

REFORMING THE JUDICIARY IN PAKISTAN

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REFORMING THE JUDICIARY IN PAKISTAN

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Pakistan's return to civilian government after eight years of military rule and the sidelining of the military's religious allies in the February 2008 elections offer an opportunity to restore the rule of law and to review and repeal discriminatory religious laws that restrict fundamental rights, fuel extremism and destabilise the country. Judicial reforms would remove the legal cover under which extremists target their rivals and exploit a culture of violence and impunity. Ensuring judicial independence would also strengthen the transition to democracy at a time when it is being undermined by worsening violence.

Laws that discriminate on the basis of religion and gender, including the blasphemy law, anti-Ahmadi laws, Hudood Ordinances and *Qisas* (retribution) and *Diyat* (bloody money) law, are part of the legacy of military rule. Given constitutional cover by military rulers and legal sanction by superior courts unwilling to uphold fundamental freedoms, these laws have undermined the rule of law, encouraged vigilantism and emboldened religious extremists. These extremists have used them to advance a radical ideology of exclusion, curtail free expression and discriminate against women and religious and sectarian minorities.

Motivated by self-preservation and self-interest, Pakistan's superior judiciary has not just failed to oppose Islamic legislation that violates fundamental rights but has also repeatedly failed to uphold the constitution. While superior courts have validated military interventions, military regimes have manipulated judicial appointments, promotions and removals, steadily purging higher court benches of independent-minded judges. This has pushed the judiciary further to the ideological right. Today, judicial independence is hampered not only by the state but also by right-wing religious groups.

If democratic functioning is to be truly restored, the military's politically motivated constitutional and legal changes that have radicalised swathes of Pakistani society must be reversed. If the democratic transition is to be sustained and strengthened, the freely elected government must respect judicial independence, and

the judicial arm of the state must live up to its responsibility to protect and preserve the constitution.

Pakistan's two largest national-level parties, the Pakistan People's Party (PPP), now in government, and the Pakistan Muslim League-Nawaz (PML-N), the main opposition party, have pledged to undo the legacy of military rule. Upon assuming power in March, the PPP and PML-N, then coalition partners, released scores of political detainees, including lawyers and judges arrested during Musharraf's November 2007 martial law. They also lifted the military regime's ban on labour and student unions, and committed to enforcing basic human rights. The coalition government has since unravelled, primarily over disagreements on mechanisms to restore over 50 higher court judges, including the Supreme Court chief justice, illegally dismissed during Musharraf's emergency. Nevertheless, both parties remain committed to restoring constitutionalism, the rule of law and judicial independence. Their ability to reach consensus on the necessary constitutional changes to remove the military's political distortions will determine the future of the democratic transition.

Before the coalition collapsed, during negotiations with the PML-N on restoring the judges, the PPP had put together a proposed constitutional package, aimed also at generating a public and parliamentary debate on constitutional reform. While the proposals included useful suggestions on strengthening parliament's role and undoing the military's constitutional manipulations, some proposed measures could undermine democratic reform, including judicial independence.

The PPP should, after parliamentary debate and public consultation, particularly with the bar associations that have played a lead role in fighting military rule, introduce a constitutional amendment package to restore democratic functioning and the rule of law. Aside from reintroducing constitutionally sanctioned checks and balances between the executive, legislature and judiciary, any such package should focus on judicial reform. An independent, reformed judiciary will not only help underpin constitutionalism and the rule of law but could also play a crucial role in preventing

another direct or indirect authoritarian intervention. The government's democratic credentials and the country's political stability would also be best served with the ruling and opposition parties reaching agreement in parliament on reversing state-driven Islamisation, repealing the laws that empower Islamist radicals at the cost of the moderate majority.

The international community should avail itself of the opportunity the new democratic government presents. By unconditionally supporting Musharraf's military regime in the belief that this relationship would deliver counter-terrorism dividends, the international community, the Bush administration in particular, had shied away from supporting democratic reform, until Musharraf's illegal martial law of November 2007. As the regional implications of Pakistan's religious laws become more tangible, with similar laws in other Muslim-majority states drawing on the Pakistani precedent, so have the costs of international inaction. With a liberal government now in place, the international community could help reverse the tide of radicalism in Pakistan if it fully supports a sustained democratic transition, including an independent judiciary.

RECOMMENDATIONS

To the Government of Pakistan:

1. Reinstate, without exception, all judges deposed unconstitutionally after 3 November 2007, including Iftikhar Muhammad Chaudhry; with the Supreme Court deciding on his reinstatement to the position of chief justice.
2. Reverse the military's constitutional and legal changes and introduce, after broad public consultation and extensive parliamentary debate, a constitutional amendment bill to restore and enhance the 1973 constitution's liberal parliamentary structure, including religious equality, by:
 - a) repealing Musharraf's Seventeenth Amendment, including Article 58-2 (b) which gives the president the power to dismiss elected governments;
 - b) removing the requirement under the Third Schedule of the constitution for the president and prime minister to be Muslims; and
 - c) reaffirming the authority of the ordinary courts to examine laws for repugnancy to Islam by abolishing the Federal Shariat Court through a constitutional amendment.
3. Ensure judicial independence by:
 - a) creating a Judicial Commission for the appointments of Supreme Court and High Court judges, guided by the May 2006 Charter of Democracy, comprising the chief justice of the Supreme Court, as its chair; the next two most senior Supreme Court justices; the four provincial chief justices; a member of the Pakistan Bar Council (PBC), nominated by the PBC; the president of the Supreme Court Bar Association (in matters related to the Supreme Court); and the four presidents of the High Court bar associations (in matters related to their respective High Court);
 - b) adhering to the seniority rule in the appointment of chief justices to the Supreme Court and High Courts;
 - c) empowering the Judicial Commission to take disciplinary actions against sitting judges; and
 - d) rendering invalid judicial appointments to the Supreme Court and High Courts should the oath of adherence to the constitution be violated.
4. Reduce opportunities for executive interference in the higher judiciary by immediately ending the practice of appointing retired judges to executive posts until two years after retirement.
5. Amend the constitution to curtail chief justices' power over transfers of judges and assignment of cases, establishing professional, managerial divisions within the courts to fulfill this task.
6. Follow through on appropriate recommendations by earlier government legal reform commissions to improve the delivery of justice, including an expansion of court facilities, personnel and other resources.
7. Commit to the letter and spirit of Pakistan's constitutional and international obligations, and the precedent of the Supreme Court judgment in the Hisba Bill case, by repealing all Islamic laws that discriminate on the basis of religion and gender, including the blasphemy law, anti-Ahmadi laws, Hudood Ordinances and *Qisas* (retribution) and *Diyat* (bloody money) law.
8. While those laws are still in effect:
 - a) institute mechanisms to identify and penalise subordinate court judges who fail to provide fair trials to women and religious and sectarian minorities, particularly Ahmadi and Christians;
 - b) monitor cases under blasphemy and anti-Ahmadi laws and the Hudood Ordinances in subordinate courts;
 - c) ensure the safety of subordinate court judges from religious extremist groups who seek to undermine the trial process;

- d) pass and enforce legislation to prevent false accusations of blasphemy and unlawful sexual intercourse, and prosecute anyone pressing frivolous charges; and
 - e) promote a broad public dialogue and meaningful parliamentary debate on discrimination in the Pakistan Penal Code.
9. Carry through on commitments to commute death penalty convictions to life imprisonment, and encourage a public debate on abolishing the death penalty.
 10. Withdraw support for the Organisation of Islamic Conference (OIC) anti-defamation resolution in the UN Human Rights Council.

To the International Community, particularly the European Union and the U.S.:

11. Persuade the Pakistan government to repeal discriminatory religious laws and comply with international obligations on human rights and religious freedoms including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
12. Call on Pakistan to withdraw support for the OIC anti-defamation resolution in the UN Human Rights Council.

Islamabad/Brussels, 16 October 2008

REFORMING THE JUDICIARY IN PAKISTAN

I. INTRODUCTION

Pakistan's democratic transition offers an opportunity to reestablish judicial independence and restore constitutionalism, including guarantees of religious and gender equality. The transition's future depends on an independent superior judiciary capable of resisting military pressure and refusing to condone another direct or indirect authoritarian intervention.

In the past, the superior judiciary, motivated by self-interest and self-preservation, has been more than willing to provide legal cover to direct and indirect military interventions.¹ Military governments have then manipulated the courts and introduced legal and constitutional changes to strengthen the military's political hold, which also benefit rightwing religious groups, their traditional allies.² Pressured by the Islamist lobby and its benefactors in government, especially under military rule, judges at both the higher and subordinate levels have failed to uphold constitutionally guaranteed religious and other fundamental rights.³

With more than 1,300 citizens killed in militant attacks in 2007, and casualties mounting in similar attacks in 2008, removing the military's distortions of the legal system that have empowered extremists at the cost of

the moderate majority should be high on the reform agenda of the elected government and parliament, as should ensuring judicial independence.⁴

Yet this reform agenda has been put on hold ironically because of the failure of the two national-level moderate parties, the Pakistan People's Party (PPP) led by Benazir Bhutto's widow and newly elected President Asif Ali Zardari and the Pakistan Muslim League of former Prime Minister Nawaz Sharif (PML-N) to agree on mechanisms to restore the superior judges dismissed during Musharraf's November 2007 martial law.

The two parties formed a coalition government after the PPP emerged as the largest single and the PML-N as the second largest party in the 18 February 2008 general elections. Both committed to instituting democracy and carrying through the judicial and legal reforms they had advocated in opposition to Musharraf's regime.⁵ In an apparent breakthrough in early August 2008, when a decision was also made to begin impeachment proceedings against Musharraf, the two parties renewed their commitment to restore the higher judges and purge the polity of the vestiges of authoritarian rule.

The coalition partners succeeded in pressuring Musharraf to resign on 18 August, but they have since parted ways over the judiciary issue. The PML-N withdrew

¹ See Crisis Group Asia Report N°86, *Building Judicial Independence in Pakistan*, 10 November 2004; Crisis Group Asia Report N°137, *Elections, Democracy and Stability in Pakistan*, 31 July 2007; and Crisis Group Asia Briefing N°70, *Winding Back Martial Law in Pakistan*, 12 November 2007.

² For the military's alliance with religious parties and groups, see Crisis Group Asia Reports N°36, *Pakistan: Madrasas, Extremism and the Military*, 29 July 2002; and N°49, *Pakistan: The Mullahs and the Military*, 20 March 2003.

³ The structure of Pakistan's judiciary includes at its base civil and judicial magistrates, who hear minor civil and criminal disputes, supervised in each district by a district and sessions judge. District and sessions judges act as an appellate tribunal in some matters and as a trial court in others. The higher, or superior judiciary, is composed of four High Courts, which are located in the provincial (state) capitals, and hear appeals from district and sessions courts. The Supreme Court, the apex court, hears appeals from the High Courts and also exercises some original jurisdiction.

⁴ Just one terror attack, on a hotel in Islamabad, the federal capital, on 20 September 2008, killed at least 53 and wounded more than 250; a single attack at an ordinance factory near Islamabad in August 2008 claimed more than 60 lives.

⁵ The PPP formed a four-party coalition in the centre that also included the Awami National Party (ANP), a Pashtun regional party, and the Jamiat Ulema-e-Islam-Fazlur Rehman (JUI-F), a Pashtun Islamist party. The PPP also became, and still remains, the junior partner of the PML-N in the Punjab coalition government. In Sindh, the PPP heads the coalition government, with the Muttahida Qaumi Movement as junior partner. It is junior partner in the ANP-led coalition government in Northwest Frontier Province (NWFP), and is senior partner in the Balochistan coalition government, composed of several smaller parties and independents, including defectors from Musharraf's Muslim League-Quaid-i-Azam (PML-Q). The PML-Q had emerged as the single largest party in Balochistan.

from the coalition on 25 August, accusing the PPP, justifiably, of failing to honour earlier accords on restoring the judges through a National Assembly resolution, followed by an executive order of the prime minister.⁶ By imposing unrealistic deadlines and refusing to compromise on the mechanism of restoration, however, Sharif's party was also culpable in weakening the coalition.

Although Asif Ali Zardari was elected president by a resounding majority of the Electoral College⁷ on 6 September 2008, the coalition's break-up could force the PPP, now with a fragile parliamentary majority, to rely on unreliable civilian partners.⁸ It could even turn to the military for support if the PML-N, now in opposition nationally but in power in Punjab, Pakistan's politically dominant province, ratchets up the pressure. Such dependence would shorten the government's life. It would also further hamper the PPP's ability to deliver on pledges of political, social and economic reform, including the long-overdue reform of the discriminatory religious legislation that reduces all Pakistani women and millions of citizens from the religious and sectarian minorities to second-class status.

The PML-N could also conceivably, despite disclaimers by its leadership, be tempted to destabilise the PPP government with the support of turncoats from Musharraf's PML-Q, despite the risk that these unreliable allies would be more than willing to jump ship if their military masters so decreed.⁹ Political infighting between the two large mainstream moderate parties would only delay their reform agenda. It would also, as in the 1990s, benefit an ambitious and oppor-

tunistic military.¹⁰ The resultant political instability would also prevent the state from stemming the rot of extremism and militancy through tangible judicial-cum-legal reform.

The PPP government has incrementally restored many sacked judges after offering fresh oaths of allegiance to the constitution to individual judges, while retaining those who had sworn allegiance to Musharraf's Provisional Constitution Order (PCO) in November 2007. The government has also reiterated pledges of constitutional reform to restore democratic parliamentary functioning, including judicial independence.

The leadership of the lawyers' movement and most bar associations, who had spearheaded the struggle to restore the judges, like the PML-N, have refused to accept the government's mechanism for restoration. Criticising the government also for its failure to restore Chief Justice Iftikhar Muhammad Chaudhry, they insist the government's process is undermining judicial independence. The lawyers', and the PML-N's, refusal to compromise on this and other critical areas of reform could, however, destabilise the government, invite another military intervention and deal a deadly blow to their struggle for constitutionalism and the rule of law.

This report examines the superior judiciary's past failure in upholding the rule of law and constitutionalism and the adverse impact of discriminatory Islamic legislation on the polity. Assessing the judiciary's role in protecting constitutionally guaranteed religious and other fundamental freedoms, the report recommends measures that a reformed judiciary could take to protect such rights in a country where violent radicalism is rampant.

⁶On 17 September, PML-N parliamentary leader Chaudhry Nisar Ali Khan was appointed leader of the opposition in the National Assembly, the lower house of parliament. PML-Q's Chaudhry Pervez Elahi gave up the post after the PML-N became the largest opposition party.

⁷Zardari won little more than a two-thirds majority in the Electoral College, which is composed of the Senate and National Assembly, the upper and lower houses of the national parliament, and the four provincial legislatures.

⁸The four-party coalition had a 235-seat majority in the 342-member National Assembly. After the PML-N's departure, the three-party coalition, reduced to 143 members, even with the support of independents and defectors from other parties, barely has a simple majority.

⁹Announcing his party's decision to quit the coalition government "after none of the commitments made to us was fulfilled", Sharif declared that his party would play "a constructive and positive role" while sitting in the opposition and would not "try to destabilise the PPP government". "Nawaz pulls out of coalition: Justice Saeeud Zaman is PML-N candidate for president's post", *Dawn*, 26 August 2008.

¹⁰The PPP and PML-N's political rivalry in the 1990s provided the military an opportunity to dismiss Benazir Bhutto and Nawaz Sharif's governments, twice over, before they finished their full term of office. In October 1999, the military ousted Prime Minister Sharif through a coup. See Crisis Group Asia Report N°40, *Pakistan: Transition to Democracy?*, 3 October 2002.

II. BACKGROUND

Pakistan's higher judiciary has repeatedly validated military interventions and sanctioned constitutional amendments that have fundamentally altered the legal and political system. Attempting to explain its failure to protect the constitution through the "doctrine of state necessity", the judiciary has relied on the dubious argument that the army's intervention could be justified because of the pressing need for political stability. This doctrine was first developed in three cases in 1955 in the Federal Court, as the Supreme Court was then known, to justify the extra-constitutional dismissal of the legislature by a titular head of state.¹¹ Drawing on the precedent of those decisions, the Supreme Court validated General Mohammed Ayub Khan's 1958 declaration of martial law, General Mohammad Zia-ul-Haq's 1977 coup and General Pervez Musharraf's 1999 coup.

While these Supreme Court judgments gave military regimes the trappings of legality, repeated military interventions have hampered the growth of civilian institutions and moderate political parties and forces. The centralisation of power in a Punjabi-dominated army has also strained centre-province relations in a multi-ethnic, multi-regional state, even as the military's use of religion to justify political control has undermined the security of Pakistani citizens, particularly women and religious and sectarian minorities.

