
- 18) The District Judges should adopt such measures which ensure handling of 50% of cases from backlog (filed up to 31 December 2008) and 50% from new cases (filed on 1st January, 2009 and onward).**

For early disposal of cases, the courts should adopt the following measures:

- a) To cope with the problem of increasing litigation, it is necessary that the courts shall carefully scrutinize the pleadings, record and dismiss/reject false, fictitious and frivolous cases as provided under Code of Civil Procedure 1908.
- b) The provision of Order 11 of the C.P.C. regarding discovery and inspection should be applied properly to narrow down the controversies as well as issues leading to recording of statement of fewer and relevant witnesses.
- c) The parties denying documents that may be proved later should be burdened with costs incurred for proving that document as well as incidental costs.
- d) The courts should make use of section 89A C.P.C. to resolve disputes through Alternate Dispute Resolution

(ADR) including conciliation, mediation and arbitration or any such other appropriate mode.

- e) The plaintiff should be obligated to provide the defendant's mailing address and telephone/ fax number.
- f) The present strength of process serving agencies is inadequate and should be appropriately increased and alternate methods of service including courier service be used as ordinary mode of effecting service.
- g) The courts should take strict action against parties or witnesses who cause deliberate delay, through imposition of costs.
- h) Execution proceedings should be completed quickly for satisfying the decree.
- i) The court should discourage frequent interlocutory applications for concentration on disposal of cases as a whole.

**19) To check filing of false and frivolous cases the courts should impose compensatory costs under section 35-A of the C.P.C. Similarly on the patron of High Court of Sindh, the other High Courts may also amend the relevant rules for incorporation of a provision to impose a cost upto rupees one lac for false, frivolous and vexatious litigation.**

**20) Civil and criminal functions of the court should be bifurcated so that the judicial Officers can try criminal and civil cases exclusively. For fuller comprehension of civil/criminal law and experience, such judicial officers be rotated annually.**

## LONG TERM MEASURES

- 1) **The judges of High Courts should carryout inspections of prisons periodically for ensuring compliance of Prison Rules and giving on the spot remedy/relief to the deserving prisoners in accordance with law.**
- 2) **The High Courts should frame an equitable, consistent and coherent policy for sending the Judges to the permanent and circuit benches so that every judge gets equal opportunity to serve at the principal seat and benches. A Judge may not be transferred just for hearing a particular case and thereafter transferring him to other station, as this practice is against the principle of independence of judiciary.**
- 3) **Necessary funds be provided by Government for infrastructure support like construction of courtrooms, amenities for lawyers/litigants parties. The strength of judicial officers and administrative staff should be increased to cope with rising trend of litigation in the country. Adequate staff, library facilities and accessory equipment like computers should also be made available to courts.**

The Committee recommended the following:

- a) The vacant posts in the subordinate courts should be immediately filled and funds for creation of new additional posts of Civil Judges cum Judicial Magistrates may be acquired from respective governments.
- b) Presently, judicial officers are appointed through respective Provincial Public Service Commissions which takes time. Keeping in view the emergent need of judges to clear backlog, the High Courts should consider making appointments on adhoc basis.

- c) The High Courts should utilize the Provincial Judicial Development Fund (PJDF) to make available the essential paraphernalia such as provision of furniture, law books, typewriters and creating an integrating computer network for access to information and material and effective supervision/monitoring of the performance of the subordinate courts.
  - d) The respective Provincial Governments may be approached for grant of supplementary funds for the construction of courtrooms, bar rooms, waiting rooms for litigant parties and witnesses and residential accommodation of judicial officers/court staff.
  - e) Upgrading and activation of judicial academies to arrange pre and in-service training of the judicial officers and staff.
  - f) Seminars and workshop should be organized for judges to have regular interaction and experience sharing with other judges at provincial and national level.
- 4) Scattered courts are also one of the major causes of non-appearance of lawyers as it takes hours to reach from one court to another. Therefore, in the cities court complexes should be constructed to accommodate all courts in one premises.**
- 5) Presently, some judges of the High Courts are performing additional functions like Chairman, Environmental Protection Tribunals, Labour Appellate Tribunals etc which affects the working of the High Courts as a whole, therefore, it is decided that the concerned Government may be asked to appoint suitable persons against these positions instead of giving additional charge to the High Court Judges.**

- 6) **The Government of Sindh in exercise of powers conferred under section 59 of the Prisons Act 1894 has brought an amendment in the Prisons Rules where-under the condemned prisoners are not kept in death cells till final decision on their appeals. Keeping in view the agonies of the condemned prisoners detained in death cells, the Committee directed that the Provincial Governments of Punjab, Balochistan and NWFP should consider making similar arrangements for taking out the condemned prisoners from death cells and keeping them in barracks with adequate security arrangements.**
- 7) **The Provincial Governments should realize the difficulties of under resource and over congested jails and establish new jails at district level or enhance the capacity of existing jails by constructing new barracks duly equipped with necessary amenities.**
- 8) **Non-production of prisoners before the Courts for trial due to shortage of resources and cramped judicial lockups is a major cause of delay in quick disposal of cases, therefore, the Provincial Governments should equip the prison department with necessary resources and increase the capacity of judicial lockups by constructing additional rooms with necessary facilities and security so that prisoners who are brought from other Districts should be kept there to face their trial.**
- 9) **To address the problem of medical facilities to the inmates of various jails, the Committee recommended that the Chief Justices of the High Courts should hold meetings with the Chief Secretaries and Finance/ Health Secretaries of the provinces to chalk out policy for providing adequate medical treatment facilities to the ailing prisoners.**
- 10) **The capacity and functioning of process serving agencies be improved and for this purpose, the provincial governments may be approached for funds.**