A. ISLAMISING THE POLITY

Under the Third Schedule of the 1973 constitution, the highest constitutional offices in Pakistan – president and prime minister – must affirm their Muslim faith in the oath of office. While this clause discriminates against non-Muslim citizens, constitutionally, Pakistan is a liberal democracy, not a theocratic state. Military rulers have, however, sought to distort the constitution's liberal democratic features, and the superior judiciary has more often than not opted to overlook military regimes' constitutional violations, such as the discriminatory religious laws included in the document by General Zia-ul-Haq.

Although the military's alliance with the mullahs predated Zia's regime, he depended far more than his predecessors on religion to justify his actions, having ousted and executed Zulfikar Ali Bhutto, an elected prime minister. Indeed, "Islamisation was employed

as the *raison d'être* of the continuation of martial law".¹² In 1979, Zia-ul-Haq Islamised the Pakistan Penal Code (PPC), enacting the Hudood Ordinances, a set of ordinances prescribing punishments according to orthodox Islamic law.¹³ Article 227, a part of the Third Constitutional Amendment Order of 1980, stipulated: "All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions". Although Article 227 also stipulated that "the personal laws of non-Muslim citizens or their status as citizens" shall not be affected, the military government's Islamisation drive effectively sanctioned discrimination against religious and sectarian minorities.

In 1980, a Federal Shariat Court (FSC) was established to ensure that all legislation conformed to Islamic injunctions and to exercise appellate power in Hudood cases. The Eighth Amendment, enacted by Zia's rubber-stamp parliament in 1985, incorporated the military dictator's ordinances and executive orders into the constitution, and placed them "outside the scope of judicial review".¹⁴ In 1985, Article 2-A was inserted, making the 1949 Objectives Resolution, which declared that Pakistan's religious system would be based on Islam, a substantive part of the 1973 constitution.

Although the superior judiciary has the power to rule against any law that violates the constitution, it has failed to do so with respect to this body of discriminatory religious legislation, which has undermined the rule of law, encouraged vigilantism and emboldened religious extremists. The higher judiciary might have limited the impact of these laws by regularly overturning bad convictions in lower courts but has failed to provide clear interpretation of the parameters of Islamic jurisprudence. It has also rejected repeated challenges to Zia's Eighth Amendment.

B. VALIDATING MILITARY INTERVENTIONS

Some courageous judges, such as Supreme Court Justices Dorab Patel and Fakhruddin G. Ibrahim,¹⁵ have refused to sanctify authoritarian interventions, and preferred

¹¹ See Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit.

¹² Hasan Askari-Rizvi, *Military, State and Society in Pakistan* (Hampshire, 2000), p. 170.

¹³ See Rubya Mehdi, *The Islamisation of the Law in Pakistan* (Richmond, 1994).

¹⁴ Amnesty International, "Pakistan: Use and abuse of the blasphemy laws", 27 July 1994.

¹⁵ They chose to resign rather than accept the legitimacy of Zia's military regime.

to resign rather than undermine constitutionalism and the rule of law. By legitimising military rule and intervention, most have, however, abdicated their duty to uphold the law.

Following Musharraf's coup, the Supreme Court was purged of judges who might have opposed the military's unconstitutional assumption of power. Judges were required to take an oath to Musharraf's Provisional Constitutional Order (PCO), 1999, superseding the oath they had sworn at their induction to the 1973 constitution.¹⁶ On 26 January 2000, thirteen judges, including Chief Justice Saidu Zaman Siddiqui and four other Supreme Court justices, were removed for refusing to do so.¹⁷

The reconstituted Supreme Court was composed of judges who willingly accepted the military's directions.¹⁸ They included Iftikhar Muhammad Chaudhry, who was elevated to the Court in January 2000 and appointed chief justice by Musharraf in 2005. The judges took their oath of office under the PCO 1999, which omits the reference to their duty to "protect, uphold and defend" the 1973 constitution.¹⁹ On 21 May 2000, this bench upheld the legality of Musharraf's coup under the doctrine of state necessity. The Supreme Court also authorised the army chief to amend the constitution, albeit within the bounds of its federal, democratic and parliamentary character. The Court also concluded that those judges who had been sacked following the PCO oath had lost any right to challenge their removal due to the passage of time.²⁰

By placing personal survival over the rule of law and constitutionalism, these judges allowed another dicta-

tor to implement sweeping changes that expanded the military's political powers and hold over the state. Like Zia's Eighth Amendment, Musharraf's Seventeenth Amendment, passed by a rubber-stamp parliament in December 2003, enshrined all executive orders and changes made under military rule.²¹ The Seventeenth Amendment gave the president, the titular head of state, the power to dismiss elected governments and parliament and also transferred from the prime minister, the head of government, key appointment powers to the president including appointments of governors, the three service chiefs and the chief justice of the Supreme Court. Musharraf's constitutional distortions weakened civilian institutions. By sidelining secular democratic forces, the military government also enabled right-wing religious parties to fill the vacuum. In dismissing legal challenges to Seventeenth Amendment, the Supreme Court shirked its responsibility to protect constitutional rule.

In 2007, there were some welcome signs of awareness within the judiciary of the costs of siding with the military. Public pressure had clearly influenced the superior judiciary's rethinking about the personal and institutional costs of following the military's dictates. "Controversy about the judiciary had come to a head in the last few years", said Mohammad Ikram Chaudhry, a former vice-president of the Supreme Court Bar Association (SCBA). "There was a lot of criticism from the legal community and international organisations about the judiciary being a corrupt institution, and judges were feeling the pressure".²²

Chief Justice Chaudhry's decisions in a number of cases raised the possibility that the Supreme Court might rule in accordance with the spirit and content of the constitution on sensitive issues,²³ particularly Musharraf's dual status as army chief and president and the use of lame-duck assemblies as the presidential Electoral College. Apparently anticipating legal challenges to his

¹⁶ According to Musharraf's Provisional Constitutional Order (PCO) 1999, henceforth presidential orders and ordinances would overrule all legislation, including the suspended constitution and the actions of the military government could not be challenged in court. By making the PCO the basic law of the land, the government suspended the basic rights and freedoms in the constitution and amended the constitution itself. See Crisis Group Report, *Pakistan: Transition to Democracy?*, op. cit., p. 13.

¹⁷ See Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit., p. 5, 13.

¹⁸ After September 2003, new judges once again took oath under the constitution.

¹⁹ The Oath of Judges Order 2000 stated that any person who had taken the oath "shall be bound by the provisions of this Order, the proclamation of Emergency of the fourteenth day of October 1999, and the Provisional Constitution Order N°1 of 1999" and "notwithstanding any judgement of any Court, shall not call in question or permit to call in question the validity of any of the provisions thereof". Text of Oath of Office (Judges) Order, 2000, *Dawn*, 30 May 2000.

²⁰ Zafar Ali Shah, PLD 2000 Supreme Court, p. 869.

²¹ According to the Seventeenth Amendment, which validates the October 1999 coup, the subsequent constitutional and political distortions, legislations, proceedings and appointments by the military government cannot be "called (into) question in any court or forum on any ground whatsoever".

²² Crisis Group interview, Islamabad, 4 July 2007. According to a 2002 survey by Transparency International, the judiciary was the country's fourth most corrupt institution, after police, power suppliers and taxation authorities. "Nature and Extent of Corruption in Pakistan", Transparency International Pakistan, 2002.

²³ The chief justice was, for instance, responsible for the court's proactive pursuit of habeas corpus petitions for "disappeared" citizens, instructing the government to disclose their whereabouts and chastising it for not following the law.

presidential election,²⁴ Musharraf dismissed Chaudhry on 3 March 2007, an action that the Supreme Court ruled unanimously as illegal on 20 July 2007, reinstating the chief justice by a 10-3 majority.²⁵

Efforts by the military government to forcibly suppress the widespread protests that followed Chaudhry's dismissal only fuelled public anger. An increasingly vocal opposition, spearheaded by the bar associations and supported by the moderate parties and all segments of civil society, including human rights groups and the media, as well as international human rights organisations and many western parliaments, channelled public resentment to military rule, transforming the issue into a political battle for the restoration of democracy and the rule of law.

Facing the most serious challenge to eight years of military rule, on 3 November 2007 Musharraf imposed martial law, suspending the constitution and issuing in its place a Provisional Constitution Order (PCO). Through this PCO, Musharraf restructured the judiciary, deposing more than 50 higher court judges. Suspending fundamental rights, the regime arrested scores of protesting lawyers, judges, journalists and political leaders and workers.²⁶ While claiming he had imposed emergency rule in a bid to remove obstacles to his government's fight against religious extremism, Musharraf in fact persecuted moderate democratic forces.²⁷

C. DEMOCRATIC TRANSITION AND JUDICIAL REFORM

On 27 December 2007, PPP leader Benazir Bhutto was assassinated. Her murder, days before the scheduled national elections, dealt the last blow to Musharraf's hopes of retaining power.²⁸ Despite selective rigging, Musharraf's PML-Q and his Islamist allies were routed in the 18 February 2008 general elections. His staunchest civilian opponents, the PPP, now led by Bhutto's widower Asif Ali Zardari and son Bilawal Zardari Bhutto, won the largest number of seats in

the National Assembly, with Nawaz Sharif's PML-N coming second.

The elections resulted in a hung parliament. At first it appeared that Musharraf and the new military leadership, now under General Ashfaq Pervez Kayani's command, would, as in the 1990s, continue to rule from behind the scenes, pitting the PPP and the PML-N against each other. On 9 March, however, Zardari and Sharif signed the Murree Declaration, agreeing to form a coalition government, "giving a practical shape to the (electoral) mandate, which was given to the democratic forces by the people of Pakistan". They also agreed that the judges sacked by Musharraf "would be restored on the position as they were on November 2, 2007, within 30 days of the formation of the federal government, though a parliamentary resolution".²⁹ The resolution would be followed by an executive order of the prime minister.

In their swearing-in ceremony, the new parliamentarians insisted on using the version of the 1973 constitution that did not contain the constitutional amendments made by Musharraf during emergency rule.³⁰ In one of its first acts, the PPP-led coalition government released the deposed judges as well as political prisoners, including lawyers, arrested during the emergency.³¹ It also lifted the military regime's ban on labour and student unions, and committed itself to enforcing human rights.

The coalition has since broken up over differences between the two parties on restoring the sacked judges.³² But reinstating the sacked judges is only the first step towards reforming the judiciary and ensuring judicial independence. If an end to executive interference is an essential precondition for a judiciary that is capable of protecting the constitution and upholding constitutionally guaranteed fundamental rights, judges too would have to be held accountable for subverting the constitution. According to Abid Hassan Minto, a former Pakistan Bar Council president: "Judges see themselves as part of the establishment itself, and believe it's their duty to protect the establishment, not the constitution".³³ Any reform agenda would also remain incomplete if the superior judiciary fails to

²⁴ Retaining the office of army chief, Musharraf was re-elected on 6 October 2007 to another five-year presidential term by a parliament that had entered the final month of its five-year term.

²⁵ Crisis Group Report, *Democracy and Stability in Pakistan*, op. cit., p. 11.

²⁶ See Crisis Group Briefing, *Winding Back Martial Law in Pakistan*, op. cit.

²⁷ With the Revocation of Emergency Order, Musharraf lifted martial law on 15 December 2007.

²⁸ See Crisis Group Asia Briefing N°74, *After Bhutto's Murder: The Way Forward for Pakistan*, 2 January 2008.

²⁹ "Six-point Murree Declaration – Text of the summit declaration", *The News*, 9 March 2008.

³⁰ For more detail of those amendments, see Constitution (Second Amendment) Order, 2007, President's order No. 6 of 2007, 14 December 2007.

³¹ Prime Minister Yousaf Raza Gilani was confirmed by a unanimous vote of confidence in the National Assembly on 29 March 2008.

³² See section V.A.2.

³³ Crisis Group interview, Lahore, 17 August 2007.

address and continues to condone the body of discriminatory religious laws, discussed below, that violate constitutionally guaranteed fundamental rights, with the ensuing radicalisation threatening the security of the Pakistani citizen and state.

III. ISLAMISING THE LEGAL SYSTEM: INSTITUTIONALISED DISCRIMINATION

A. THE BLASPHEMY LAW

The Pakistan Penal Code is based on colonial India's Penal Code of 1862, which has however been amended several times since 1947. Pakistan's blasphemy law might, for instance, appear to be based on the British colonial law that prohibits the denigration of religion, but the Pakistani version is significantly different. Section 295A in the PPC that addresses religion is certainly inherited from the Indian Penal Code. Prohibiting "deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs", it is not in itself discriminatory and is generally consistent with international standards on the defamation of religion. The Zia-ul-Haq regime's amendments, however, placed special emphasis on the protection of Muslims; called for harsher punishments for offences against Islam; and required trials under Section 295 to be presided over by a Muslim judge. Said a Karachi-based human rights lawyer and Supreme Court advocate: "It is these provisions that make the PPC a discriminatory system".³⁴

They include:

Section 295B (1982): Calls for life imprisonment for anyone who "wilfully defiles, damages or desecrates a copy of the holy Qu'raan ... or uses it in any derogatory manner". It allows for such a person to be arrested without a warrant.

Section 295C (1986): Imposes the death penalty, or a life sentence, on anyone who, "by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad".

The blasphemy law's vague language makes no reference to a potential offender's state of mind or intention, exacerbating its impact and inviting widespread abuse and "the harassment and persecution of minorities in Pakistan".³⁵ It effectively delegates authority to private citizens and public officials to enforce social biases. Radical Sunni outfits in particular have exploited

³⁴ Crisis Group interview, Akhtar Hussain, Karachi, 20 July 2007.

³⁵ "Pakistan: Use and abuse of the blasphemy law", Amnesty International, 27 July 1994.

the law to target religious and sectarian minorities, using trials for religious offences as occasions to rally their base. In May 1994, for example, a group of clerics used a blasphemy hearing against two Christians in the Lahore High Court as a stage for public calls for Pakistan's "Talibanisation".³⁶

Since 1991, blasphemy cases carry a mandatory death penalty. Although such a sentence has never been carried out, the blasphemy law remains, in the words of an analyst, "a lethal weapon in the hands of religious extremists"³⁷ and "the handiest instrument for mullahs to persecute rivals, particularly members of the Christian community [as well as] liberals".³⁸ It also encourages violence.

In July 2002, an inmate belonging to the radical Sunni Sipah-i-Sahaba (SSP) murdered a scholar convicted of blasphemy by a Lahore district court.³⁹ In August 2003, a Christian was arrested under Section 295 for littering near a mosque in Lahore. A police officer killed the man while he was in custody out of a sense of "religious duty".⁴⁰

Blasphemy cases are not treated as typical criminal trials. I.A. Rehman, director of the independent Human Rights Commission of Pakistan (HRCP), emphasised: "In blasphemy cases involving minorities, lower courts invariably convict the accused. They cannot take the risk of acquitting the person".⁴¹ Lahore's police chief admits that religious groups pressure the police into lodging charges under the blasphemy law.⁴² Such groups also attack and intimidate defence lawyers, making it difficult for the accused to get legal representation. "I cannot dare to file a petition in court that this is a discriminatory provision of law", said a Supreme Court advocate and human rights lawyer. "Even as a teacher of law, I was hesitant to talk about the blasphemy law, because of past incidents when students who belong to religious parties have filed blasphemy cases against such professors".⁴³ Intimidation also extends to the higher judiciary; most notably, in Octo-

ber 1997, a Lahore High Court judge who had acquitted a teenaged boy of blasphemy was shot dead in his chambers.

Often defendants in blasphemy cases request a transfer of their case to another jurisdiction, which the law permits if a case is not heard on time or if the circumstances do not allow for a fair hearing.⁴⁴ The superior courts have also limited the impact of the blasphemy law, overturning subordinate court verdicts or dismissing cases for lack of evidence.⁴⁵ However, so long as the law remains on the books, Pakistani citizens, and minorities in particular, will be vulnerable to its abuse.

In 2000, shortly after seizing power, Musharraf promised to amend the blasphemy law to allow only senior district officials to register blasphemy cases but soon withdrew the proposed change under pressure from the religious lobby. In 2005, parliament passed a law requiring that a senior police official investigate a blasphemy accusation before a complaint was filed in the courts. Seldom implemented, the law has not led to a significant reduction in blasphemy charges.⁴⁶ Well-off complainants who are seeking to use the blasphemy law in financial or property disputes can easily skirt the requirement: "All it takes is a well-placed bribe to get around this safeguard".⁴⁷

In May 2007 Musharraf's PML-Q government rejected a private member bill by a ruling party parliamentarian, calling for changes that would make the blasphemy law less discriminatory. The parliamentary affairs minister was quoted as saying: "Islam is our religion and

³⁶Zahid Hussain, *Frontline Pakistan: The Struggle with Militant Islam* (Lahore, 2007), p. 95.

³⁷Zahid Hussain, "Lethal law", *Newsline*, September 2001.

³⁸Hussain, *Frontline Pakistan*, op. cit., p. 8.

³⁹Adnan Adil, "Murder in God's name?", *Newsline*, July 2002.

⁴⁰"Country Report: Pakistan", Amnesty International, 2005. The policeman was later convicted of murder. "Meanwhile, churches are attacked, temples are attacked, and no real action is taken in the courts", said a human rights lawyer. Crisis Group interview, Karachi, 20 July 2007.

⁴¹Crisis Group interview, Lahore, 17 August 2007.

⁴²"Blasphemy law and religious sentiments", *Daily Times*, 12 June 2007.

⁴³Crisis Group interview, Karachi, 20 July 2007.

⁴⁴For example, the case of Salamat Masih, a Christian boy accused of blasphemy in May 1993, was transferred from Gujranwala, where no lawyer was prepared to take the case for fear of retaliation from Sunni radicals, to Lahore, where it was eventually heard and dismissed by the Lahore High Court.

⁴⁵Crisis Group interviews, lawyers, Lahore and Karachi, July-August 2007. However, there have been some exceptions, as in August 2001 when the Lahore High Court upheld the death penalty for a Christian accused of blasphemy, who was involved in a land dispute with a Muslim landlord.

⁴⁶Amnesty International reported 44 registered blasphemy cases in 2006. "Country Report: Pakistan", Amnesty International, 2007.

⁴⁷Crisis Group telephone interview, Ann Buwalda, Jubilee Campaign, September 2007. Religious minorities are often targeted. "First, one accuses a Christian of blasphemy. Then one pressures the sessions judge into convicting the victim. Upon conviction of the accused, one immediately grabs the house of the victim". "Blasphemy law and property grabbing", *Daily Times*, 10 June 2007.

such bills hurt our feelings. This is not a secular state but [the] Islamic Republic of Pakistan".⁴⁸

In a major recent judgment, the Lahore High Court overturned a blasphemy conviction by allowing the defendant to recite the first *Kalima* as evidence of his innocence, thereby shifting the burden of evidence to the prosecution, as required by law.⁴⁹ A legal analyst argued: "This decision as an operating precedent makes it difficult for a conviction to be obtained in the lower courts without a strict evidentiary standard".⁵⁰

B. TARGETING AHMADIS

Pakistan's anti-Ahmadi laws merit special attention because of their link with the sectarian conflict and violence that remains the primary source of terrorism in the country. Right-wing religious groups began demanding the Ahmadi sect⁵¹ be declared a non-Muslim minority shortly after independence in 1947. In 1953, anti-Ahmadi riots led to the imposition of martial law in Lahore, Punjab's provincial capital, the fall of the provincial government and eventually the fall of the central government. A court of inquiry examining the disturbances issued a report stating that there was no consensus amongst the *ulema*⁵² on the definition of "Muslim", and therefore any Muslim individual or sect was entitled to its own interpretation of the religion.⁵³

Ahmadis were legally recognised as Muslims until 1974 when, capitulating to the religious lobby, following Jamaat-i-Islami-led street demonstrations in Punjab, Zulfikar Ali Bhutto's government passed a constitutional amendment that officially excommunicated Ahmadis.

In 1984, to appease orthodox Sunnis, his main constituency, General Zia-ul-Haq further institutionalised Ahmadi segregation through amendments to the Penal Code. The Supreme Court dismissed a constitutional petition against these amendments, as did the Federal Shariat Court.

The provisions include:

Section 298-B, which prohibits:

1. Any person of the Qadiani group or the Lahori⁵⁴ group (who call themselves Ahmadis or by any other name) who by words, either spoken or written or by visible representation:
 - a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (Peace Be Upon Him-PBUH), as *Ameer-ul-Mumineen* [leader of the faithful], *Khalifa-tul-Mumineen* [caliph of the faithful], *Khalifa-tul-Muslimeen* [caliph of the Muslims], *Sahaabi* or *Razi Allah Anho* [companions of the Prophet];
 - b) refers to or addresses, any person, other than a wife of the holy Prophet Muhammad (PBUH), as *Ummul-Mumineen* [Mother of the Faithful, a title reserved for the Prophet's wives];
 - c) refers to, or addresses, any person, other than a member of the family (*Ahle-bait*) of the holy Prophet Muhammad (PBUH), as *Ahle-bait* [family of the Prophet]; or refers to, or names, or calls, his place of worship as Masjid (mosque); shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to [a] fine.
2. Any person of the Qadiani group or Lahori group, (who call themselves Ahmadis or by any other names), who by words, either spoken or written, or by visible representations, refers to the mode or form of call to prayers followed by his faith as *Azan* [call to prayer] or recites *Azan* as used by the Muslims, shall be punished with imprisonment of either description for a term which may be extended to three years and shall also be liable to [a] fine.

Section 298-C, which prohibits:

Any person of the Qadiani group or the Lahori group (who call themselves Ahmadis or any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representation or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either

⁴⁸ Sohail Khan, "Government rejects bill to amend blasphemy law", *The News*, 9 May 2007.

⁴⁹ The first *Kalima* is testimony of faith in Islam.

⁵⁰ Taimur Malik, "The blasphemy challenge", *Daily Times*, 29 July 2008.

⁵¹ Ahmadis are a Sunni minority sect, followers of Mirza Ghulam Ahmed, who sections of the community believe was a twentieth century prophet.

⁵² *Ulema*: plural of *Alim* (religious scholar).

⁵³ Lawrence Ziring, *Pakistan in the Twentieth Century: A Political History* (Oxford, 1997), pp. 134-145.

⁵⁴ The Ahmadi community is divided among the Qadiani and Lahori factions.

description for a term which may extend to three years and shall also be liable to fine [crimes under this section are non-bailable].⁵⁵

Ahmadis must either renounce their beliefs to be declared Muslim, or be declared non-Muslim.⁵⁶ Muslims must officially declare that they do not recognise the Ahmadi community as Muslim before they can obtain a Pakistani passport. In 2004 the government introduced new machine-readable passports that, unlike earlier ones, did not include a religion column. However, after hardline clerics accused Musharraf of secularising the country, the government restored the religious column. In June 2007, the Election Commission of Pakistan issued separate electoral lists for the Ahmadi community for the February 2008 elections despite government commitments to end separate electorates.⁵⁷

Anti-Ahmadi laws have deepened sectarian fault lines, with the Sunni extremist Sipah-i-Sahaba, for instance, demanding that the Shia sect be also declared non-Muslim. This discriminatory legislation has also encouraged vigilantism and violence.

As with the blasphemy law, the vague language of Section 298 has resulted in a flood of cases, mostly trivial, against Ahmadis. For example, in 1989 Mirza Mubarak Ahmad, an Ahmadi, was arrested for distributing a pamphlet and, while in prison, was seen saying his prayers by a political opponent, who then filed a criminal case against him for posing as a Muslim. The case took eleven years, and a judicial magistrate in Hyderabad finally found Ahmad guilty under Section 298. In his judgment, the magistrate acknowledged that the constitution gives every citizen the right to practice his or her faith. However, since Ahmad had faced the *Kaaba*,⁵⁸ while offering his prayers, “he posed himself as Muslim and injured the feeling of

Muslims”. The judgment continued: “No doubt offering [prayer] by any person as per his own faith is no offence, but when hurt has been caused the feelings of other persons then it becomes an offence, and when a person of ... Ahmadi [community commits] any act by posing himself as Muslim, then it is an offence [under Section 298]”.⁵⁹

A Supreme Court advocate who focuses on human rights issues noted: “In the majority of cases against Ahmadis, the complaints have been filed by someone belonging to one sectarian school of thought or another”.⁶⁰ During the 1990s, as many as 2,000 Ahmadis were accused of blasphemy.⁶¹ A May 2005 non-governmental organisation (NGO) report found that the largest numbers of blasphemy cases filed against any minority community were against Ahmadis.⁶² According to the U.S. State Department, 28 Ahmadis faced criminal charges under Pakistan’s religious laws in 2006.⁶³

Judges have been generally hesitant to acquit Ahmadis, fearing reprisals from religious radicals. During Zia-ul-Haq’s martial law, for example, a military court had convicted seven Ahmadis on charges of murder. After martial law was lifted, the cases were appealed in the Lahore High Court. Radical clerics obstructed proceedings, forcing the judge to hear the case in his private chambers. Commenting on the eventual acquittal, defence counsel Abid Hassan Minto told Crisis Group, “It would not have been possible for such a judgment in an open court, with the mullahs there”.⁶⁴ The failure to provide a fair trial to Ahmadis is especially a problem in the subordinate courts where judges are even more vulnerable to threats from local Islamist groups.

Article 8 of the constitution deems “laws inconsistent with or in derogation of fundamental rights to be void”. In 2003, reviewing the constitutionality of the MMA’s Hisba Bill, passed by the NWFP Assembly to implement Shariah, the Supreme Court ruled the bill violated the constitution. It declared: “Private life, personal

⁵⁵ Pakistan Penal Code, Section 298.

⁵⁶ Catering to its right-wing Sunni base, in 2006, the Mutta-hida Masjlis-i-Amal (MMA) tabled the Apostasy Act 2006 in the National Assembly, calling for the death penalty for male apostates from Islam, and imprisonment until penitence or death for female apostates. Apostasy could be proved through confession or by the testimony of two adult witnesses. Among other provisions, the proposed bill demanded that the right to property of anyone accused of apostasy should be revoked, and that proven apostates be given a maximum of one month to “return to Islam”. Text of Apostasy Bill 2006 (Proposed), available at www.thepersecution.org/50years/apostasybill.html. All the key religious leaders in the National Assembly signed the bill.

⁵⁷ Ali Waqar, “Ahmadis set to boycott general elections again”, *Daily Times*, 29 June 2007.

⁵⁸ Muslims pray in the direction of the *Kaaba*, Islam’s holiest site in Mecca, Saudi Arabia.

⁵⁹ Judgment of the Case, Court of Judicial Magistrate (I), Hyderabad, Sindh, case no. 96 of 1999. See also www.thepersecution.org/case/case001.html.

⁶⁰ Crisis Group interview, Karachi, 20 July 2007.

⁶¹ Akbar S. Ahmed, “Pakistan’s blasphemy law: words fail me”, *The Washington Post*, 19 May 2002.

⁶² Since 1988, 37 per cent of registered cases of blasphemy were against Ahmadis; Christians represented 13 per cent of blasphemy cases. See Waqar Gillani, “647 booked under blasphemy law since 1988, says NCJP”, *Daily Times*, 9 May 2005.

⁶³ “Pakistan”, in “International Religious Freedom Report 2007”, Bureau of Democracy Human Rights and Labor, U.S. Department of State, Washington DC, 2007.

⁶⁴ Crisis Group interview, Lahore, 17 August 2007.

thoughts and the individual beliefs of citizens cannot be allowed to be interfered with". It further stated: "Islamist jurists are unanimous on the point that except for *Sallat* [prayer] and *Zakat* [alms] no other obligation stipulated by Islam can be enforced by the state". The Court also reinforced the 1954 opinion of the court of inquiry that the ulema "had no unanimity before the Court of Inquiry on the definition of 'Muslim', because, everyone being a Muslim has his own interpretation of Quran and Sunnah. Therefore, [a state official] under the Hisba Bill, cannot be empowered to determine in his discretion whether any act is consistent with Islamic moral values and etiquettes or not".⁶⁵

The same court, however, failed to declare the blasphemy laws, anti-Ahmadi legislation or the anti-women Hudood Ordinances unconstitutional.

C. WOMEN AND THE HUDOOD ORDINANCES

Promulgated in 1979 by Zia-ul-Haq's military regime and incorporated into the constitution through the Eighth Amendment, the Hudood Ordinances, in the words of HRCP Chairperson Asma Jahangir were "the precursor to [the] conversion of the judiciary".⁶⁶ Since the judges appointed are those who "are loyal to whatever the state ideology" happens to be, according to prominent human rights lawyer and Supreme Court advocate Hina Jilani, Pakistan now has "a judiciary that has been influenced by Islamisation".⁶⁷

The ordinances prohibit theft, alcohol consumption, sexual intercourse outside of marriage termed "fornication" and, until November 2006, rape. The punishments are divided between *Hadd* (Quranic) punishments, which include amputation of limbs, flogging, stoning to death and other forms of capital punishment; and *Taazir* (non-Quranic) punishments for lesser offences, including imprisonment and whipping.

The ordinances included:

- The Prohibition (Enforcement of *Hadd*) Order IV of 1979: Prohibits the sale and consumption of alcohol and drugs; in the case of drinking, it prescribes public whipping.

- The Offences Against Property (Enforcement of Hudood) Ordinance, 1979: Relating to theft and armed robbery, its punishments include: for a first offence of theft, amputation of the right hand from the wrist; for a second offence the amputation of a foot; and for third-time offenders imprisonment for life.
- Offence of *Zina*⁶⁸ (Enforcement of *Hadd*) Ordinance, 1979: Prohibits non-marital fornication, rape, gang rape, kidnapping or inducing women to forced marriage; punishments include stoning to death, whipping and imprisonment.
- The Offence of *Qazf* (Enforcement of *Hadd*) Ordinance, 1979: Prohibits false accusation of *zina*.
- The Execution of the Punishment of Whipping Ordinance, 1979: Applies to all crimes under the Hudood Ordinances.

Women's testimony is not accepted in *Hadd* cases, nor is that of non-Muslims unless the accused is also non-Muslim. Under the ordinances, the testimony of four adult male witnesses was required to prove rape. By 1986, the courts issued thirteen sentences of amputation of limbs, seven of death by stoning and six of public whipping.⁶⁹ All except one of these sentences were overturned on appeal to the superior courts or the Federal Shariat Court.

While the Hudood Ordinances cover a range of crimes, women have been the principal victims of these laws. "Allegations of *zina* flooded the courts", primarily against "young couples marrying against the wishes of their parents".⁷⁰ Rape victims, including those impregnated by their offender but who could not prove rape according to the requirements for evidence, were also accused under the *Zina* Ordinance. One of the more striking cases was that of Safia Bibi, a blind woman accused and convicted of *zina* after she filed rape charges against her employer and his son. In April 2002, a woman who had filed charges against her brother-in-law for rape was instead found guilty of adultery by a sessions court judge and sentenced to death by stoning.⁷¹ In both cases, judgments were overturned on appeal to a higher court.

Even though the most severe punishments under the Hudood Ordinances have generally not been implemented, their psychological and social impact is severe. Women sentenced to death by stoning, for example,

⁶⁵Text of judgment at www.supremecourt.gov.pk/pr/hasba.htm.

⁶⁶Asma Jahangir, "What the protection of Women Act does and what is left undone", in "State of Human Rights 2006", Human Rights Commission of Pakistan, Lahore, 2006, pp. 5-12. Asma Jahangir is a Crisis Group Board member.

⁶⁷Crisis Group interview, Lahore, 16 August 2007. Hina Jilani is the UN Secretary General's Special Representative on Human Rights Defenders.

⁶⁸Various forms of unlawful sexual intercourse.

⁶⁹Jahangir, *op. cit.*, p. 8.

⁷⁰*Ibid.*

⁷¹See Sanna Bucha, "Twice damned", *Newsline*, May 2002.

are kept in solitary confinement under extreme conditions, expecting their sentence to be carried out, and even when released become social outcasts. Said Majida Rizvi, a former Supreme Court justice, also the lawyer who had defended Safia Bibi: “When there are no facilities, when the state cannot take care of these women once they return to society, you simply cannot have these laws”.⁷²

In 1997, the Commission of Inquiry on Women, headed by former Supreme Court Justice Nasir Aslam Zahid, recommended repealing the ordinances.⁷³ The government ignored the recommendation. In 2003, the National Commission on the Status of Women (NCSW), a government body established in 2000 to review and recommend reforms to laws and regulations that affect the status and rights of women, published its findings. According to the head of the NCSW, former Supreme Court justice Rizi, Jamaat-e-Islami’s chief Qazi Hussain Ahmed and other Islamist leaders attempted to disrupt the commission’s functioning.⁷⁴ When its report was released, recommending repeal of these discriminatory laws, not a single government representative attended the launch.⁷⁵

The NCSW found that “instead of remedying social ills, [the Hudood] Ordinances led to an increase in injustice against women and, in fact, became an instrument of oppression against women”; 80 per cent of women prisoners had been charged under the *Zina* Ordinance.⁷⁶

The NCSW also argued that Section 3 of the *Zina* Ordinance violated the rights of non-Muslims since this includes laws relating to religious minorities. The ordinance calls for “at least two Muslim adult male witnesses”, violating Article 25 of the constitution that guarantees equality for all citizens regardless of religion and gender.⁷⁷ The Supreme Court has failed to address these flaws and has repeatedly dismissed challenges to the Eighth Amendment.