- 11) Computerization and networking should be introduced at all levels of judicial hierarchy. By introducing specifically designed software, the effectiveness of computers could be enhanced to check and monitor the case flow and measuring the qualitative and quantitative output of judicial officers. Therefore, all the computers of a province should be connected through web based networking so that data transferring to MIT branch, High Court becomes easy.
- 12) Installation of Video Conferencing facility between the courts and jails will also help the courts in early disposal of cases. Therefore, High Courts should take initiatives for introducing modern techniques and automation in the courts.
- 13) In the province of Punjab, the judicial officers of the subordinate Judiciary are drawing additional judicial allowances equal to three times of their salaries, therefore, it is desirable that the judicial officers of all the provinces be treated alike and disparity in their salaries and allowances be removed.
- 14) The salary/allowances of court staff should also be suitably increased.

Drafted by:

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Approved by:

-Sd-  
(Justice Iftikhar Muhammad Chaudhry)  
Chief Justice of Pakistan/Chairman, NJPMC

**Institutions/Individuals from whom input received**

1. Supreme Court of Pakistan.
2. Federal Shariat Court.
3. Lahore High Court.
4. High Court of Sindh.
5. Peshawar High Court.
6. High Court of Balochistan.
7. All District and Sessions Courts.
8. Mr. Justice Mian Shakir-ullah-Jan, Judge, Supreme Court of Pakistan.
9. Mr. Justice Ijaz ul Hassan, Judge, Supreme Court.
10. Mr. Justice M Qaim Jan Khan, Judge, Supreme Court.
11. Mr. Justice Zia Perwaiz, Judge, Supreme Court.
12. Mr. Justice Ghulam Rabbani, Judge, Supreme Court.
13. Mr. Justice Rashid Ahmed Jhalandari, Judge, Supreme Court.
14. Mr. Justice (R) Rana Bhagwandas. Member, LJCP.
15. Professor Jawad S. Khawaja. Member, LJCP.
16. Ms. Anis Haroon, Chairperson, National Commission on the Status of Women/Member, LJCP.
17. Attorney General for Pakistan.
18. Ministry of Law & Justice, Govt. of Pakistan.
19. Law Department, Govt. of the Punjab.
20. Law Department, Govt. of Sindh.

21. Law Department, Govt. of NWFP.
22. Law Department, Govt. of Balochistan.
23. Prosecutor General, Punjab.
24. Prosecutor General, Sindh.
25. Prosecutor General, N.W.F.P.
26. Advocate General, Punjab.
27. Advocate General, Sindh.
28. Advocate General, Balochistan.
29. Inspector General of Police, Punjab.
30. Inspector General of Police, Sindh.
31. Inspector General of Police, N.W.F.P.
32. Inspector General of Police, Balochistan.
33. Inspector General of Police, Islamabad.
34. Inspector General of Prisons, Punjab.
35. Inspector General of Prisons, Sindh.
36. Inspector General of Prisons, N.W.F.P.
37. Inspector General of Prisons, Balochistan.
38. Director General, Federal Investigation Agency, Islamabad.
39. Mr. Mahmood-ul Hassan, Vice Chairman, Sindh Bar Council, Karachi.
40. Mr. Naeem Perwaiz, Secretary, NWFP Bar Council.
41. Mr. Tahir Shabbir Ch, Advocate, President, District Bar Association, Sahiwal.
42. Mr. Niaz-ul-lah Khan Niazi, Advocate, President, Islamabad Bar Association, Islamabad.

43. Mr. Haroon Irshad Jannjua, President, District Bar Association, Chakwal.
44. Mr. Hamid Khan, Advocate, Supreme Court.
45. Mr. Ibad ur Rehman Lodhi, Advocate, Supreme Court, Rawalpindi.
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48. Dr. Tariq Hassan, Advocate, Supreme Court, Islamabad.
49. Mr. Rustam Khan Kundi, Advocate High Court. Dera Ghazi Khan, NWFP.
50. Syed M. Haroon Rashid, Advocate, High Court, Hyderabad.
51. Mr. Sabhagchand D. Matlani, Advocate. High Court, Dadu, Sindh.
52. Professor M.Wali khan, Organizational Reform Expert, High Court of Sindh.
53. Syed Asghar Ali Shah, ADSJ, NWFP.
54. Mian Fiyaz Rabbani, SCJ, Mirwah, District Khairpur.
55. Rana Muhammad Nawaz Khan, Civil Servant/Executive Officer, Home Office, UK.
56. Mr. Javid Mian, District Attorney, Lahore.
57. Mr. Abdul Ghani, (Citizen), Sagodha.
58. Mr. M. Yaseen Malik, (Citizen), District Gujarnawala.
59. Mr. Khan Muhammad Khosa, Jampur.
60. Mrs. Zarina Shamim, Widow of Ch. Dil Muhammad Tarar, Advocate Supreme Court, Islamabad.