In November 2006 parliament passed the Protection of Women Act (PWA). Although a step forward, it did not repeal the Hudood Ordinances. The PWA

removes the offence of rape from the Hudood Ordinances and has returned it to the Pakistan Penal Code, separating *zina* from *zina-bil-jabr* (rape), thus preventing complaints of rape from being converted into charges of unlawful sexual intercourse. This has reduced the number of false accusations against rape victims.⁷⁸ The act also repealed the punishment of whipping. Although it has also made it easier for women to obtain divorce and escape forced marriage, they still cannot give evidence in *Hadd* cases.

While the PWA’s initial draft called for sweeping amendments to the Hudood Ordinances, the Musharraf government watered down the draft, under pressure from its religious allies, particularly the six-party MMA. Calling the new bill “farcical”, HRCP argued that it gave judges a significant amount of latitude to “interpret the law in the most orthodox way” and “complicated matters by creating confusion between Islamic and civil laws, as well as on questions of jurisprudence of the appropriate forum”.⁷⁹ While the PWA transferred rape to the Penal Code, for example, the government failed to issue a notification identifying and transferring authority to the competent civil courts to handle rape cases. Until that was done, the act’s legal provisions could not be implemented, raising doubts that the government had the intention of doing so.

Moreover, “Some of the malice of the *Zina* Ordinance has been carried into the Penal Code”.⁸⁰ The law still allows the registration of fornication cases against married couples until they can prove marriage, contradicting a Supreme Court ruling in 1973, which held that if a man and woman claimed they were married, this claim must be accepted. A significant number of fornication cases against married couples continue to be filed, especially in rural areas where marriages are often not properly registered.⁸¹ Inhumane sentences such as death by stoning and amputations also remain in place.

D. THE FEDERAL SHARIAT COURT

Created by General Zia-ul-Haq, the Federal Shariat Court theoretically falls within the purview of the Supreme Court but amounts to a parallel Islamic judicial system. It has the power to review laws for repug-

⁷² Crisis Group telephone interview, 9 August 2007.

⁷³ Zahid is a former chief justice of the Sindh High Court, and a former justice of the Supreme Court and Federal Shariat Court.

⁷⁴ Crisis Group telephone interview, Majida Rizvi, 9 August 2007.

⁷⁵ Ibid.

⁷⁶ “National Commission on the Status of Women’s Report on Hudood Ordinances 1979”, Government of Pakistan, April 2003.

⁷⁷ Ibid.

⁷⁸ Crisis Group interviews, lawyers and human rights activists, countrywide, July-August 2007.

⁷⁹ “State of Human Rights 2006”, HRCP, op. cit., p. 199.

⁸⁰ Crisis Group interview, Hina Jilani, Lahore, 16 August 2007.

⁸¹ Ibid.

nancy to Islam and serves as an appellate court in Hudood cases. The FSC bench consists only of Muslim judges, all appointed by the executive, three of whom may be religious scholars without any prior judicial or legal experience. The president can modify the terms of appointment at will. He can assign an FSC judge to any other office or function, even to executive positions in the Law Commission, contravening the separation of the executive and judicial branches.⁸² Under Article 203 of the constitution, a lawyer must also be a Muslim to appear before the FSC, even though the court's jurisdiction includes non-Muslims.

Not simply a judicial body, the FSC also exercises quasi-legislative powers. "The FSC tells the parliament how to make the law", said Asma Jahangir.⁸³ The court has, for instance, called for radical changes to the banking system, declaring that Pakistan's interest-based financial system was un-Islamic.⁸⁴ If parliament does not amend a law within the time period given by the FSC, the court's judgment obtains the force of law.⁸⁵

While the ordinary superior courts operate within clearly defined parameters of constitutional interpretation, the FSC's powers of judicial review are far more vague since "Islamic interpretation can vary from one extreme to another".⁸⁶ Such interpretations have been used to impede social change and have provided hardliners within the Pakistani clergy a significant avenue to influence the legal system.

In March 1981, for example, the FSC declared the punishment of stoning by death to be un-Islamic, provoking strong criticism from orthodox *ulema*. Pressured by the religious lobby, the FSC chief justice was removed and a new bench that was authorised to review the earlier judgment overturned it. In 1990, the Court ruled that a blasphemy conviction should carry a mandatory death penalty with no possibility of pardon.

In 1991, the FSC ruled that land reform was contrary to Islam and the teachings of the Holy Prophet. In 1992, it ruled that the *Qisas* (retribution) and *Diyat*

(blood money) law, which allows a party to seek monetary compensation from another where bodily harm has occurred, should also allow the immediate relatives of a murder victim to pardon the perpetrator in return for monetary compensation. The *Qisas* and *Diyat* law⁸⁷ thus allows family members to pardon the killer. This has practically provided legal cover to the practice of so-called "honour killings" – killings of female relatives seen to have disgraced the family.

An October 2004 bill called for more stringent measures against honour killings, including giving senior police officers the power to investigate such cases. Rights activists criticised it for being too weak.⁸⁸ Honour killings still occur "at a colossal level", according to former Supreme Court judge Nasir Aslam Zahid.⁸⁹ An FSC judgment also abolished presidential powers to remit the sentences of convicted killers, ruling that only a murder victim's heirs could exercise such powers.⁹⁰ This has hampered the PPP government's efforts to commute death sentences to life imprisonment and abolish the death penalty.

Even when the FSC is not particularly active, the executive can use it to undermine the judiciary.⁹¹ The president can appoint a permanent judge of a High Court to the FSC without his or her consent, after consultation with the chief justice of the relevant court. A High Court judge who does not accept an appointment to the FSC is "deemed to have retired from this office",⁹² enabling the executive to use the FSC "as a dumping ground for chief justices who refuse to bow before the winds of expediency".⁹³ This power is often exercised to sideline independent judges such as Nasir Aslam Zahid, who was known for judicial activism on illegal incarcerations, and was

⁸² An FSC judge must, under Article 203: "perform such other functions as the President may deem fit; and pass such other order as he may consider appropriate".

⁸³ Crisis Group interview, Lahore, 16 August 2007.

⁸⁴ In June 2002, the Shariat Appellate Bench overturned its own decision and asked the FSC to rehear the original case. The case is still pending. See Shujaiddin Qureshi, "The banks' new clothes", *Newsline*, February 2007.

⁸⁵ Crisis Group interview, constitutional lawyer, Karachi, 20 July 2007.

⁸⁶ Crisis Group interview, Asma Jahangir, Lahore, 16 August 2007.

⁸⁷ The *Qisas* and *Diyat* Ordinance was promulgated by the president in 1990, and was not adopted by parliament until 1997, under Nawaz Sharif's government.

⁸⁸ See "Pakistan: New 'honour killing' law does not go far enough - rights groups", IRIN news, 27 October 2004.

⁸⁹ Crisis Group interview, Karachi, July 2007.

⁹⁰ Mohammad Kamran, "SC Shariat Bench to hear appeal on presidential remissions today", *Daily Times*, 3 December 2003.

⁹¹ For example, the office of the chief justice of the FSC remained vacant under much of Musharraf's tenure, thereby making the court inoperative. However, as part of his restructuring of the judiciary under emergency rule in November, Musharraf appointed a new chief justice and the FSC began to again take up cases.

⁹² Article 203C (5).

⁹³ Khalid Anwar, "Usurping the prerogatives of the National Assembly: The Federal Shari'ah Court" in Tariq Jan et al (eds.), *Pakistan: Between Secularism and Islam* (Islamabad, 2003), p. 191.

transferred to the FSC in 1994.⁹⁴ The Supreme Court itself referred to the FSC bench as a “dumping ground” in its landmark decision in a 1996 case, commonly referred to as the Judges Case, which arrogated to the judiciary significant powers in the appointment and promotion of judges.⁹⁵

While the current FSC bench is more moderate and less influential than it was in the 1980s and 1990s, the very presence of such a court casts a shadow. The FSC has generally been more active during civilian governments since it offers an indirect channel of influence for the army and its allies in the clergy.⁹⁶ While it is too early to tell whether this will be the case during the current democratic transition, the court’s very existence in Pakistan’s judicial system impedes access to justice by perpetuating a parallel legal system. Justice would be best served if the Federal Shariat Court were abolished through a constitutional amendment.⁹⁷

Since Article 227 of the constitution stipulates that all laws should conform to the injunctions of Islam, any ordinary court may pronounce on such matters, precluding the need to bypass the ordinary judiciary on matters of Islamic interpretation.⁹⁸ Finally, a Council of Islamic Ideology, also established under Zia-ul-Haq, can advise parliament on a proposed law’s conformity to Islamic injunctions. The FSC, therefore, only diverts resources away from an under-staffed and under-funded judiciary.

⁹⁴ Crisis Group interviews, lawyers and retired judges, Karachi and Lahore, July-August 2007. See also Sajjad Ali Shah, *Law Courts in a Glass House* (Karachi, 2001), pp. 267-268.

⁹⁵ Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit.

⁹⁶ Crisis Group interviews, countrywide, July-August 2007.

⁹⁷ The case of Mirza Tahir Hussain, a British national, presents a striking depiction of Pakistan’s dual justice system. Sentenced to death by a sessions court in Islamabad in 1989 for highway robbery and murdering a taxi driver, Hussain appealed to the Lahore High Court, which eventually dismissed the charges against him in 1996 for lack of evidence. However, the FSC subsequently took up the case claiming that highway robbery cases after dusk fell under its jurisdiction and sentenced Hussain to death. The Sharia bench of the Supreme Court upheld the sentence in 2003. Under UK pressure, President Musharraf eventually remitted the sentence to life imprisonment; in November 2006, Hussain was finally released. See “Freed after 17 years and home to a hug from the brother who never gave up”, *The Times*, 28 November 2006. See also Asian Human Rights Commission, “PAKISTAN: Online petition for the release of an innocent person facing the death penalty after 18 years in prison”, 19 October 2006.

⁹⁸ A FSC decision is binding on the provincial High Courts and may be appealed in the Supreme Court.

IV. RESTORING THE RULE OF LAW

While discriminatory religious laws must be repealed on fundamental constitutional grounds, it is also necessary to address the political climate that has produced and perpetuated them. Indeed the laws discussed above cannot be dissociated from the absence of strong democratic institutions that effectively defend fundamental rights and constitutionalism. T. Kumar, Amnesty International’s Asia advocacy director, said, “The core of the problem in Pakistan is that the problem of human rights and religious freedoms is not improving because of un-elected leaders trying to take shortcuts to power, and so there is a lack of opportunity for democratic institutions like the judiciary to take hold”.⁹⁹

Religious parties have been able to parlay military patronage into significant political gains that have compromised the delivery of justice.¹⁰⁰ Widespread attacks on minorities reflect a general sentiment that the authorities lack either the political will or the ability to act. The PPP government has taken a more proactive approach, but far more is needed, particularly a commitment by the government and parliamentary opposition to ensure that the rule of law and constitutionalism is not just restored but sustained.¹⁰¹

Any steps toward repealing Islamic laws are certain to draw strong protest from the religious lobby. Whether the mullahs can derail reform efforts, as they have in the past, will depend on how effectively the moderate parties consolidate the democratic transition and build support for reform within and outside parliament. While the judiciary has a constitutional mandate to review and strike down discriminatory laws, the parliament must perform its constitutional legislative function and the political parties must ensure public ownership of the process. “The judiciary doesn’t have implementing force; in which case the pressure of the bar, the media, the parties and the general public is

⁹⁹ Crisis Group interview, Washington DC, September 2007.

¹⁰⁰ The JUI-F, for instance, strongly opposed the PPP government’s decision to commute the death penalty. See “JUI-F opposes commutation of death penalty”, *Dawn*, 8 July 2008.

¹⁰¹ In June 2008, for instance, 23 Ahmadi students were suspended from Punjab Medical College for preaching their beliefs. According to Punjab health secretary Anwaar Ahmed Khan, the university administration was pressured by “over 1,000 highly-charged people” on campus, and gave in fearing that “there would have been bloodshed”. At the PPP government’s insistence, the university reinstated the Ahmadi students. Mohammad Saleem and Zulqemain Tahir, “Ahmadi students fear for safety after expulsion from PMC”, *Herald*, July 2008; and “IJT protests students’ reinstatement”, *Dawn*, 10 July 2008.

needed to enforce [the rule of law]”, said PML-N parliamentarian Siddiq-ul Farooq.¹⁰² Added a prominent lawyer: “We should not expect the restored judges to restore the 1973 constitution. I firmly believe that only political forces should change the political system”.¹⁰³

A. THE PENAL CODE: RESTORING FUNDAMENTAL RIGHTS

In its first tenure¹⁰⁴ Prime Minister Benazir Bhutto’s PPP government had promised constitutional reform but lacked the two-thirds majority needed to reverse Zia’s Eighth Amendment. However, Bhutto’s first government did release all women charged under the Hudood Ordinances.¹⁰⁵ In 1994, Bhutto’s second government ratified the UN Convention for the Elimination of All Forms of Discrimination Against Women and also decided to amend the blasphemy law to require formal authorisation by a judicial magistrate before any blasphemy case could be registered or arrest made. The government also planned to pass a law against the false accusation of blasphemy. Although it failed to follow through, succumbing to the pressure of the religious parties, Bhutto directed district magistrates to release people accused under the blasphemy law until a proper investigation into their cases.

After the president dismissed Bhutto’s second government at the military’s behest in 1996, Nawaz Sharif overturned the order. Nawaz Sharif’s first government had made the death penalty mandatory in blasphemy cases in 1991, following the FSC judgment on the issue discussed above. In its second tenure, the Sharif government passed the *Qisas* and *Diyat* law in 1997. The government also attempted to pass the Fifteenth Amendment Bill in 1998, which called for Shariah to be the basic law of the land, stating: “the provisions of this article shall have effect notwithstanding anything contained in the Constitution, any law or judgement of any Court”. The bill passed the National Assembly but was stalled by the PPP-led opposition in the Senate.¹⁰⁶

Just as it was an advocate of human rights in government during the 1990s, the PPP strongly supported human rights legislation in parliament under Musharraf’s rule. For instance, it introduced the first bill to completely repeal the Hudood Ordinances. In November 2007, PPP Senator, and now law minister, Farooq Hameed Naek strongly criticised the discriminatory legislation. Said Naek: “The blasphemy law is used against political opponents and minorities, but there have been no moves in parliament to do away with it”.¹⁰⁷ In its 2008 manifesto, the PPP vowed to review the “statutes that discriminate against religious minorities and are sources of communal disharmony”.¹⁰⁸ Now in government, the party should take the lead in removing this body of bad laws from the statute books.

The PPP and the PML-N have both pledged to repeal Musharraf’s Seventeenth Amendment that has tilted the balance of power in a parliamentary democracy from the directly elected prime minister, the head of government, to the indirectly elected president, the head of state. The PPP and the PML-N should also forge a consensus on repealing the Eighth Amendment, thus restoring the 1973 constitution to its original form and spirit. Indeed, repealing Zia’s and Musharraf’s amendments in their entirety will be central to rebuilding the justice system.

The PPP government’s decision to table a bill that would allow bail for those accused of murder if their cases were not decided within two years certainly marks a step forward.¹⁰⁹ However, the government appears to be backing down on its decision to replace capital punishment by life imprisonment after opposition from the clergy and other social conservatives. With over 7,000 prisoners on death row,¹¹⁰ it is critical the government stand its ground, seeking parliamentary support of such reform measures, particularly from the PML-N and other moderate parties.¹¹¹

¹⁰² Crisis Group interview, Islamabad, 5 July 2007.

¹⁰³ Crisis Group interview, Lahore, 27 December 2007.

¹⁰⁴ Benazir Bhutto’s first government lasted from 1988-1990, and her second from 1994-1996. Nawaz Sharif’s first government lasted from 1990-1993, and his second from 1997-1999.

¹⁰⁵ Suad Josphe and Afsaneh Najmabadi, *Encyclopaedia of Women and Islamic Culture: Family, Law and Politics* (Leiden, 2003), p. 83.

¹⁰⁶ See “Crime or Custom?”, Human Rights Watch, 1999, at www.hrw.org/reports/1999/pakistan/Pakhtuml-03.htm.

¹⁰⁷ Crisis Group interview, Karachi, 18 July 2007.

¹⁰⁸ See www.ppp.org.pk/manifestos.html.

¹⁰⁹ Syed Faisal Shakeel, “Constitution muted on way to restore judges: Naek”, *Dawn*, 2 September 2008.

¹¹⁰ According to Amnesty International, 88 per cent of all known executions under the death penalty in 2007 occurred in China, Iran, Saudi Arabia, Pakistan and the U.S. “Death penalty: Facts and figures”, Amnesty International, 2 May 2008. “Pakistan: Spate of imminent executions in wake of Mirza Hussain case”, Amnesty International, 1 June 2006.

¹¹¹ Said PML-N spokesperson Siddiqul Farooq, “We will support any reform effort that lessens crime, but the law must also [appeal to] humanity, and treat citizens equally, irrespective of caste, creed and religion”. Crisis Group interview, Islamabad, 5 July 2008.

Legal reforms alone are no guarantee that Pakistan's judiciary will deliver justice. For example, there has not been a single conviction in a gang-rape case since 2003. In February 2007, Zille Huma, a female minister in Punjab's provincial government, was murdered by Ghulam Sarwar, who admitted to killing other women but was never convicted.¹¹² Said a former Supreme Court judge: "There is a problem of reporting and tackling crimes such as these because of the threats involved, so they are not stopped. Huma's murder was a clear case of this".¹¹³ Yet the problem goes far beyond just the public's failure to report and the police's failure to investigate. Judges too, particularly within the lower ranks of the judiciary as earlier mentioned, are far too inclined to give a pass to those responsible for crimes against women and religious and sectarian minorities. The successful implementation of any new legislation will depend on strong institutions, particularly a judiciary that is sensitised to religious, sectarian and gender discrimination.

B. PRIORITISING THE DELIVERY OF JUSTICE

For legal reform to be effective, judicial reform is essential. Indeed, legal reform must be examined in the context of a failing judicial infrastructure. Under-equipped courts and prisons deny access to justice to citizens, especially the poor who are the principal targets of the discriminatory religious laws. The limited writ of the justice system and the resulting vacuum has also enabled widespread vigilantism.

Given that 75 to 80 per cent of cases are handled in the lower courts, far much more investment is needed in expanding the capacity of the subordinate judiciary. The number of pending cases in the civil courts is estimated at 1.5 million. This huge backlog contributes to significant delays. It can take anywhere between ten to twenty years before the final judgment is given in civil cases.¹¹⁴ Successive government law commissions have recommended a substantial increase in the number of judicial officers, courts and other facilities only to have their recommendations ignored.¹¹⁵ For an

efficient subordinate judicial system, a civil judge should have no more than 300 cases in his file at any time. By this measure, some 250 more judges are needed in Sindh alone.¹¹⁶ The government needs to give greater priority not just to hiring new judges but also to judicial training to ensure that the subordinate judiciary has competent and committed personnel.

In criminal cases, insufficient government investment has resulted in corruption and inefficiency within both the courts and the police. Inadequate pay and resources, limited investigation and prosecution capacities and long gaps between the filing of charges and trial dates during which evidence often disappears are some of the problems that must be urgently addressed.¹¹⁷ Criminal cases can take more than five years to process, except when tried by special courts, such as accountability courts, where cases are often politically motivated and miscarriage of justice is even more likely.¹¹⁸ As a result, Pakistan has a critically low arrest and conviction rate.¹¹⁹

According to Article 10(2) of the constitution: "Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate". According to the law, detention after arrest depends on the order of a magistrate who must be satisfied that there are prima facie sufficient grounds or else the detainee is placed in the court's custody. The law also prohibits the police from detaining a person for more than fourteen days, after which the detainee must be transferred to a prison that is responsible for the prisoner's presence in court. A trial can only begin after a *challan*, or case brief, has been produced. This process, however, often takes up to two years, and *challans* are sometimes not submitted at all.¹²⁰

Under-trial prisoners are often not brought to the court on trial dates because of the unavailability of transpor-

¹¹² "State of Human Rights 2007", HRCP, p. 148.

¹¹³ Crisis Group interview, Karachi, July 2007.

¹¹⁴ Statistics provided to Crisis Group by former Supreme Court judge Nasir Aslam Zahid, Karachi, 17 July 2007. See also Figure 1: Pendency Index by Province 2001-2004, in "Charts and Tables: Judicial Policy Action No.14", Access to Justice Program, Ministry of Law, Justice and Human Rights, Government of Pakistan.

¹¹⁵ See Nasir Aslam Zahid, "Delay, Arrears and Denial of Justice". Paper presented at First South Asian Regional Colloquium on Access to Justice, New Delhi, 1-3 November 2002.

¹¹⁶ Crisis Group interview, Nasir Aslam Zahid, Karachi, 17 July 2007.

¹¹⁷ Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit. See also Crisis Group Asia Report N°157, *Reforming Pakistan's Police*, 14 July 2008; and Ishaq Tanoli, "Police non-cooperation causing serious delays in justice system", *Dawn*, 24 July 2008.

¹¹⁸ See Zahid, "Delay, Arrears and Denial of Justice", op. cit.

¹¹⁹ Pakistan's prosecution rate is estimated at less than 10 per cent. Crisis Group interviews, lawyers and retired judges, Karachi, July 2007.

¹²⁰ Crisis Group interview, HRCP director I.A. Rehman, Lahore, 17 August 2007.

tation.¹²¹ Prison personnel also seek bribes from prisoners to ensure access to a judge.¹²² Fearing indefinite detention, many detainees are forced to plead guilty to obtain lower sentences or to bribe police officials rather than seeking justice through the court system. “A poor person eventually gives up”, said PML-N spokesperson Siddiq-ul Farooq. “He feels it’s better to make a compromise, rather than wait until a hearing”.¹²³ The huge backlog of cases also provides opportunities for corruption for many within the subordinate judiciary as judges seek bribes to fix an early hearing. In fact, access to justice is often only available when the higher judiciary is willing to enforce fundamental constitutional rights, including through suo motu¹²⁴ action.¹²⁵

In 1993, hearing an appeal by the Balochistan provincial government, the Supreme Court ruled: “The right of ‘access to justice to all’ is a well recognised inviolable right enshrined in Article 9 of the Constitution”; it includes due notice of proceedings, an impartial tribunal or court and a reasonable opportunity of defence. An unreformed judicial system has, however, denied prisoners’ access to justice, making it even more important for the PPP government to translate pledges of judicial reform into practice.

While the High Courts often reprimand subordinate court judges for inefficiency and misconduct relating to financial corruption, they have seldom held judges of these courts accountable for unfair trials and convictions, even though they can be disciplined for misconduct.¹²⁶ Although the High Court’s revisional jurisdiction in civil and criminal matters permits it to take suo motu action on unfair trials and convictions, this is rarely exercised. “Subordinate court judges are too often let off for bad convictions”, said a member of the Pakistan Bar Council.¹²⁷

¹²¹ Crisis Group telephone interview, former Supreme Court judge Majida Rizvi, 9 August 2007.

¹²² Crisis Group interview, Humayun Ehsan, principal, Pakistan Law College, Lahore, 15 August 2007.

¹²³ Crisis Group interview, Islamabad, 5 July 2007.

¹²⁴ Suo motu is a Latin legal term for “on its own motion”, and in this context relates to the court taking up a case without a party filing a petition.

¹²⁵ For example, responding to a news report that two women were abducted by police in Islamabad and detained illegally in the Rawalpindi, the Supreme Court ordered the women’s immediate release and called for their testimony before a district magistrate. Shakeel Anjum, “Police spring into action on Supreme Court’s orders”, *The News*, 31 August 2007.

¹²⁶ Crisis Group interviews, lawyers and former judges, countrywide, July-August 2007.

¹²⁷ Crisis Group interview, Hamid Khan, Lahore, 16 August 2007.

The superior judiciary must take its responsibility of overseeing the subordinate judiciary far more seriously, evaluating the performance of judges and quality of judgments in the lower courts. The higher courts must hold lower courts accountable in providing fair and timely trials, delivering impartial verdicts and honouring the rights of petitioners and defendants.

In September 2007, the National Judicial Policy Making Committee, the country’s top legal policymaking body, noted that corruption in lower courts led to deviations from the law, demanding that the higher courts take greater steps in monitoring the lower courts, including through surprise visits.¹²⁸ While there are existing mechanisms of oversight, the process is hampered by lack of capacity. Urbanisation and the emergence of new districts have expanded the number of lower courts, while the numbers of higher court judges remain unchanged. Higher court judges also typically ignore areas that are less accessible, leaving review of those courts to district and sessions court judges, which are seldom carried out.¹²⁹

The subordinate judiciary’s effectiveness largely depends on the higher judiciary’s leadership, which has the ultimate responsibility for the rule of law. They must also provide consistent and meaningful interpretation of the constitution for the lower courts to follow, particularly on matters of fundamental rights and on Islamic jurisprudence, something they have, with some exceptions, failed to do. Instead the superior judiciary has more often than not succumbed to executive pressure, particularly during periods of military rule.¹³⁰

The effects may then filter down to the subordinate judiciary. High Court chief justices can allocate cases to specific judges and also assign judges to lower courts across a province. The former chief justice of the Lahore High Court, a Musharraf ally, for instance, regularly promoted handpicked judges and sent important cases “only to those benches manned by his favourites”.¹³¹ The constitution should be amended to limit a chief justice’s powers to assign cases and judges, transferring that authority to a new managerial division within the courts.¹³²

¹²⁸ Nasir Iqbal, “Order to ‘check’ corruption in judiciary”, *Dawn*, 9 September 2007.

¹²⁹ Crisis Group interview, Supreme Court advocate, Lahore, 17 August 2007.

¹³⁰ Crisis Group interviews, lawyers and retired judges, July-August 2007.

¹³¹ Crisis Group interview, Lahore, 24 December 2007.

¹³² See Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit.

Like the courts, Pakistan's prisons are overburdened. According to HRCP, prisons were overcrowded by 133 per cent countrywide in 2007, with 95,016 prisoners compared to the authorised strength of 40,825, largely because of "a sluggish criminal justice system".¹³³ In recent testimony to a Senate committee, the superintendent of Rawalpindi Central Jail said that the facility had an official capacity of 1,994 but the present population was over 5,900.¹³⁴ The situation is no better in the smaller provinces. In Sindh's capital Karachi, the central prison has a capacity of 1,500 but in July 2007 contained over 5,500 prisoners.¹³⁵ The nearby juvenile facility had a total population of 413, although only ten had been convicted.¹³⁶

Providing bail to prisoners would greatly reduce the burden on prisons but bail is seldom granted even where allowed by law.¹³⁷ Moreover, too many offences, including those under the religious laws discussed above, are non-bailable. According to a former Supreme Court judge: "Our system is working on the concept that you arrest a person, keep them in prison for six months to a year, then either throw them out or ask them to confess and sentence them to time already served". He added that public interest litigation could certainly help but only on a case-by-case basis. It "does not change the system. Jurists should look into the problem and decide how the law has to be improved".¹³⁸

Better training of prison staff in recent years and the induction of more qualified personnel have somewhat improved prison conditions.¹³⁹ However, overcrowded prisons, unmonitored staff and long delays in trying cases increase the chances of abuse. In the absence of public defenders, the cost of litigation, which also includes unreasonably high paper fees, application fees and court fees further hampers access to justice, particularly for the poor. "The litigant is the most miserable class in Pakistan", said PPP spokesperson Farhatullah Babar.¹⁴⁰ So long as the courts are not perceived as a viable option for the majority of citizens, prison-

ers will continue seeking extra-legal remedies, including bribes, and thus feed a corrupt justice system.

Prime Minister Yusuf Raza Gillani has declared that prison reform will be a major part of his legislative agenda. His cabinet intends to present a bill in parliament seeking an end to the practice of imprisoning under-trial defendants.¹⁴¹ Law Minister Farooq Hameed Naek also intends to create an autonomous public defenders office for free legal aid to the poor.¹⁴² The government should not allow challenges by the religious lobby and social conservatives to stall its reform agenda. It should respond by building up public opinion and seeking support in parliament for measures such as commuting death sentences into life imprisonment and encourage a public debate on abolishing the death penalty altogether.

¹³³ "State of Human Rights 2007", Human Rights Commission of Pakistan Annual Report, 2008.

¹³⁴ "Senate body suggests separate jail for women: Adiala jail congestion", *Dawn*, 3 July 2008.

¹³⁵ Statistics provided during Crisis Group visit to Karachi prison, July 2007.

¹³⁶ Statistics provided to Crisis Group during visit to Karachi Juvenile Prison, July 2007.

¹³⁷ Crisis Group interview, HRCP director I.A. Rehman, Lahore, 17 August 2007.

¹³⁸ Crisis Group interview, Nasir Aslam Zahid, Karachi, 17 July 2007.

¹³⁹ Crisis Group interview, Hina Jilani, Lahore, 16 August 2007.

¹⁴⁰ Crisis Group interview, Islamabad, 4 July 2007.

¹⁴¹ Gillani said: "Let the judges first hear the cases and see whether they are guilty. [Until] that time, they should not be put in jails". Rauf Klasra, "Gilani now wants relief for under-trial prisoners", *The News*, 23 June 2008.

¹⁴² Crisis Group interview, Farooq Hameed Naek, Islamabad, June 2008.

V. CONSOLIDATING DEMOCRACY

A. REVERSING MUSHARRAF'S LEGACY

On 7 August 2008, in a joint communiqué PPP leader Asif Ali Zardari and PML-N leader Nawaz Sharif had declared their coalition government's "resolve to implement the Charter of Democracy, to work together to steer the country on to the path of constitutional governance, restoring the supremacy of the constitution, independence of the judiciary, [the] rule of law, and to avert the impending economic crisis, which the coalition inherited on 31 March, 2008".¹⁴³ Responding to the statement, HRCP said that it was "high time the coalition rose to the occasion and made the electorate forgive their dithering, fulfilling their pledges to completely break from authoritarianism to a democratic transition based on parliamentary sovereignty and judicial independence". It added: "The coalition leaders' earnestness in resolutely pursuing the course they have chosen alone will guarantee them the public support without which the state cannot achieve anything".¹⁴⁴

On 26 August, however, the six-month-old coalition government collapsed, just a week after it had successfully used the threat of impeachment to force President Musharraf to resign. Announcing that his party would now sit on the opposition benches, Sharif accused Zardari of thrice violating written agreements to restore the judiciary.¹⁴⁵

1. Repealing the Seventeenth Amendment

On 7 August, the PPP and the PML-N had also agreed that as long as the Seventeenth Amendment, including Article 58-2 (b) remained in place, the two coalition partners would put up a non-partisan candidate for the presidency.¹⁴⁶ Asif Ali Zardari's decision to

contest the presidency violated this agreement, as did the PPP's failure to restore the judges within 24 hours of Musharraf's resignation or impeachment.

While the unravelling of the coalition is certainly a setback for the democratic transition, the ruling and opposition parties in parliament must urgently reach consensus on repealing Musharraf's Seventeenth Amendment. They must, in particular, immediately introduce a constitutional amendment to repeal Article 58-2 (b), which gave the president the power to dismiss elected governments.

In the run-up to the presidential election, Zardari emphasised: "If I am elected president, one of my highest priorities will be to support the prime minister, the National Assembly and the Senate to amend the constitution to bring back into balance the powers of the presidency and thereby reduce its ability to bring down democratic governance".¹⁴⁷ In his first presidential address to the joint session of parliament, Zardari said: "The days of constitutional deviation are over". Calling on parliament to "form an all parties committee to revisit the Seventeenth Amendment and article 58 (2) b", he said: "Never before in the history of the country has a president stood here and given away his powers".¹⁴⁸ His government must now work with the parliamentary opposition to table a constitutional amendment bill repealing the article and also returning to the prime minister the powers to appoint the governors, the three service chiefs and the chief justice of the Supreme Court.¹⁴⁹

2. Restoring the judges

The government has moved forward on restoring the judges. To date, all but four Supreme Court judges and deposed Chief Justice Chaudhry have taken fresh

¹⁴³Text of 7 August 2008 joint communiqué, *The News*, Islamabad, 8 August 2007. On 14 May 2006, PPP leader Benazir Bhutto and PML-N leader Nawaz Sharif, then both in exile, had signed the Charter of Democracy in London, committing their parties to fighting dictatorship, removing the military's constitutional distortions and strengthening parliamentary democracy.

¹⁴⁴"HRCP urges coalition to redeem all pledges", *Dawn*, 9 August 2008.

¹⁴⁵On 17 September, PML-N's Chaudhry Nasir Ali Khan was appointed the leader of the opposition in the National Assembly, the lower house of parliament.

¹⁴⁶The written agreement to implement the Murree accord, made public by Nawaz Sharif on 25 August said that the coalition partners would name Musharraf's replacement along the following lines: "A. In case the office of the President still retains the powers acquired under Seventeenth Amendment,

a nationally respected, non-partisan, and pro-democracy figure acceptable to coalition partners will be put forward as the consensus candidate for the office of the President. B. In case the Seventeenth Amendment is repealed and the powers of the President are restricted to the original powers as envisaged in 1973 constitution then the PPP will have the right to put forward its own candidate". "PML-N makes public text of agreement to implement Murree Declaration", Associated Press of Pakistan, 25 August 2008.

¹⁴⁷Asif Ali Zardari, "Democracy within our reach", *The Washington Post*, 4 September 2008.

¹⁴⁸Asim Yasin, "President willing to surrender powers", *The News*, 21 September 2008; and "'Revisit' presidential powers – Zardari's offer to parliament", *Dawn*, 21 September 2008.

¹⁴⁹The PPP and PML-N had agreed to do so in the May 2006 Charter of Democracy.

oaths to the constitution for their reinstatement.¹⁵⁰ The vast majority of High Court judges have also been restored.¹⁵¹ As mentioned earlier, the PPP had, on several occasions, accepted the PML-N's demand to restore the judges through a National Assembly resolution, followed by an executive order of the prime minister. Law Minister Naek, however, insists "An executive order and a parliamentary restoration would have lacked constitutional and legal standing".¹⁵²

Because the constitution provided no recourse on the issue of reinstating or reappointing judges, and the PML-N refused to reach agreement on an appropriate constitutional amendment, the government says it had no choice but to restore the judges individually after they had taken a fresh oath to the constitution. Most judges have been given the seniority they held on 2 November 2007, although some deposed High Court judges have been elevated to the Supreme Court.¹⁵³

Although Prime Minister Yousaf Raza Gilani insists that all remaining judges, including Iftikhar Muhammad Chaudhry, would be restored,¹⁵⁴ the government seems disinclined to restore the deposed chief, and particularly disinclined to restore him to his position as chief justice of the Supreme Court. Law Minister Naek insists: "Doors are open for all the deposed judges to take a fresh oath under the Constitution. Nobody is asking them to take an oath under any PCO (Provisional Constitution Order)". When asked about Chaudhry's fate, he said: "Justice [Abdul Hameed] Dogar is the rightful Chief Justice and we have to think twice before reinstating the deposed chief justice as it will create a constitutional crisis in the country".¹⁵⁵ Since

Dogar had taken oath under the Third Schedule to the constitution, in accordance with Article 270-C, said Naek, his appointment was legal and constitutional: "So far as the constitutional obligations and provisions are concerned, there can be no two Chief Justices".¹⁵⁶

The government must stand by its pledge to restore all remaining deposed judges, including Iftikhar Chaudhry, leaving it to the Supreme Court, which should constitute a full bench for the purpose, to decide on the legality of Dogar's appointment as chief justice by President Musharraf and Chaudhry's restoration to that post. Precedent for this does exist. In 1988, after dismissing Muhammad Khan Junejo's government, Zia-ul-Haq appointed a caretaker government without a prime minister. That set-up lasted until Benazir Bhutto became prime minister in December 1988. In a case challenging the validity of the interim government, known as the Haji Saifullah case, the Supreme Court ruled that the office of the prime minister "was necessary at all times for running the affairs of the country", and that the absence of a prime minister violated the essential features of the constitution, effectively declaring the interim government unconstitutional. Following the judgment, the law ministry issued a notice for the dismissal of the more than 30 superior court judges appointed during that period. In a review petition, however, the Supreme Court said that the law ministry did not have the power to dismiss those judges, and that the courts alone could decide their tenure.¹⁵⁷

Terming the government's method of restoration a "humiliation of the judiciary and mockery of the justice system", Sharif stresses that a restored judiciary minus Iftikhar Chaudhry would be "a joke".¹⁵⁸ The

¹⁵⁰ Of the five still to be restored, Justice Falak Sher retired on 20 September 2008.

¹⁵¹ According to the law minister, 80 to 90 per cent of the sacked judges have already been restored. Nasir Iqbal, "Four deposed judges take fresh oath", *Dawn*, 21 September 2008.

¹⁵² Crisis Group interview, Islamabad, June 2008.

¹⁵³ An announcement by the law and justice division, after three deposed judges took a fresh oath in September and resumed their positions as judges of the Supreme Court said: "The president has been pleased to re-appoint the following deposed judges of the Supreme Court of Pakistan with effect from the date they take their oath of their offices". The notification after a number of Lahore High Court judges were restored after taking a fresh oath said that they would "retain their original seniority position as it stood on November 2, 2007, and shall also be entitled to pensionary benefits on the basis of their original appointment as judges of the High Court in accordance with the Constitution and the law".

¹⁵⁴ Ansar Abbasi, "Gilani firm on reinstatement of all judges", *The News*, 26 September 2008.

¹⁵⁵ Dogar will retire on 21 March 2009 after which Justice Sardar Muhammad Raza Khan, restored to the Supreme Court on 20 September 2008, would, according to the senior-

ity list, become chief justice. Khan will retire in February 2010. Nasir Iqbal, "Three deposed Supreme Court judges take oath: Chief Justice issue to be taken up after Iftikhar's oath: Naek", *Dawn*, 6 September 2008. Nasir Iqbal, "Dogar 'rightful' chief justice, says Naek," *Dawn*, 28 August 2008. See also Syed Faisal Shakeel, "Constitution mute on way to restore judges: Naek", *Dawn*, 2 September 2008.

¹⁵⁶ "Four deposed Pakistan judges reinstated", Press Trust of India, 20 September 2008.

¹⁵⁷ Crisis Group interview, Iftikhar Gilani, federal law minister at the time of the case, Islamabad, 10 July 2008. See also Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford, 2001), pp. 716-717.

¹⁵⁸ Said Sharif: "It is not difficult to move a motion for reinstatement of the judges in parliament, debate it and carry it the same day. If you don't want to do it in ten minutes, take a few hours and issue executive orders after the passage of the resolution in parliament, restoring the judges in the evening". This, he said, was the roadmap his party had given the PPP, which had been accepted. Amir Wasim, "PPP forces Nawaz

leadership of the lawyers' movement agrees, rejecting the government's mechanism for restoring the judges on the grounds that reappointment, through a fresh oath, amounted to approving Musharraf's illegal acts after the imposition of martial law in November 2007. Calling for Iftikhar Chaudhry to once again become the "functional" chief justice, refusing to accept Justice Abdul Hameed Dogar as the constitutional chief justice, they are also adamant that the judges who had taken oath under Musharraf's PCO must be sacked.¹⁵⁹

Yet the majority of the judges deposed by Musharraf have accepted the government's mechanism for restoration, with some judges complaining that the leadership of the lawyers' movement are taking decisions without consulting them.¹⁶⁰ Leaders of the lawyers' movement admit that the government has gained public credibility by restoring a large number of judges. While the implications of the lawyers' failure to compromise and the future directions of their movement for judicial independence will be discussed below, the movement certainly appears to be losing public support. Supreme Court Bar Association President Aitzaz Ahsen admitted: "The general public, columnists and politicians are already asking the lawyers to accept the change, as negotiation would not serve anybody".¹⁶¹

B. ASSESSING THE PPP'S CONSTITUTIONAL REFORM PACKAGE

During negotiations with the PML-N on democratic reform in general, and more specifically on the restoration of the deposed judges, the PPP government had

to set new deadline", *Dawn*, 23 August 2008; and Nasir Jamal, "Nawaz puts his foot down", *Dawn*, 24 August 2008.

¹⁵⁹The Lahore High Court Bar Association also passed a resolution declaring Asif Ali Zardari's oath as president illegal because Chief Justice Dogar administered it. "President's oath illegal: LHBA", *Dawn*, 12 September 2008. Hamid Khan, a leading member of the movement, said that the lawyers would continue to struggle until the restoration of the "real judges" and the ouster of the "PCO judges". "Struggle for fair justice system to continue: Wajih", *Dawn*, 20 August 2008.

¹⁶⁰After his restoration, a Supreme Court judge said that he had been sacked by dictator but reinstated by a democratic government. Nasir Iqbal, "Dogar 'rightful' chief justice, says Naek", *Dawn*, 28 August 2008.

¹⁶¹"Government cashes in on fresh oath offers, says Aitzaz", *Dawn*, 19 September 2008. On another occasion, Ahsen reminded the deposed judges who had been restored after taking a fresh oath: "It is only because of the lawyers' movement that reinstatement of the deposed judges became an issue, otherwise nobody would have remembered them". Nasir Iqbal, "Lawyers kept judges issue alive: Aitzaz", *Dawn*, 31 August 2008.

drafted a constitutional amendment bill in spring 2008. Law Minister Naek emphasised that the proposed package of amendments prepared by his ministry was open to debate, discussion and revision within and outside parliament.¹⁶²

The preface of the proposed constitutional amendment bill, stating "reasons and objectives", noted: "Through extra-constitutional deviation, the Constitution of the Islamic Republic of Pakistan had undergone substantial changes, adversely affecting [the] parliamentary system envisaged by it. Substantial amendments have been made [in this proposed bill] to restore its parliamentary character and also ensure independence of the judiciary".¹⁶³ After the PML-N's decision to withdraw from the coalition, the government still plans on tabling such a bill. If the bill is to restore parliamentary democracy, judicial independence and the rule of law, the government should remove those amendments in the original draft which, as HRCP correctly commented, are unlikely "to deepen democratic governance", including meaningful judicial reform.¹⁶⁴

1. Judicial appointments

While necessary, the restoration of the pre-emergency judiciary is not sufficient for meaningful judicial reform. It can only be achieved through constitutional provisions that ensure free and transparent processes of judicial appointments, promotions and removals.

Under Article 177 of the constitution, the president appoints the chief justice of the Supreme Court, and the other Supreme Court judges in consultation with the chief justice. Under Article 193, the president also appoints judges of the High Courts in consultation with the Supreme Court chief justice, the provincial governor, and the High Court chief justice, except for an appointment to the latter's office. While any Pakistani citizen with fifteen years experience as a High Court advocate can be appointed to the Supreme Court, in practice Supreme Court judges are elevated from the High Courts rather than appointed directly from the bar. High Court appointments are presently made either from the private bar or from the ranks of the subordinate judiciary.

¹⁶²Crisis Group interview, Islamabad, June 2008. The preface of the drafted bill, provided to Crisis Group by Naek, states: "This is not a sacrosanct document and can be changed or altered by coalition partners in the parliament and others".

¹⁶³Preface, proposed constitutional amendment bill.

¹⁶⁴HRCP's study of the proposed constitutional amendment package, press release, 7 June 2008.

In the Judge's Case of 1996, the Supreme Court held that "the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice", and unless there are "concrete and valid reasons" is entitled to the appointment.¹⁶⁵ In a subsequent decision, the Supreme Court extended this rule to the appointment of the chief justice of the Supreme Court.¹⁶⁶ While this has now become the general doctrine, there is still need to formally limit the executive's power over judicial appointments.¹⁶⁷

In 2005, in a private member bill in the Senate, the PPP had called for the creation of a Judicial Commission for judicial appointments, composed of the chief justice of the Supreme Court, as its chair; the two next most senior Supreme Court justices; the four High Court chief justices; a member of the Pakistan Bar Council, nominated by the Council; the president of the Supreme Court Bar Association (in matters related to the Supreme Court); and the four presidents of the High Court bar associations (in matters related to their respective High Court).¹⁶⁸ The May 2006 Charter of Democracy called for the creation of a similar commission.

The PPP's proposed constitutional amendment bill contains a provision for establishing such a commission but excludes bar association representatives. According to the proposal, the commission would comprise the Supreme Court chief justice (chairperson), all chief justices of the High Courts, including the Islamabad High Court or, in the event of their absence, the most senior judge of the relevant bench, and the federal minister for law and justice, who for the Supreme Court chief justice's appointment would be the commission's chair. The Judicial Commission would put forward two names to the prime minister, who after choosing one would forward his choice to the Joint Parliamentary Committee, comprising of three

members of the treasury bench, two members of the opposition in the National Assembly and one senator nominated by the leader of the opposition for final confirmation.¹⁶⁹

Similarly, a commission would be established for the appointments of High Court judges, comprising the chief justice of the Supreme Court (chairperson); the chief justice of the relevant High Court; and the federal minister for law and justice. In the case of a High Court chief justice's appointment, the federal law minister would chair the commission. The process of choosing and confirming High Court judges would be equivalent to the one at the federal level, with the province's chief minister and a provincial Joint Parliamentary Committee, playing the relevant role.

The PPP should reconsider excluding bar representatives from the proposed commission. Bar associations have a major stake in judicial appointments and are well placed to assess the merits of a lawyer or judge considered for elevation. The presence of the law minister in both commissions, especially as chairperson in the selection of the chief justices of the Supreme Court and High Courts, also negates the principle of the separation of powers between the executive and judiciary. "The commission must be headed by a neutral party", said a prominent Supreme Court advocate. "The law minister's power needs to be limited".¹⁷⁰ The proposed commission, moreover, fails to refer to a judge's seniority. The Pakistan Bar Council protested: "It is the consistent view of the lawyers that the senior most judge of the Supreme Court should be appointed the Chief Justice of Pakistan".¹⁷¹

If the seniority principle is replaced by the proposed selection process, any Supreme Court judge aspiring to the office of chief justice would be inclined to seek the law minister's favour and the support of the sitting chief justice and the chief justices of the provincial High Courts. Argued Supreme Court advocate Athar Minalla, a spokesperson for the deposed chief justice and a former minister under Musharraf: "Since High Court chief justices [would be] also on the commission, and since all appeals from the High Courts go to the Supreme Court, a Supreme Court judge [aspiring

¹⁶⁵ Al-Jehad Trust, PLD 1996 Supreme Court, pp. 324, 363-367.

¹⁶⁶ Asad Ali v. Federation of Pakistan, PLD 1998 Supreme Court.

¹⁶⁷ According to former Supreme Court Chief Justice Saeduzzaman Siddiqui, who was removed during Musharraf's coup in October 1999: "If civilian governments strictly follow the rule according to the Judges Case, it's a reasonable guarantee that people of integrity will be appointed to the High Courts and the Supreme Court". Crisis Group interview, Karachi, July 2007.

¹⁶⁸ The PPP's 2005 bill was based on recommendations from the Pakistan Bar Council and Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit. "This wide endorsement means that if we don't do it, we will lose credibility and political capital", said the PPP spokesperson, Farhatullah Babar. Crisis Group interview, Islamabad, July 2007.

¹⁶⁹ Insertion of new Article 177A, PPP's proposed constitutional amendment bill.

¹⁷⁰ Crisis Group interview, Islamabad, 15 July 2008.

¹⁷¹ "Resolution on: Consideration of the Constitutional Amendment Package Proposed by the Government", Pakistan Bar Council, 22 June 2008.

to be chief justice] will think twice before overturning any decision from a High Court”.¹⁷²

A provision in the PPP’s proposed bill also prohibits judges of the superior courts from taking up other public offices until two years after retirement. Since judges are often given lucrative executive appointments as a reward for favourable decisions, this would be a welcome step. However, some lawyers believe even two years is not enough time to ensure that higher court judges are not influenced by the lure of government positions after retirement. One lawyer argued, “retired judges shouldn’t be appointed [to public offices] until a new government is in place”; other lawyers suggested that there should be a bar on such appointments for life.¹⁷³

2. Judicial accountability

Under Article 209 of the constitution, the Supreme Judicial Council (SJC), composed of the chief justice of Pakistan, the two next most senior Supreme Court justices and the two most senior High Court chief justices, has sole responsibility for disciplinary action against judges. It relies on references from the president and, under the Seventeenth Amendment, any other party, including its own motions.

The SJC has been largely non-functional or, when active, a political tool against opponents of military regimes.¹⁷⁴ During Zia-ul-Haq’s military regime, the SJC began proceedings against Ghulam Safdar Shah, one of the dissenting Supreme Court judges in the 1979 murder conviction of Prime Minister Zulfikar Ali Bhutto. Shah claimed other judges on the bench had tried to pressure him into supporting a guilty verdict.¹⁷⁵

The PPP’s proposed constitutional amendment bill would replace the SJC with a Judicial Commission comprising a “non-politicised retired Chief Justice of Pakistan who shall be the Chairman of the Commission”; two “non-politicised” retired Supreme Court judges; and a “non-politicised” retired judge of each of the High Courts. The president would appoint all members “on terms and conditions to be determined by the Federal Government”.¹⁷⁶ There is no definition

of the term “non-politicised” or any reference to the competent authority that would determine it. The term’s vagueness makes it vulnerable to manipulation. Placing these appointments in the hands of the executive would also compromise neutrality. Instead, lawyers and retired judges have suggested that the commission responsible for judicial appointments should also be responsible for disciplinary action against judges, a mechanism also recommended by the Charter of Democracy.¹⁷⁷

Accountability is essential for a judiciary with a record of corruption and which has historically been complicit in the military’s subversions of the constitution.¹⁷⁸ However, it is equally important that any instrument of accountability does not place the judiciary under executive control.¹⁷⁹ Article 175 of the constitution calls for the progressive separation of the judiciary from the executive within fourteen years of the constitution’s ratification (in 1973). In 2007, Law Minister Naek, then an opposition senator, had told Crisis Group: “Article 175 has to be applied in totality. But what has the government done [to ensure this]?”¹⁸⁰ Minister Naek is now in a position to convince his government and the parliamentary opposition to make judicial independence a reality.

3. Judicial activism

Article 184(3) gives the Supreme Court the power to take suo motu action and to pass enforceable orders on “a question of public importance with reference to the enforcement of any of the Fundamental Rights” conferred by the constitution. While the court has largely chosen to look the other way when authoritarian regimes violated fundamental rights, at certain junctures it has used its judicial powers. These include the Supreme

¹⁷² Crisis Group interview, Islamabad, 28 July 2008.

¹⁷² Crisis Group interview, Islamabad, 28 July 2008.

¹⁷³ Crisis Group interviews, Iftikhar Gilani, Islamabad, 10 July 2008, and other bar leaders, Islamabad and Lahore, July 2008.

¹⁷⁴ Crisis Group interviews, lawyers, Islamabad and Lahore, July 2008.

¹⁷⁵ The SJC began the proceedings under the pretext that one of Shah’s educational certificates had been forged. Shah eventually left the country.

¹⁷⁶ Text of proposed constitutional amendment bill.

¹⁷⁷ Crisis Group interviews, lawyers, July 2008.

¹⁷⁸ Crisis Group has recommended new administrative structures and oversight mechanisms to monitor and investigate corruption in the judiciary, including an auditing unit within the judicial administration that would require judges to periodically report their income and benefits, and those of close relations. Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit., p. 14.

¹⁷⁹ In November 2004, Crisis Group wrote: “An effective removal mechanism is necessary to ensure that judges who succumb to financial or political corruption can be taken off the bench. The power to divest a judge of his or her robes, however, also can be a potent political tool. Combining the worst of all possibilities, the present mechanisms for removing judges fail to address financial and political corruption while vesting excessive power in the hands of the executive”. Crisis Group Report, *Building Judicial Independence in Pakistan*, op. cit., p. 12.

¹⁸⁰ Crisis Group interview, Karachi, 19 July 2007.

Court ruling that public hanging violated the dignity of man as enshrined in Article 14 of the constitution.¹⁸¹ Under Chief Justice Chaudhry, the court frequently used these powers, intervening, for instance, in the government's controversial sale of Pakistan Steel Mills and proactively pursuing cases of "disappearances", thus directly challenging the role of the intelligence agencies.

The PPP's proposed bill would require a bench of at least five judges, constituted by the chief justice and two of the most senior judges of the Supreme Court, to hear suo motu cases.¹⁸² It would further limit the judiciary to making only declaratory judgments in fundamental rights cases, revoking its authority to pass enforceable orders. "This undermines the Court's ability to provide relief to citizens", said a human rights activist.¹⁸³ Equally critical of the proposed amendment, HRCP said: "the original jurisdiction of the Supreme Court to hear matters of public importance with reference to the enforcement of Fundamental Rights is severely curtailed by the package".¹⁸⁴

The PPP government would be best served by removing this controversial clause from any constitutional amendment bill. PPP parliamentarians recognise the contribution of judicial activism in upholding fundamental rights. Said Fakhrunnisa Khokar, a PPP member of the National Assembly and former High Court judge: "Suo moto power gives a constitutional court the capacity to impart justice to those who don't have access to it, or can't afford it".¹⁸⁵ PPP leader Benazir Bhutto had herself approached the court in June 2007 for redress, petitioning the Supreme Court under Article 184(3) for a rectification of the Election Commission's voters lists, which had several million names missing.¹⁸⁶

The abuse of suo motu powers and public interest litigation by judges is certainly a matter of concern. Even those who support the retention of such powers stress that judges should use them sparingly. "Public interest litigation can become extremely harmful, especially when there is no other democratic institution to serve as counter balance", said HRCP's Asma Jahangir.¹⁸⁷ In the 1990s, Supreme Court Chief Justice Sajjad Ali Shah abused the court's powers under Article 184(3)

when his seniority and thus his claim to the chief justice's position were challenged.¹⁸⁸ Indeed, superior court judges can abuse these powers, particularly when there is a vacuum created by a weak subordinate judiciary and a weak parliament.¹⁸⁹

There is little legal recourse if the Supreme Court abuses such power. However, rather than a constitutional amendment, the Supreme Court's Rules of Business could be used to define the parameters of public interest litigation. Lawyers' associations, such as the SCBA, can also help ensure judicial restraint.¹⁹⁰

4. Ending the doctrine of necessity

According to Article 6 of the constitution: "Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason". The PPP's proposed constitutional amendment bill would prevent "any court, including a High Court or the Supreme Court" condoning, affirming or validating "any extra-constitutional measure or takeover [of government] by use of force or show of force or by other unconstitutional means as envisaged in Article 6".¹⁹¹ Another proposed amendment states: "A Judge of the Supreme Court, a High Court or the Federal Shariat Court who makes [an] oath other than that prescribed in the Third Schedule, shall cease to be a Judge of the Supreme Court or a High Court or the Federal Shariat Court as the case may be".¹⁹²

While these proposed amendments should only be included in any future bill after extensive consultations with the bar councils and consensus in parliament, the elected government has reason to doubt the judiciary's commitment to the constitution, given the Court's past record. The two largest parties in parliament, the ruling PPP and its PML-N opposition, had agreed in their Charter of Democracy that: "No judge shall take oath under any Provisional Constitution Order or any other oath that is contrary to the exact language of the original oath prescribed in the Constitution of 1973".¹⁹³

¹⁸¹ Hamid Khan, op. cit., p. 776.

¹⁸² While there is no constitutional limit, benches of two or three judges typically hear cases under Article 184(3).

¹⁸³ Crisis Group interview, Islamabad, 15 July 2008.

¹⁸⁴ "HRCP's study of the proposed constitutional amendment package", op. cit.

¹⁸⁵ Crisis Group interview, Islamabad, 15 July 2008.

¹⁸⁶ See Zeeshan Haider, "Bhutto challenges Pakistani voter list in court", Reuters, 26 June 2007.

¹⁸⁷ Crisis Group interview, Lahore, 17 July 2008.

¹⁸⁸ Khan, op. cit., pp. 824-826.

¹⁸⁹ In August 2007, emboldened by the chief justice's 20 July reinstatement, the Supreme Court ordered the Karachi city government to ban the movement of heavy vehicles during daytime; it was widely perceived to have overstepped its mandate in this case.

¹⁹⁰ Crisis Group interview, Asma Jahangir, Lahore, 17 July 2008.

¹⁹¹ Amendment of Article 175. Text of the proposed constitutional amendment bill, op. cit.

¹⁹² Amendment of Article 255. Ibid.

¹⁹³ The Charter of Democracy, op. cit.

The superior judiciary must develop doctrine and tradition that reinforces its role as guarantor of constitutional rule. This should extend beyond opposing military coups to protecting the constitution against political manipulation by civilian or military governments. The Supreme Court has developed doctrines to safeguard the basic structure of the constitution but has diluted them in subsequent decisions or at times even in the same judgment. In 1996, Mahmood Khan Achakzai challenged the validity of Zia's Eighth Amendment in the Supreme Court. In one part of the judgment the Court ruled that some basic characteristics of the 1973 constitution, including parliamentary democracy and federalism, within the context of Islamic provisions articulated in Article 227, are sacrosanct. Even parliament cannot undermine them. Contradicting this, the judges nevertheless upheld the Eighth Amendment.

In the Zafar Ali Shah case in 2000 challenging the legality of Musharraf's coup, the Supreme Court advanced the doctrine of the Achakzai decision, ruling that neither parliament nor the executive could amend the constitution's basic features of parliamentary democracy, federalism and an independent judiciary. However, repeating the example of the Achakzai case, the Court also validated Musharraf's takeover and, furthermore, gave him the power to amend the constitution. It later chose not to invoke its own doctrine when it upheld Musharraf's Seventeenth Amendment in 2005, stating that only parliament, and not the superior judiciary, could strike down amendments violating the three basic features of the constitution.¹⁹⁴ Once again espousing the doctrine of state necessity, the Court gave a military government the authority to dilute democratic governance.

Such abdications of the Court's powers have understandably provoked doubts about whether the higher judiciary is prepared to stand by its statements. Nevertheless, the Achakzai and Shah cases could provide the basis for a significant shift in the Court's philosophy. "The Zafar Ali Shah judgment was an unmitigated disaster, but in this one important respect, it was a step forward", said former law minister Khalid Anwer.¹⁹⁵

The constitution, unanimously adopted by parliament in 1973, established the basic structure of parliamentary democracy, providing a strong foundation that even military governments have been unable to abolish completely, and have hence tried to manipulate within its constitutional framework. By developing the doc-

trine to safeguard the basic structure of the constitution, the Court could prevent the legislature – whether elected in a free and fair election or, as has been done repeatedly in the past, in a rigged election – from using constitutional amendments to advance partisan objectives and dilute parliamentary democracy. "The basic structure of a constitution is decided upon by the people when that constitution is [produced]", said a former law minister. "That basic structure ensures continuity. If you want to change it, go to the people in a referendum and say: 'We want to change these basic features, yes or no?'"¹⁹⁶

C. THE ROLE OF THE BAR: REFOCUSING THE LAWYERS' MOVEMENT

Having played a leading role in opposing military rule in 2007, the legal community was the principal target of Musharraf's martial law in November. Currently, the lawyers' movement is focused on the restoration of all the deposed judges, particularly deposed Chief Justice Iftikhar Chaudhry. The lawyers, as mentioned earlier, also insist on the sacking of the judges who, swearing an oath to Musharraf's PCO, remained on the bench or replaced the deposed judges.

The bar associations criticised the coalition government's decision to expand the strength of the bench from eighteen to 29 judges through the Finance Bill in June 2008, aimed at accommodating the sitting judges in the event of the deposed judges' restoration. As the government incrementally restores the sacked judges, even as it retains the PCO judges, the bar associations are no longer of one mind on the way forward for their movement. Several lawyers interviewed have argued that removing the PCO judges by executive fiat would be illegal, and that their presence on the bench would be more appropriately addressed by a restored Supreme Court.¹⁹⁷

The bar associations are finding it difficult to retain unity, and indeed popular support, particularly since several sacked judges have rejoined the bench after accepting the government's chosen mechanism of restoration. HRCP Director I.A. Rehman noted:

Perhaps they [the leaders of the lawyers' movement] could not or did not have the time to decide whether their agitation was in the nature of a trade union strike or a political movement for change. If the former was the case, the risk in stretching the

¹⁹⁴ Crisis Group interviews, lawyers and retired judges, countrywide, July-August 2007. See Roedad Khan, "Who will protect the Constitution?", *The Nation*, 4 August 2005.

¹⁹⁵ Crisis Group interview, Karachi, 19 July 2007.

¹⁹⁶ Crisis Group interview, Iftikhar Gilani, Islamabad, 10 July 2008.

¹⁹⁷ Crisis Group interviews, lawyers, July 2008.

struggle beyond the endurance of the judges and lawyers should not have been ignored. In such struggles, it is crucial to assess when the agitation should be wound up and inflexibility replaced with [pragmatism]. If the agitation fell in the second category, then the strategy recommended for long-term political movements should have been adopted – and in this, there is room neither for short-period ultimatums nor for promising success within days.¹⁹⁸

Financial pressures are also taking their toll on the movement. During and immediately after the November martial law, its members boycotted the courts, stalling their proceedings almost completely, especially in small cities.¹⁹⁹ However, financial and other burdens have made a full boycott unsustainable in the long run. According to one analyst: “The constant agitation on the streets, along with innumerable bar meetings and occasional hunger strikes and general strikes, have virtually destroyed the practices of many lawyers. The public has become so weary of litigation that it has stopped opting for lawsuits in many cases”.²⁰⁰ An editorial in a major daily argued: “the legal system has almost ground to a halt in the face of [the judges issue], and the lawyers that service the [lower] courts have been preoccupied over the last eighteen months with matters far removed from those concerning people at the bottom of the pile”.²⁰¹

As a major, but still emergent, pressure group, the lawyers’ movement is also vulnerable to subtle methods of manipulation from external actors. Some Islamist parties and forces have attempted to exploit the lawyers’ street demonstrations, posing as the advocates of democracy in a bid to acquire popular legitimacy and thus promote their own agenda. For example, armed members of the Jamia Hafsa madrasa and other religious right-wing groups reportedly attended the lawyers’ “long march” in June 2008 from Karachi to Islamabad.²⁰² A proposal by the All Pakistan High Court

Bar Association to lock the country’s courtrooms was, according to some lawyers, authored by the right-wing religious party, Jamaat-e-Islami, not the bar leadership.²⁰³ In September, lawyers in some districts of Punjab locked courts, preventing fellow lawyers, court staff and litigants from entering the premises.²⁰⁴ Such extreme steps will only serve to damage the movement’s credibility and support.

The movement has also witnessed internecine disputes and turf battles, especially between the SCBA and the Pakistan Bar Council (PBC) over the movement’s leadership.²⁰⁵ Nevertheless, the legal community will remain an important pressure group if it can maintain a focus on basic principles, and adhere to lawful and sustainable means of pressure. Said a prominent lawyer: “I would like the judges to be restored but that’s not my main issue at the moment. My main issue is the restoration of the 1973 constitution and the removal of all accretions made under Musharraf”.²⁰⁶

The bar’s inflexibility risks weakening its relevance. Calls by some lawyers for the elected government’s ouster and illegal actions such as locking down the courts undermine both the rule of law and the democratic transition rather than bolster them. “I don’t support the PPP, but I want to see this government succeed”, said one lawyer. Noting that the country risked a return to military rule, he added that the government had “been given a public mandate. We [lawyers] have to keep that in mind”.²⁰⁷ Indeed, the bar should accept Law Minister Naek’s invitation to “come and sit with the government”.²⁰⁸ Their input would prove invaluable in helping the government table an appropriate constitutional package to remove the distortions of military rule. Since the bar is, in the words of a former law minister, “the parent limb of the bench”,²⁰⁹ the lawyers can and must play a key role in judicial reform.

In addition to the PBC and the SCBA, the leadership of the lawyers falls under the major bar associations such as the four provincial bar councils and the four

¹⁹⁸ I.A. Rehman, “For justice and democracy”, *Dawn*, 12 September 2008.

¹⁹⁹ Crisis Group interviews, lawyers, countrywide, December 2007. “An attack on the judiciary is an attack on the entire legal fraternity”, said Syed Mohammad Shah, Lahore District Bar Association president, shortly after martial law was lifted. “The lawyers cannot take it lying down. The reference against the chief justice [in March 2007] was an executive measure against an individual; this PCO is against the entire judicial edifice of the country”. Crisis Group interview, Lahore, 27 December 2007.

²⁰⁰ Anees Jillani, “The stalled revolution”, *Newsline*, July 2008.

²⁰¹ “Simple justice”, *The News*, 11 August 2008.

²⁰² Crisis Group interviews, Islamabad and Lahore, July 2008. See also Aoun Abbas Sahi, “Interview: Justice (ret’d.) Tariq Mahmood”, *Newsline*, July 2008.

²⁰³ See Rana Tanweer, “Apolitical lawyers against courtroom lockdown”, *Daily Times*, 9 July 2008.

²⁰⁴ “Lawyers turn their back on courts”, *Dawn*, 19 September 2008.

²⁰⁵ Crisis Group interviews, Islamabad and Lahore, July 2008. See also Nasir Iqbal, “PBC resolution criticizes Aitzaz’s remarks”, *Dawn*, 10 August 2008.

²⁰⁶ Crisis Group interview, Abid Hasan Minto, Lahore, 27 December 2007.

²⁰⁷ Crisis Group interview, Islamabad, 15 July 2008.

²⁰⁸ Nasir Iqbal, “Dogar ‘rightful’ chief justice, says Naek”, *Dawn*, 28 August 2008.

²⁰⁹ Crisis Group interview, Iftikhar Gilani, Islamabad, 10 July 2007.

provincial High Court bar associations. To be effective, these associations must also be democratic and resist external interference from both government and bench. Lawyers must recognise the need for internal reform of their own movement.

Since leadership positions in bar associations are viewed as stepping stones to the bench, ambitious lawyers have often courted the favour of High Court judges, and in the process enabled those judges to establish footholds in the bar. "It is incidental when a person elevated to the judiciary has the credibility to be a judge, because of all the things he has to do to get there", said Humayun Ehsan, principal of the Pakistan Law College in Lahore.²¹⁰ The list of lawyers to be elevated to the bench is kept secret, restricting oversight and enabling rampant nepotism in judicial promotions. "Often, candidates for elevation have cases of misconduct against them, and the bar doesn't know that a person is in line for elevation until he is appointed", said a Pakistan Bar Council member.²¹¹ Bar associations should be given access to such lists. A council should be established, comprising bar leaders, a longstanding demand by lawyers.²¹² The council should produce reports, in collaboration with human rights organisations and media representatives, on lawyers being considered for elevation, thus ensuring that the right candidates are elevated to the bench.

Unofficial partnerships between High Court chief justices and leading lawyers, including virtual monopolies over particular kinds of cases, have encouraged abuse of power by judges and malpractice by lawyers. They have also damaged the unity and independence of the bar.²¹³ The former chief justice of the Lahore High Court, a close Musharraf ally as mentioned earlier, regularly interfered in the affairs of the bar. "For four years the chief justice of the Lahore High Court was patronising a handful of lawyers, with special favours like appointments to key commissions", said a former Lahore High Court Bar Association (LHCBA) president.²¹⁴ The chief justice manipulated elections to bar associations, especially the LHCBA.²¹⁵ This included stay orders on bar elections initiated by the advocate general's office, the top legal office in the provincial government, preventing bar associations from follow-

ing through on election results to keep either the chief justice's allies in and his critics out of office.²¹⁶

While the major bar associations can pass resolutions against judges, as they have done on numerous occasions, these resolutions lack implementing power and could be made more effective if they are followed up, when necessary, with references under Article 209 to the Supreme Judicial Council or, in the event of an amendment to this article, the body responsible for judicial misconduct.

D. THE INTERNATIONAL ROLE

1. An ideology beyond Pakistan's borders

Pakistan is party to numerous international conventions and agreements including the Universal Declaration of Human Rights. On 17 April 2008, the PPP government ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which develops some of the principles of the Universal Declaration of Human Rights (UDHR), including religious freedoms.²¹⁷ The same day, the government also signed the International Covenant on Civil and Political Rights (ICCPR), which emphasises basic freedoms of religion and conscience, and also asserts fundamental rights relating to due process, articulated in the UDHR, something the Musharraf regime had refused to do.

The PPP government must now move towards ratifying the ICCPR. It must also meet the obligations of these international instruments,²¹⁸ and understand the

²¹⁰ Crisis Group interview, Lahore, 15 August 2007.

²¹¹ Crisis Group interview, Hamid Khan, Lahore, 16 August 2007.

²¹² Crisis Group interview, Humayun Ehsan, 15 August 2007.

²¹³ Crisis Group interviews, bar leaders, Lahore, August 2007.

²¹⁴ Crisis Group interview, Lahore, 16 July 2008.

²¹⁵ Crisis Group interviews, lawyers, Lahore, August 2007.

²¹⁶ In a recent election for the presidency of a district bar association in the Punjab district of Bahawalpur, for instance, the incumbent, Mohammed Iqbal Khaqwani, a known ally of the Lahore High Court chief justice, filed a complaint against his rival who had won the election. Although such a petition would have normally been entertained in a Bahawalpur court, the chief justice allowed the transfer of the case to a Lahore court, which ordered a stay of the election, allowing Khaqwani to continue in office. Khaqwani then reportedly voted for Mohammed Ashraf Wala, another ally of the chief justice, in the subsequent PBC election. The LHCBA adopted a resolution calling for the chief justice's dismissal and moved a petition against him in the Supreme Court, which did not fix a hearing for the case. Although lawyers in Lahore welcomed the chief justice's retirement in December 2007, they have also argued that they will not accept his replacement until all deposed judges are reinstated. Crisis Group interviews, Lahore-based lawyers, January and July 2008. Also see "LHC gets new chief justice", *Dawn*, 25 December 2007.

²¹⁷ Pakistan had signed the covenant on 3 November 2004 but the Musharraf government had not ratified it.

²¹⁸ In an interview conducted during Musharraf's military government, Angela Wu, international director of the Wash-

importance of abiding by international legal standards, even where the country is not a signatory to particular covenants.

In 1988, commenting on the relevance of international human rights law to common law jurisdiction in Pakistan, then-Chief Justice of Pakistan Muhammad Haleem argued:

A valid domestic jurisdiction defence can no longer be founded on the proposition that the manner in which the state treats its own nationals is ipso facto a matter within its domestic jurisdiction ... because a matter is essentially within the domestic jurisdiction of the state only if it is not regulated by international law. In the modern age of economic and political interdependence, most questions which, on the face of it, appear to be essentially domestic ones are, in fact, essentially international....The international human rights norms are in fact part of the constitutional expression of the liberties guaranteed at the national level.²¹⁹

On 30 March 2007, the UN Human Rights Council passed a non-binding resolution presented by Pakistan on behalf of the Organisation of the Islamic Conference (OIC) to prohibit the defamation of religion, particularly Islam, ostensibly in response to rising discrimination against Muslims in several countries after 11 September 2001. The OIC resolution does not address discrimination or persecution of individuals but rather equates such instances to the defamation of Islam itself. The European Union (EU) representative noted that various international covenants already forbade discrimination on the grounds of religious belief and only needed enforcement. Other representatives voiced concerns that the OIC resolution would limit freedom of expression.²²⁰

On 3 October 2007, Pakistan Foreign Secretary Riaz Mohammed Khan told an OIC meeting at the sidelines of the UN General Assembly: "Islamophobia cannot be viewed from the narrow perspective of freedom of expression. It poses a much broader challenge and has the potential to disrupt peace within and among states.

ington DC-based Becket Fund for Religious Liberty, which works extensively on issues related to Pakistani law, said: "Pakistan would violate half the provisions if it did accede [to the ICCPR]". Crisis Group interview, Washington DC, 14 September 2007.

²¹⁹ Amjad Mahmood Khan, "Persecution of the Ahmadiyya community in Pakistan: An analysis under international law and international relations", *Harvard Human Rights Journal*, vol. 16 (Spring 2003).

²²⁰ Elizabeth Kendal, "UN Human Rights Council: protecting religion", World Evangelical Alliance, 12 April 2007.

We must ... explore the possibility of evolving an effective international framework to prevent the defamation of religions".²²¹

The democratically elected government in Pakistan should withdraw support of the OIC "anti-defamation" resolution. By undermining free speech, human rights standards and freedom of religion, such resolutions only contribute to the spread of intolerance and embolden religious radicals globally, just as the blasphemy law has in Pakistan. "The blasphemy law now implicates more than just Pakistan", said an NGO representative. "It's part of a much larger movement. So the question is, 'Is the world prepared to accept this philosophy, and if not, then why will it do to apply such laws on the people and the religious minorities within Pakistan?'"²²² The anti-Ahmadi laws are another example of how Pakistan's discriminatory state ideology has had international ramifications in recent years.²²³

2. International engagement

Defenders of Pakistan's religious minorities have often raised human rights cases in forums such as the UN Working Group on Arbitrary Detention. In 2002, the Jubilee Campaign, a group that defends the freedoms of persecuted minorities in several countries including Pakistan, moved the working group to consider the case of a Christian man who had been convicted of blasphemy in a district court in Punjab, a verdict that was sustained in the Lahore High Court. Considering evidence that had not been taken into account by the Pakistani courts, notably that the complainant had forcibly acquired the properties of thirteen Christian families, the working group delivered a not guilty verdict. A three-member bench of the Supreme Court of Pakistan subsequently acquitted the accused. In its decision, the Court said that the complainant's previous actions against Christians created enough doubt for an acquittal. While the judgment did not reference

²²¹ Masood Haider, "Pakistan urges Muslim states to tackle Islamophobia", *Dawn*, 4 October 2007.

²²² Crisis Group interview, Washington DC, 14 September 2007.

²²³ Anti-Ahmadiism particularly has gained force in other Muslim majority states including Bangladesh and Indonesia where the Pakistani example is often cited as a precedent by anti-Ahmadi lobbies. See section on Bangladesh in "International Religious Freedom Report 2007", op. cit. See also Crisis Group Asia Briefing N°77, *Indonesia: Implications of the Ahmadiyah Decree*, 7 July 2008. According to a U.S. official: "The treatment of the Ahmadi is a litmus test [for religious freedoms]. If you see them persecuted, it's a bad sign". Crisis Group interview, Washington DC, September 2007.

the UN working group, that body's decision likely had an impact on the Supreme Court.²²⁴

Because Pakistani case law provides for deference to UN documents and decisions, such bodies can wield significant influence on Pakistan's judiciary. Influential international actors, particularly the U.S., could also play a constructive role where there are serious concerns about Pakistan's discriminatory laws.

"Pakistan doesn't just have one problem", said Patricia Carley, associate director for policy at the U.S. Commission on International Religious Freedom. "It has various problems, such as the Hudood laws, blasphemy law and anti-Ahmadi laws, so there's enough to be concerned about".²²⁵ U.S. agencies and offices such as the U.S. Commission on International Religious Freedoms and the Bureau of Democracy, Human Rights, and Labor/Office of International Religious Freedom of the State Department are strong critics of Pakistan's discriminatory religious laws. Under Musharraf, however, the Bush administration prioritised its alliance with the Pakistani military over U.S. government agencies' concerns about democracy, human rights and religious freedoms. With a democratic transition providing opportunities for constructive engagement, a new U.S. administration should give these agencies a greater role in the formulation of policy towards Pakistan.

In April 2004, the European Parliament ratified the EU Third Generation Cooperation Agreement with Pakistan, which came into force in September 2004 to expand economic relations. Article 1 of the agreement establishes respect for human rights and democratic principles as a principal basis of cooperation.²²⁶ Before the agreement came into force, then EU External Affairs Commissioner Chris Patten stated that "several serious concerns remain" about Pakistan's human rights record, including the "blasphemy law, violence against women, the death penalty and child labour".²²⁷ As the agreement was signed with a military government, unsurprisingly Article 1 was honoured in the breach.²²⁸ The EU now has an opportunity of

ensuring that a democratically elected government honours the article. However, EU member states must also realise that only a sustained democratic transition will pay human rights dividends. If the EU is indeed supportive of human rights in Pakistan, it should extend political support and expand economic assistance.

The international community has also been hesitant to support a rights agenda in Pakistan, particularly with regard to religious freedoms because of a misguided perception that popular sentiment in a fragile state largely supports Islamic law. Such perceptions exaggerate both the fragility of the Pakistani polity and popular support for the religious lobby. The rout of the mullahs in the February 2008 elections provided ample proof that the vast majority of Pakistani citizens are moderate and that liberal democracy rather than Islamisation has popular resonance. In the presence of a democratically elected government, headed by a party with a liberal agenda, there is, moreover, little need for confrontation. Instead a constructive dialogue and engagement on issues of legal reform could encourage the Pakistan government to rally its popular base, thus countering the religious lobby's attempts to derail democratic reform.

²²⁴ Ibid.

²²⁵ Crisis Group interview, Washington DC, 17 September 2007.

²²⁶ "The countries of South Asia and the Indian subcontinent", European Parliament Fact Sheet, November 2005.

²²⁷ John Quigley, "EU commends Pakistan's democratic progress", *EurAsia Bulletin*, vol. 8, no. 1&2 (January-February 2004). Chris Patten is now Co-Chair of Crisis Group's Board of Trustees.

²²⁸ Referring to Article 1, one observer noted: "While admirable in principle, the unfortunate reality is that the EU has never suspended an Agreement for violations of the terms of Article One". Quigley, op. cit.

VI. CONCLUSION

Pakistan's religious laws relate more to citizens' status than to their conduct. In passing these laws, General Zia-ul-Haq's military government had curtailed the role of the ordinary courts and practically enforced a parallel system of Islamic justice that has given conservative religious groups a strong footing in the judicial system. The results have been devastating for the rule of law, encouraging the systematic violation of human rights, and pushing Pakistan further away from the standards of human rights and social equality guaranteed in the constitution. At the same time, repeated military interventions, validated by the superior judiciary, have undermined constitutionalism and the rule of law.

The democratic transition provides an opportunity to restore constitutional functioning, overseen by a reformed and independent judiciary that is capable of playing its role as the guardian of Pakistan's basic law. The legal community, which has played a vanguard role in the struggle for democracy, understandably wants judicial independence prioritised by the government and its parliamentary opposition. The PPP government and the PML-N, now the largest opposition party, must also realise that a sustained democratic transition needs an independent and reformed judiciary, capable of acting as a bulwark against future direct or indirect authoritarian interventions.

The government must restore all judges, including Iftikhar Chaudhry. Its failure to do so will undermine its democratic credentials and weaken the democratic transition. HRCP's Rehman rightly notes: "Not restoring some ... will cause deep fissures in the judiciary – there will be judges who were retained by Musharraf, judges appointed after November 3, judges chosen to rejoin the Bench and judges marked out for ditching. Differences of opinion on points of law make a judiciary strong but one cannot say the same about it if many of the judges consider themselves as carrying a heavy moral burden".²²⁹ After all sacked judges have been restored, the Supreme Court should constitute a full bench to judge the constitutional implications of reinstating Chaudhry as chief justice and removing Dogar from that post.

The judiciary must now reclaim its mandate to safeguard the rule of law by protecting women and minorities from discriminatory religious legislation and to uphold the constitution. In the last years of military rule, the superior judiciary had taken some steps in

checking the abuse of power by the Musharraf regime and its security agencies. This process must continue during the democratic transition, with the defining test for an independent judiciary being the protection of elected governments from army interference and the protection of the constitution from political manipulation. The Achakzai and Zafar Ali Shah judgments, which developed the doctrine of the basic features of the constitution, should redefine the higher judiciary's philosophy, provided the Supreme Court seizes the opportunity to put it into practice. However, any Supreme Court bench or individual judges who violate their oath to the constitution must be held accountable for their acts.

In the spirit of democracy, the PPP government should avoid rushed executive decisions and legislation that could impede rather than enable political, including judicial and legal, reform. Instead, it should enter into a rigorous debate and dialogue with civil society, particularly with the bar associations, and seek consensus within parliament on the necessary amendments to restore constitutionalism and the rule of law. The government must also ensure that its policies are grounded in the principles of parliamentary democracy, judicial independence and federal functioning. Despite disagreements with the PPP on the judicial issue, PML-N leader Nawaz Sharif has pledged that his party would support all steps the PPP takes to strengthen democratic norms. Said Sharif: "We want the government to complete its five-year constitutional term while ensuring good governance, [the] rule of law and supremacy of the 1973 Constitution and the parliament".²³⁰

Efforts to roll back the military's constitutional distortions must not stop at provisions relating to presidential and parliamentary powers, essential as they are to any viable democratic transition. They must also address the military's constitutional amendments in their entirety, repealing those laws that violate fundamental rights and religious freedoms. Cooperation between the major ruling and opposition parties in parliament will be an essential precondition if state-sponsored Islamisation is to be reversed.

The government and parliament's task of restoring constitutionalism, the rule of law and civilian supremacy will not be easy. Eight years of authoritarian rule has cemented the military's influence and undermined the rule of law and the foundations of democratic governance. Nevertheless, the popular base of the two mainstream national-level parties, the ruling PPP and opposition PML-N, remains intact. Indeed, it was the

²²⁹ Rehman, "For justice and democracy", op. cit.

²³⁰ "Punjab ministers' issue settled with PPP: Nawaz", *Dawn*, 10 September 2008.

key to the parties' survival during almost a decade of military rule. The two parties must now respect their pledge "to set an alternative direction to the country – on an economically sustainable, socially progressive, politically democratic and pluralistic, federally cooperative [and] ideologically tolerant state".²³¹ As the government and parliament find their political footing, both parties must ensure parliamentary sovereignty and respect democratic norms. By restoring public confidence in government, and with public support, the government, parliament and judiciary can hold the military at bay, ensuring that this transition does not suffer the fate of previous short-lived democratic interludes.

Islamabad/Brussels, 16 October 2008

²³¹ The Charter of Democracy, op. cit.

APPENDIX A

MAP OF PAKISTAN



APPENDIX B

ABOUT THE INTERNATIONAL CRISIS GROUP

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Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

Crisis Group's reports and briefing papers are distributed widely by email and printed copy to officials in foreign ministries and international organisations and made available simultaneously on the website, www.crisisgroup.org. Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

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Crisis Group's international headquarters are in Brussels, with advocacy offices in Washington DC (where it is based as a legal entity), New York, London and Moscow. The organisation currently operates eleven regional offices (in Bishkek, Bogotá, Cairo, Dakar, Islamabad, Istanbul, Jakarta, Nairobi, Pristina, Seoul and Tbilisi) and has local field representation in sixteen additional locations (Abuja, Baku, Bangkok, Beirut, Belgrade, Colombo, Damascus, Dili, Dushanbe, Jerusalem, Kabul, Kathmandu, Kinshasa, Port-au-Prince, Pretoria and Tehran). Crisis Group currently covers some 60 areas of actual or potential conflict across four continents. In Africa, this includes Burundi, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of the Congo, Eritrea, Ethiopia, Guinea,

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